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| Type: | Advisory Opinion |
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**In the text below original pagination is provided in [square brackets].**



[1] also France, Italy and Czechoslovakia
[2] date when the request for an advisory opinion or application was filed with the court Registry

[37/4] Permanent Court of International Justice

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| *Before:* | M. | Adatci, | *President*; |
| | M. | Guerrero, | *Vice-President*; |
| | Mr. | Kellogg, | *Judges*. |
| | Baron | Rolin-Jaequemyns, | |
| | Count | Rostworowski, | |
| | Mm. | Fromageot, | |
| | | de Bustamante, | |
| | | Altamira, | |
| | | Anzilotti, | |
| | | Urrutia, | |
| | Sir | Cecil Hurst, | |
| | Mm. | Schucking, | |
| | | Negulesco, | |
| | | Jonkheer Van Eysinga, | |
| | M. | Wang, | |

THE COURT,

composed as above,

gives the following opinion: [38/5]

On May 19th 1931, the Council of the League of Nations adopted the following Resolution:

> "The Council of the League of Nations has the honour to request the Permanent Court of International justice to give an advisory opinion, in accordance with Article 14 of the Covenant, on the following question:
>
> > "Would a regime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, the text of which is annexed to the present request, be compatible with Article 88 of the Treaty of Saint-Germain and with the Protocol No. 1 signed at Geneva on October 4th, 1922?"
>
> The Council requests that the Permanent Court will be so good as to treat the present request for an advisory opinion as a matter of urgency.
>
> The Secretary-General is authorized to submit the present request to the Court, to give any assistance required in the examination of the question and, if necessary, to take steps to be represented before the Court."

In pursuance of this Resolution, the Secretary-General, on May 19th, 1931, transmitted to the Court a request for an advisory opinion in the following terms:

> "The Secretary-General of the League of Nations, in pursuance of the Council Resolution of May
> 19th, 1931 and in virtue of the authorization given by the Council,
>
> has the honour to submit to the Permanent Court of International Justice an application requesting the Court, in accordance with Article 14 of the Covenant, to give an advisory opinion to the Council on the question which is referred to the Court by the Resolution of May 19th, 1931.
>
> The Secretary-General will be prepared to furnish any assistance which the Court may require in the examination of this matter, and will, if necessary, arrange to be represented before the Court."

The request was accompanied by the German text of the Austro-German Protocol of March 19th, 1931, together with a certified true copy of Protocol No. 1 signed at Geneva on October 4th, 1922 (French text with English translation), [39/6] referred to in the Council's Resolution. The minutes of the discussion (Council meetings of May 18th and 19th, 1931) following which this Resolution was adopted, were sent subsequently. The Secretary-General also forwarded to the Court, at the latter's request, the text of the French Government's memorandum of May 14th, 1931, submitted to the Council on the 18th of that month in connection with the "Austro-German Protocol for the creation of a Customs Union", together with the publication of the League of Nations entitled: *The Financial Reconstruction of Austria-General Survey and Principal Documents*. Finally, the Secretary-General placed at the Court's disposal French and English translations of the Protocol of March 19th, 1931, which had been communicated to him by the German delegation to the Sixty-Third Session of the Council. In conformity with Article 73, No. 1, paragraph 1, of the Rules of Court, the request was communicated to Members of the League of Nations and to States entitled to appear before the Court. Furthermore, the Registrar, by means of a special and direct communication, informed the Governments of States bound by the Treaty of Saint-Germain-en-Laye of September 10th, 1919, or by Protocol No. 1 (Declaration) relating to the reconstruction of Austria, signed at Geneva on October 4th, 1922, or by the Austro-German Protocol of March 19th, 1931[1], which States were

[1] The Union of South Africa, the Commonwealth of Australia, Austria, Belgium, the Dominion of Canada, Chine, the Cuban Republic, Czechoslovakia, France, Germany, Great Britain, Greece, India, Italy, Japan, the Dominion of New Zealand, Nicaragua, Poland, Portugal, Roumania, Siam, Spain and Yugoslavia.

regarded by the President of the Court (the latter not being in session) as likely, in accordance with the terms of Article 73, No. 1, paragraph 2, of the Rules, to be able to furnish information on the question submitted to the Court for advisory opinion, that the Court was prepared to receive from them written statements and, if they so desired, to hear oral arguments made on their behalf at a public hearing to be held for the purpose.

After obtaining the suggestions of the Governments chiefly concerned on the subject of the subsequent procedure in the case, the President of the Court, by an Order made on [40/7] May 27th, 1931, fixed July 1st, 1931, as the date by which the Governments which had received the above-mentioned special and direct communication were to file their written statements. By that date statements had been filed on behalf of the German, Austrian, French, Italian and Czechoslovak Governments.

In the course of public sittings held on July 20th, 21st, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 31st and August 1st, 2nd, 4th and 5th, 1931, the Court heard the oral arguments of M. Viktor Bruns, on behalf of the German Government, of M. Erich Kaufmann and M. Hans Sperl, on behalf of the Austrian Government, of Me Paul-Boncour and M. Jules Basdevant, on behalf of the French Government, of M. Krcmár and M. Plesinger Bozinov, on behalf of the Czechoslovak Government, and of M. Massimo Pilotti and M. Vittorio Scialoja, on behalf of the Italian Government, and also the replies given by them to questions put by some members of the Court.

In addition to the statements and observations of the Governments appearing before the Court and the documents transmitted by the Secretary-General of the League of Nations, as stated above, the Court had before it certain documents and written information sent to it by the representatives of the said Governments.

The Court, in view of the fact that it included on the Bench judges of the nationality of three only of the five Governments which appeared before it, considered, before the beginning of the public hearings, the question of the application of Article 31 of the Statute and of Article 71 of the Rules of Court in the present case. It decided, on July 17th, 1931, that there was no occasion for it to pronounce upon this question unless officially requested to do so, and it instructed the Registrar to convey this decision to the interested Governments.

Thereupon, the Agent for the Austrian Government, by a letter dated the same day, officially submitted the said question to the Court, at the same time informing the Court of the

name of the person whom the Austrian Government would appoint as judge *ad hoc* in the event of the Court's deciding that the said articles were applicable. [41/8]

On July 18th, 1931, the Court decided to communicate the letter of the Agent of the Austrian Government to the Agents of the other interested Governments, informing them that, at the hearing fixed for July 20th and before any argument upon the case, it would hear any observations which they might desire to make, and would then pass upon the question submitted to it by the Austrian Government. The Court added that if a similar question were raised by another Government, it would pass upon that question at the same time.

By a letter dated the same day, the Agent for the Czechoslovak Government, referring to the fact that the said question had been submitted to the Court, announced the nomination and appointment to the Court, in the event of the admission of judges *ad hoc*, of a person of Czechoslovak nationality.

Accordingly, the Court, at the hearing held by it on July 20th, 1931, and before any argument on the merits of the case, heard the observations submitted with regard to the application of Article 31 of the Statute and of Article 71 of the Rules of Court in this case, by M. Kaufmann, on behalf of the Austrian Government, by M. Plesinger Bozinov, on behalf of the Czechoslovak Government, by M. Bruns, on behalf of the German Government, by M. Basdevant, on behalf of the French Government, and by M. Pilotti, on behalf of the Italian Government.

After deliberation, the Court decided that there was no ground in this case for the appointment of judges *ad hoc* either by Austria or by Czechoslovakia. When informing the representatives of the interested Governments of this decision at the hearing, the President added that the text of the decision would be communicated to them later. The decision was embodied in an Order made by the Court on July 20th, 1931, the text of which is annexed to the present Advisory Opinion.

It is in these conditions that the Court is now called upon to give its opinion. [42/9]

* * *

Austria, owing to her geographical position in central Europe and by reason of the profound political changes resulting from the late war, is a sensitive point in the European

system. Her existence, as determined by the treaties of peace concluded after the war, is an essential feature of the existing political settlement which has laid down in Europe the consequences of the break-up of the Austro-Hungarian Monarchy.

It was in view of these circumstances that the Treaty of Peace concluded at Saint-Germain on September 10th, 1919, provided as follows:

> "*Article* 88.
>
> 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 any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power."

It was, more particularly, in view of the same circumstances that, when Austria was given the financial and economic assistance necessary to her independence, the Protocols of October 4th, 1922, were drawn up and signed at Geneva, of which Protocol No. 1 runs as follows:

> "Protocol No. I
>
> [*Translation*]
>
> DECLARATION
>
> The Government of His Britannic Majesty, the Government of the French Republic, the Government of His Majesty the King of Italy, and the Government of the Czechoslovak Republic,
>
> Of the one part,
>
> At the moment of undertaking to assist Austria in her work of economic and financial reconstruction, [43/10]
>
> Acting solely in the interests of Austria and of the general peace, and in accordance with the obligations which they assumed when they agreed to become Members of the League of Nations,
>
> Solemnly declare:
>
> That they will respect the political independence, the territorial integrity and the sovereignty of Austria;
>
> That they will not seek to obtain any special or exclusive economic or financial advantage calculated directly or indirectly to compromise that independence;
>
> That they will abstain from any act which might be contrary to the spirit of the conventions which will be drawn up in common with a view to effecting the economic and financial reconstruction of Austria, or which might prejudicially affect the guarantees demanded by the Powers for the protection of the interests of the creditors and of the guarantor States;
>
> And that, with a view to ensuring the respect of these principles by all nations, they will, should occasion arise, appeal, in accordance with the regulations contained in

the Covenant of the League of Nations, either individually or collectively, to the Council of the League, in order that the latter may consider what measures should be taken, and that they will conform to the decisions of the said Council.

The Government of the Federal Republic of Austria,

Of the other part,

Undertakes, in accordance with the terms of Article 88 of the Treaty of Saint-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.

This undertaking shall not prevent Austria from maintaining, subject to the provisions of the Treaty of Saint-Germain, her freedom in the matter of customs tariffs and commercial or financial agreements, and, in general, in all matters relating to her economic regime or her commercial relations, provided always that she shall not violate her economic independence by granting to any State a special regime or exclusive advantages calculated to threaten this independence.

The present Protocol shall remain open for signature by all the States, which desire to adhere to it. [44/11]

In witness whereof the undersigned, duly authorized for this purpose, have signed the present Declaration (Protocol 1).

Done at Geneva in a single copy, which shall be deposited with the Secretariat of the League of Nations and shall be registered by it without delay, on the fourth day of October, one thousand nine hundred and twenty-two.

(*Signed*) Balfour.
(*Signed*) G. Hanotaux.
(*Signed*) Imperiali.
(*Signed*) Krcmar.
(*Signed*) Pospisil.
(*Signed*) Seipel."

Spain and Belgium acceded to this Protocol.

It will be seen that these provisions, without imposing any absolute veto upon Austria, simply require her to abstain or, in certain circumstances, to obtain the consent of the Council of the League of Nations.

By a Protocol drawn up at Vienna on March 19th, 1931, Germany and Austria agreed to conclude a treaty with a view to assimilating the tariff and economic policies of the two countries on the basis and principles laid down in that Protocol, thereby resulting in the establishment of a customs union regime.

There is nothing in this Protocol, which provides for any consent by the Council of the League of Nations. In point of fact, however, the Protocol was communicated by the German and Austrian Governments themselves to the British, French and Italian Governments, among others, and the British Government brought the matter before the Council.

It was in these circumstances that the Council requested the Court to give an advisory opinion on the following question:

> "Would a regime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, the text of which is annexed to the present request, be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol No. 1 signed at Geneva on October 4th, 1922?' [45/12]

Accordingly, the Court has not to consider the conditions under which the Austro-German customs union might receive the Council's consent. The only question the Court has to settle is whether, from the point of view of law, Austria could, without the consent of the Council, conclude with Germany the customs union contemplated in the Vienna Protocol of March 19th, 1931, without committing an act which would be incompatible with the obligations she has assumed under the provisions quoted above.

I. - Firstly, as regards the undertakings assumed by Austria in Article 88 of the Treaty of Saint-Germain:

When - as had previously been provided in Article 80 of the Treaty of Peace concluded with Germany on June 28th, 1919 - the Treaty of Saint-Germain laid down that the independence of Austria was inalienable, except with the consent of the Council of the League of Nations, that Treaty imposed upon Austria, who in principle has sovereign control over her own independence, an obligation not to alienate that independence, except with the consent of the Council of the League of Nations.

If we consider the general observations at the beginning of the present Opinion concerning Austria's present status, and irrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the practice of States, the independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present

frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.

If by the regime contemplated by the Austro-German Protocol of 1931 Austria does not alienate her independence, the Council's consent on this matter is obviously not necessary. In the other event, however, it is essential. [46/13]

By "alienation", as mentioned in Article 88, must be understood any voluntary act by the Austrian State which would cause it to lose its independence or which would modify its independence in that its sovereign will would be subordinated to the will of another Power or particular group of Powers, or would even be replaced by such will.

Further, since the signatory Powers to the Treaty of Saint-Germain other than Austria have in Article 88 approved this inalienability by Austria of her independence, they are themselves clearly bound not to participate in acts involving alienation.

Having thus stipulated the inalienability of Austria's independence otherwise than with the consent of the Council of the League of Nations, Article 88 provides: “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 any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power.”

There is no doubt that the word "consequently" connects the first and second sentences in the article. But, although the undertaking given by Austria in this second sentence to abstain from certain acts, which might directly or indirectly compromise her independence, refers to the observance of the inalienability of her independence laid down in the first sentence, it does not follow that the acts from which Austria has undertaken to abstain are, as a consequence, necessarily acts of alienation proper, that is, acts which would directly cause her to lose her independence or would modify it, as stated above.

Moreover, the undertaking given by Austria to abstain from "any act which might directly or indirectly or by any means whatever compromise her independence" can only be interpreted to refer to "any act calculated to endanger" that independence, in so far, of course, as can reasonably be foreseen. [47/14]

An act calculated to endanger cannot be assimilated to the danger itself, still less to the consummation of that danger, any more than a threatened loss or risk can be assimilated to a loss or risk which actually materializes.

In any case, if more is wanted, the "participation in the affairs of another Power" mentioned at the end of Article 88 as an example - which ceased to be of practical application upon Austria's entry into the League of Nations - of an act which might, pending such entry, compromise her independence, cannot possibly be assimilated to an act of alienation.

II. - As regards the Protocol signed at Geneva on October 4th, 1922, by Austria, France, Great Britain, Italy and Czechoslovakia, and subsequently acceded to by Belgium and Spain, it cannot be denied that, although it took the form of a declaration, Austria did assume thereby certain undertakings in the economic sphere.

From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes.

That Austria’s undertakings in the 1922 Protocol fall within the scope of the obligations undertaken by her in Article 88 of the Treaty of Saint-Germain appears from the express or implied reference made to that provision in this Protocol.

Accordingly, the "economic independence" expressly mentioned in the last paragraph of Austria's undertakings in the 1922 Protocol refers in the economic sphere to "the independence of Austria" within the meaning of Article 88 of the Peace Treaty, so that, as has been shown, a violation of this "economic independence" would be a violation of "the independence of Austria".

Thus also the grant of a special regime or exclusive advantages calculated to threaten Austria's independence within the [48/15] meaning of the last paragraph of the 1922 Protocol would be one of these acts which might compromise Austria's independence within the meaning of Article 88.

But this in no way prevents the undertakings assumed by Austria in a special and distinct instrument open to the accession of all Powers, whether, signatory to the Peace Treaty or not, and to which in fact a Power non-signatory to the Peace Treaty (i.e. Spain) did accede, from possessing their own value and on that account a binding force complete in itself and capable of independent application.

Thus Spain, who was not a Party to the Peace Treaty and who consequently cannot invoke Article 88, would, on the contrary, be entitled to rely on the 1922 Protocol as the only instrument to which she is a Party, in order to enforce Austria's express undertakings in that Protocol.

It has been argued that the first part of the 1922 Protocol containing the declaration by France, Great Britain, Italy and Czechoslovakia and, by accession, Belgium and Spain, is a simple restatement of the undertaking given by States Members of the League of Nations in Article 10 of the Covenant to respect the territorial integrity and political independence of each Member. Similarly, this part has been regarded as a simple reaffirmation of the obligation assumed by the signatory Powers of the Treaty of Saint-Germain not to participate in any acts not compatible with the inalienability of Austria's independence.

It was therefore submitted that Austria's undertakings ought to be regarded merely as the exact counterpart of the undertakings of the other Powers and, accordingly, as a mere repetition of Article 88 of the Peace Treaty.

As regards the Covenant of the League of Nations, however, while it certainly contains an undertaking to respect the territorial integrity and political independence of each Member and even to preserve as against external aggression this territorial integrity and political independence, it must be served that it contains neither any undertaking on the [49/16] part of States not to alienate their own independence, of which they alone are in principle entitled to

dispose, nor any undertaking not to seek economic advantages calculated to compromise the independence of another State which is free dispose of it as it pleases.

Furthermore, as regards Article 88, it has been shown that even admitting it Austria's undertakings in the 1922 Protocol are covered by this article, nevertheless they constitute undertakings possessing their own value and consequently are capable of independent application as would be the case if, instance, Spain sought to enforce them.

Similarly, no useful comparison can be drawn between other customs unions, numerous examples of which have been and still continue to be furnished by political history, and the customs union contemplated in the Austro-German Protocol.

In fact, it has not been shown that any of the countries bound by customs unions had undertaken in any way to abstain from any act, negotiations or economic engagement calculated to compromise its economic independence, or to abstain from granting to another Power a special regime or exclusive advantages calculated to threaten that independence.

In sum, the provisions of the 1922 Protocol create for Austria undertakings obligatory in themselves, 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 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 any State a special regime or exclusive advantages calculated to threaten this independence.

III. – That being so, a consideration of the Austro-German Protocol of March 19th, 1931, the full text of which is annexed hereto, leads to the following results.[50/17]

By the Protocol of Vienna of 1931, the German and Austrian Governments agreed to enter into negotiations for a treaty "to assimilate the tariff and economic policies of their respective countries" (*Angleichung der zollund handelspolitischen Verhdltnisse*) on the basis and within the limits of the principles laid down in that Protocol (Preamble).

While declaring that the independence of the two States and full respect for their international engagements are to be completely maintained (Art.1), both Governments undertook

(Art.2) to agree on a tariff law and customs tariff which are to be put into force simultaneously and concordantly in Germany and Austria and the technical execution of which shall be uniform, although each country will enforce its application by means of its own administration (Art.5), the customs receipts being apportioned according to a quota to be fixed (Art.6, No.2).

As between Germany and Austria, export and import duties are in principle to be removed (Art. 3). There will be, subject to inevitable exceptions necessary for public health and security, no import, export or transit prohibitions (Art.7, No.1). As regards exchange of goods between the two countries, the turnover tax and commodities forming the subject of monopolies or excise duties will provisionally be regulated by agreement (Art.4).

As regards the economic treaty regime, Article 9, while declaring that both Governments retain in principle (grundsatzlich) the right to conclude commercial treaties "on their own behalf", provides on the other hand that the German and Austrian Governments will see that the interests of the other Party are not violated in contravention of the tenor and purpose of the customs union treaty, i.e. the assimilation of the tariff and economic policies of both countries; the negotiations, Article 9 continues, will, as far as possible, be conducted jointly and, notwithstanding that treaties are to be signed and ratified separately, exchanges of ratifications are to be simultaneous (Art. 9, Nos. 2 and 3).

From the point of view of form, therefore, Austria will certainly possess commercial treaties concluded, signed and ratified by herself. But in reality, and without its being necessary [51] to consider in this connection whether Article 9 does or does not imply that there may be limitations other than those set out in Nos. 2 and 3, to the right of concluding " treaties" on her own account, it will suffice to note the provisions for joint negotiations, for regard for the interests of the other Party, and the undertaking to the effect that one Party will not ratify without the other.

Lastly, the necessary consequence of this new economic treaty regime will be the modification of Austria's existing treaty regime, which must of course be brought into accord with the projected customs union treaty (Art.10).

Furthermore, disputes which may arise in connection with the interpretation and application of the customs union treaty are to be submitted for arbitration to a paritative arbitral committee (Art.11, No.1a), whose duty it will also be to bring about a compromise in cases where the treaty provides for a special arrangement or in cases where the treaty makes the realization of the intentions of one Party dependent upon the consent of the other (Art.11, No.1b).

Lastly, the treaty, which is to be concluded for an unspecified duration, may be denounced after three years; it may be denounced before the conclusion of this period, should either of the two countries consider that a decision of the arbitral committee infringes its vital economic interests (Art.12, and Art.11, No.3).

IV. – It is not and cannot be denied that the regime thus established certainly fulfils "the requirements of a customs union: uniformity of customs law and customs tariff; unity of the customs frontiers and of the customs territory vis-a-vis third States; freedom from import and export duties in the exchange of goods between the partner States; apportionment of the duties collected according to a fixed quota" (Austrian Memorial, p.4).

Properly speaking, what has to be considered here is not any particular provision of the Protocol of 1931, but rather the Protocol as a whole or, better still - to use the actual [52/19] terms of the question put by the Council - "the regime" to be established on the basis of this Protocol.

It can scarcely be denied that the establishment of this regime does not in itself constitute an act alienating Austria's independence, for Austria does not thereby cease, within her own frontiers, to be a separate State, with its own government and administration; and, in view, if not of the reciprocity in law, though perhaps not in fact, implied by the projected treaty, at all events of the possibility of denouncing the treaty, it may be said that legally Austria retains the possibility of exercising her independence.

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.

On the other hand, it is difficult to deny that the projected regime of customs union constitutes a "special regime" and that it affords Germany, in relation to Austria, "advantages" which are withheld from third Powers.

It is useless to urge that the Austro-German Protocol of 1931 (Art.1, No.2) provides that negotiations are to be entered into for a similar arrangement with any other country expressing a desire to that effect.

It is clear that this contingency does not affect the immediate result of the customs union as at present projected between Germany and Austria.

Finally, if the regime projected by the Austro-German Protocol of Vienna in 1931 be considered as a whole from the economic standpoint adopted by the Geneva Protocol of 1922, it is difficult to maintain that this regime is not calculated to threaten the economic independence of Austria and that it is, consequently, in accord with the undertakings specifically given by Austria in that Protocol with regard to her economic independence. [53/20]

FOR THESE REASONS,

the Court,

by eight votes to seven,

is of opinion that:

A regime established between Germany and Austria, on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, would not be compatible with Protocol No. I signed at Geneva on October 4th, 1922.

DONE in English and in French, the French text being authoritative, at the Peace Palace, The Hague, this fifth day of September, one thousand nine hundred and thirty-one, in two copies, one of which is to be placed in the archives of the Court, and the other to be forwarded to the Council of the League of Nations.

(*Signed*) M. Adatci President

(*Signed*) Å. Hammarskjöld, Registrar

M. Guerrero, Count Rostworowskil, MM. Fromageot, Altamira, Urrutia and Negulesco, whilst concurring in the above Opinion, declare that, in their opinion, the regime of customs union projected by the Austro-German Protocol of March 19th, 1931, since it would be calculated to threaten the independence of Austria in the economic sphere, would constitute an act capable of endangering the independence of that country and would, accordingly, be not only incompatible with Protocol No. I of Geneva of October 4th, 1922, but also and in itself incompatible with Article 88 of the Treaty of Saint-Germain of September 10th, 1919.

M. Anzilotti, whilst concurring in the operative portion of the present Opinion, declares that he is unable to agree in regard to the grounds on which it is based, and accordingly has delivered the separate opinion which follows hereafter.

MM. Adatci and Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, MM. Schucking, van Eysinga and Wang, declaring that they are unable to concur in the Opinion given by the Court and availing themselves of the right conferred on them by Article 71 of the Rules of Court, have delivered the joint dissenting opinion which follows hereafter.

(*Initialed*),M.A.

(*Initialed*),A.H.

[55/22] Individual Opinion by M. Anzilotti

[*Translation*]

Although I am in agreement with the Court's conclusion, my point of view is widely different. Owing to the importance of the case and the grave legal problems involved, I consider it my duty to make use of the right conferred upon me by the Rules and to state my personal opinion as briefly as possible, as well as the reasons which have enabled me to accept the conclusion of the present Advisory Opinion.

1. In the first place, we must consider what is the real question which the Court was called upon to decide.

The Council asks whether "a regime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931," would "be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol No. I signed at Geneva on October 4th, 1922".

Neither Article 88 of the Treaty of Saint-Germain nor the Geneva Protocol of October 4th, 1922, imposes upon Austria any obligations other than to abstain from certain acts otherwise than with the consent of the Council of the League of Nations. The regime in question would only be incompatible with Article 88 of the Treaty of Saint-Germain or with the Protocol of Geneva if that consent of the Council were necessary and Austria failed to obtain it.

Accordingly, the question put to the Court is whether the conclusion of a Customs Union with Germany on the basis and within the limits of the Protocol of March 19th, 1931, is among the acts from which Austria must abstain otherwise than with the consent of the Council of the League of Nations. It is indeed from this aspect that the question was discussed before the Court. Germany and Austria maintain that the proposed Customs Union would not be included among the acts for which the Treaty of Saint-Germain and the Geneva [56/23]Protocol require the consent of the Council, while France, Italy and Czechoslovakia maintain the contrary.

The dispute upon which the Court is asked to give its opinion therefore relates to the applicability of the provisions of Article 88 and the Geneva Protocol to this particular case. The reply will have the following effect: either the said provisions are not applicable to this case (so-

called theory of compatibility), so that Austria is free to conclude the Customs Union with Germany; or these provisions or some of them are applicable to the case (so-called theory of incompatibility), and Austria must abstain from concluding the Customs Union with Germany or must apply to the Council for its consent.

2. When Article 88 of the Treaty of Saint-Germain and the Geneva Protocol require Austria to abstain from certain acts otherwise than with the consent of the Council of the League of Nations, the purpose is to give effect to the principle contained in the first part of the said Article 88: "The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations." We must therefore first of all study the meaning and consequences of this principle.

The idea that Austria's independence is inalienable except with the consent of the Council of the League of Nations has its origin in Article 80 of the Treaty of Versailles. That article imposed upon Germany two obligations: to acknowledge and respect “strictly" the independence of Austria, within the frontiers which may be fixed in a treaty between that State and the Principal Allied and Associated Powers; and to agree that "this independence shall be inalienable, except with the consent of the Council of the League of Nations". There is little doubt that this provision, which has no counterpart in the other treaties of peace, was adopted in order to secure Austria's existence against the danger of incorporation within the German Reich.

Article 88 merely repeats and generalizes the principle already enunciated in the Treaty of Versailles. The idea underlying this article is that Austria's existence within the [57/24] frontiers fixed for her is an essential element in the political system created by the peace treaties. The real aim of the principle contained in the first part of Article 88 is to secure that existence and to prevent Austria from being absorbed within another State or coming under the dependence of another State, unless the Council of the League of Nations, the sovereign judge of political situations and of the requirements of peace, shall so dispose.

We may therefore affirm that this article was not adopted in the interests of Austria, but in the interests of Europe as a whole, and thus it will be readily understood that Article 88, far from granting Austria rights, only imposes upon her obligations.

3. We must now define the meaning and scope of the terms "independence" and "inalienable" in the first part of Article 88.

With regard to the former, I think the foregoing observations show that the independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law.

The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the exceptional and, to some extent, abnormal class of States known as "dependent States". These are States subject to the authority of one or more other States. The idea of dependence therefore necessarily implies a relation between a superior State (suzerain, protector, etc.) and an inferior or subject State (vassal, protégé, etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of international law. [58/25]

It follows that the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of *de facto* dependence which characterize the relation of one country to other countries.

It also follows that the restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.

This is obviously the standpoint of the Treaty of Saint-Germain when it proclaims the independence of Austria despite the many serious restrictions it imposes upon her freedom in the economic, military and other spheres. These restrictions do not put Austria under the authority of the other contracting States, which means that Austria is an independent State within the meaning of international law. This is the independence which Article88 declares to be

"inalienable". What now is the meaning of that term?

4. The idea naturally suggested by the word "alienate " is the transfer of something from one person to another, but it seems that the word may also mean: "lose of one's own accord ", "get rid of ", "renounce ", etc. We may question the possibility of transferring so strictly personal a quality as a State's independence; on the other hand, it will be admitted that this quality ceases to exist by the will of the State itself when the latter agrees to renounce it in favour of another State, for example, by becoming absorbed in the latter or placing itself under the latter's authority.

Whatever may be said as to the exact meaning of this word, the idea that it seems to express is clear enough: Austria must not voluntarily lose her existence as an independent State otherwise than with the consent of the Council of the League of Nations.

This being so, Article 88 marks a twofold departure from ordinary international law. [59/26]

According to ordinary international law, every country is free to renounce its independence and even its existence; this rule does not apply to Austria who, under Article 88, cannot voluntarily lose her independence, still less therefore her existence, except with the consent of the Council of the League of Nations.

Similarly, according to ordinary international law, each country must respect the independence of other countries, but it is not forbidden to agree to another State's voluntarily renouncing its independence in its favour. This is not allowed in the case of Austria, as regards the signatory States to the Treaty of Saint-Germain, except of course with the consent of the Council of the League of Nations.

5. I now pass on to the second part of Article 88, which is as follows:

> "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 any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power."

We must determine - and, as I shall show later, the whole case turns on this – what acts

are contemplated by this provision.

The foregoing observations show that the principle contained in the first part of Article 88 of itself creates certain obligations for Austria and the other contracting States. Obligations similar to those of the latter States are explicitly imposed upon Germany by Article 80 of the Treaty of Versailles (*supra*, No. 2). The second part of Article 88 refers directly to Austria alone and requires her to abstain from any act which may directly or indirectly or by any means whatever compromise her independence, in the absence of the consent of the Council of the League of Nations.

On the strength of the connection between the second and first sentences of Article 88 and clearly expressed by the word "consequently", the German and Austrian Governments [60/27] have argued that the acts from which Austria must abstain in the absence of the Council's consent are acts which alienate her independence, or which can be assimilated to an alienation of independence. If I understand their argument rightly, they say that what Austria is forbidden to do by the first sentence in Article 88 is to alienate her independence; since the second sentence merely draws consequences from the first sentence, the acts from which Austria must abstain can only be acts of alienation or acts amounting to alienation.

This argument must be most carefully examined, for the reply to be given to the Council depends almost entirely upon this point. If the acts from which Austria must abstain in the absence of the Council's consent are only acts of alienation or act, amounting to an alienation of independence, the answer must be in the affirmative; if not, in the negative. And the efforts of the representatives of the German and Austrian Governments have been devoted mainly to this question.

6. In my opinion, the arguments of these Governments do not hold and for the following reasons.

(a) Undoubtedly the second sentence in Article 88 is connected with the first by the word "consequently". But this word does not necessarily imply that the second sentence merely draws the logical consequences from the principle laid down in the first; it may just as well mean that

the second sentence lays down rules the purpose of which is to ensure effect being given to this principle. Both interpretations are undoubtedly possible, and therefore we must study the text itself to see whether the second sentence in Article 88 merely draws consequences from and applies the first, or whether it adds further obligations in order to give effect thereto.

(b) It is a fundamental rule of interpretation that words must be given the ordinary meaning which they bear in their context unless such an interpretation leads to unreasonable or absurd results. [61/28]

If we give to the words in the second sentence of Article 88 - disregarding for the moment the last clause - the meaning they normally bear in their context, it is hard to admit that the acts in question are only acts of alienation or acts amounting to an alienation of independence. The ordinary meaning of the word "compromise" is certainly not "to alienate"; an "act which might compromise . . . independence" is, in the ordinary meaning of the words, an act calculated to place independence in danger. If we take the ordinary meaning of the words in their context, an act may very well compromise a State's independence directly or indirectly or by one means or another, but I do not see how all this can be made to apply to alienation.

Quite clearly the normal meaning of the words in the context of the second sentence of Article 88 is not the meaning given to them in the arguments of the German and Austrian Governments. If we interpret the words according to the meaning they would normally bear in their context, the conclusion is rather that Austria is obliged to abstain from certain acts which are not or are not necessarily acts alienating her independence, but which are calculated to expose that independence to danger.

Putting aside for the moment a more exact definition of the acts in question, this interpretation cannot, I think, be regarded as leading to an unreasonable or absurd result. On the contrary, it seems to me perfectly intelligible that, in order to secure Austria's existence, for important political reasons, an attempt was made to prevent her, in the absence of the Council's consent, from accomplishing certain acts which, although they left her independence formally intact, would expose it to danger. Elementary rules of political foresight would suggest to the

authors of the Treaty of Saint-Germain that they should put the Council in a position to prevent acts of this kind and to intervene before some final, and therefore by that time perhaps inevitable, act was on the point of accomplishment. Accordingly, the result to [62/29]which the natural meaning of the words in their context leads us being perfectly reasonable, this is the interpretation which must be adopted.

(c) The interpretation of the second sentence of Article 88 by the German and Austrian Governments appears to me unacceptable also from another point of view. Since the obligation upon Austria not to alienate her independence, either openly or in a disguised manner, arises out of the first sentence of the article, the second would be perfectly superfluous if it merely means that Austria is to abstain in the absence of the Council's consent from any act of overt or covert alienation. The Austro-German argument really deprives the second sentence of all importance, and thus it runs counter to a fundamental rule in the interpretation of legal texts according to which, when there are two interpretations, one of them attributing a reasonable meaning to each part of the text and the other not fulfilling these conditions, the first must be preferred.

(d) It must be observed lastly that Article 88 itself furnishes definite evidence that the acts referred to in the text include not only acts of alienation of independence. I would refer to the last clause of the article where it says: "particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power".

I am well aware that the clause was in all probability the outcome of the incident of Article 61 of the Constitution of Weimar. I might also admit for the sake of argument, and subject to an express reservation on the point, that this clause applied only up to the point when Austria entered the League of Nations and that since that time it has ceased to be applicable. It is nevertheless true, and this is what matters, that when Article 88 cites as an example an act from which Austria is to abstain except with the consent of the Council of the League of Nations, that example is not an act of alienation or one amounting to an act of alienation; it is merely an act which might expose that [63/30] independence to danger. It is difficult to see how this may be reconciled with the view that this article was intended to prohibit only acts of alienation of independence.

7. The conclusion which seems to follow from the foregoing considerations is that Article 88 of the Treaty of Saint-Germain contemplates two kinds of acts from which Austria is to abstain except with the consent of the Council of the League of Nations.

(A) So-called acts of alienation of independence; or to be more accurate - acts by which Austria would renounce her independence in favour of another State, such, for example, as a treaty by which Austria agreed to be incorporated in the German Reich, or by which she undertook to join a Federal State, etc. It will readily be admitted that cases of this kind, while they are the most serious, are not the most probable.

(B) Acts which, while leaving Austria her independence, would have the effect of exposing that independence to danger. I do not think these acts can be more exactly defined than by saying that they must be acts which, as far as can be reasonably foreseen, would endanger that independence. A treaty by which Austria undertook to intervene in the affairs of other Powers; the adoption of a constitutional law under which the head of another State would of right be President of the Austrian Republic. These seem to be undoubted examples of this class of acts looked at from a general standpoint. But it must be added at once that, from their very nature, acts of this kind are particular instances: an act which in certain circumstances presents no danger whatsoever to a State's independence may well be extremely dangerous in circumstances of another kind.

It follows that in order to establish the compatibility of the Austro-German Customs regime with Article 88 of the Treaty of Saint-Germain, that regime must be neither a so-called act of alienation of Austria's independence nor an act which, [64/31]while leaving this independence formally intact, would be susceptible of exposing it to danger. Both conditions are equally necessary and on all fours with each other.

8. I pass now to the Geneva Protocol of October 4th, 1922.

It is above all on this point that I find myself at variance with the grounds of the present

Opinion. The Court's argument seems to be as follows: A regime established between Austria and Germany on the basis and within the limits of the principles laid down in the Protocol of March 19th, 1931, is not necessarily incompatible with Article 88 of the Treaty of Saint-Germain, but is incompatible with the Geneva Protocol. In my view, on the contrary, that regime can only be incompatible with the Geneva Protocol if it is incompatible with Article 88 of the Treaty of Saint-Germain, since the Geneva Protocol does not impose on Austria, as regards her independence, any obligation which does not already ensue from that article.

It is an arguable question whether the States who in 1922 signed the Geneva Protocol were in a position to modify *inter se* the provisions of Article 88, which provisions, as I have already pointed out (supra, No. 2), form an essential part of the peace settlement and were adopted not in the interests of any given State, but in the higher interest of the European political system and with a view to the maintenance of peace. However that may be, I am content to observe that, as regards the obligations devolving upon Austria, the Protocol is covered by the provisions of Article 88.

I leave on one side the close relation between the first and second parts of this Protocol, which tends to support my argument, and I confine myself to the following observations.

As regards the first paragraph of Part II of the Protocol, it has not been disputed that it corresponds exactly to the first part of Article 88. Obviously, when this paragraph speaks of " any negotiations or . . . any economic or financial engagement", it says nothing that is not covered by the [65/32] expression "any act" contained in Article 88. The variation is easily explained if regard be had to the subject matter and the purpose of the Protocol.

As regards the second paragraph, it seems that the Court's opinion is chiefly based on the last part of it. It must therefore be closely examined.

This part, starting with the words "provided always", etc., follows in the context an enumeration of matters which are not affected by the obligations devolving upon Austria in accordance with the terms of the preceding paragraph which themselves are "in accordance with the terms of Article 88 of the Treaty of Saint-Germain ". If this last part limits those matters not failing under the scope of Article 88, obviously it refers back to that article. In fact, Austria is not obliged not to grant a special regime or exclusive advantages. Her obligation consists in the duty not to violate her economic independence by granting to any State a "special regime or exclusive advantages " calculated to threaten this independence, and therefore to abstain from any “act

calculated to compromise her independence". The last part of the second paragraph of Part II of the Protocol thus is only a particular application of Austria's obligations under Article 88 of the Treaty of Saint-Germain.

It is true that the section which we are considering speaks of "economic independence" and prohibits Austria from granting a special regime or exclusive advantages calculated to threaten "this independence", whereas Article 88 refers to Austria's independence without further qualification. It seems certain, however, that if a legal meaning can be attributed to the expression "economic independence", this meaning must be "the independence of a State in the economic sphere". Accordingly, what the last part of the second paragraph of the Protocol prohibits Austria from doing is to compromise her independence in the economic sphere. Here again there is nothing which is not already covered by the obligations ensuing from Article 88.

It follows that the question raised by this section of the Protocol, namely, whether the Austro-German Customs Union would constitute a special regime or exclusive advantages [66/33] calculated to threaten Austria's economic independence, is embraced by the more general question which has to be considered on the basis of Article 88, namely, whether the customs union, though leaving Austria her independence, would have the effect of endangering that independence.

It follows also that the question whether, having regard to No. 2 of the first article of the Vienna Protocol, the regime established by this Protocol is to be regarded as a special regime or as constituting exclusive advantages, is not of much importance. In the necessary appraisement of this regime from the point of view of the dangers to which it might expose Austria's independence, due regard must of course be had to this clause in so far as it is capable of practical application; the rest is in reality a question of words.

9. I thus find myself impelled to the conclusion which I had reached on the basis of Article 88 of the Treaty of Saint-Germain: the Austro-German Customs regime will only be compatible with the provisions mentioned in the Council's request provided that

(a) it is not in the nature of a so-called alienation of Austria's independence, and

(b) it is not capable, so far as can reasonably be foreseen, of exposing that independence to any danger.

With regard to the first point, it is to be noticed that the regime provided for by the Protocol of March 19th, 1931, is established on a footing of complete legal equality and reciprocity. Now, though it is no doubt possible that two States which stand in the relationship of superior and subordinate may contract between them absolutely equal and reciprocal obligations, it is on the other hand difficult to conceive how such a relationship can result from a treaty which, being concluded between equals, creates none but reciprocal obligations.

To my mind, the objection that in this case there would be two impairments of independence instead of one only, which impairments would subsist side by side without mutually cancelling each other and one of which, namely, that of Germany's independence, would be lawful, whilst the other, that of Austria's independence, would be unlawful, confuses [67/34] the ideas of independence and of liberty (see supra, No. 3). If Austria, which is now Germany's equal, contracts towards the latter an obligation equal to that which Germany contracts towards Austria, the legal position of the two States in relation to each other, in so far as concerns their reciprocal independence, is not changed, though their liberty is more restricted than before. Austria's independence would only be affected by a regime giving Germany a position of legal superiority; but such a position cannot ensue from a treaty which is recognized to have been drawn up on a basis of absolute legal equality and reciprocity.

Similarly, no importance attaches to the observation that though the obligations ensuing from the proposed Customs Union are equal and reciprocal, in practice this reciprocity would not operate in such a way that the impairment of Austria's liberty would be offset by the impairment of Germany's liberty. This contingency, which I consider extremely probable, may be of importance when appraising the danger to which the conclusion of the Customs Union would expose Austria's independence; but it is irrelevant to the question whether reciprocity of obligations is compatible with alienation of independence.

I do not think it necessary to dwell on this point. The arguments whereby it has been sought to show that certain clauses of the Protocol of Vienna are in the nature of an alienation of Austria's independence, appear to be based on a conception of this independence different from that of Article 88; accordingly, a reference to this conception (supra, No. 3) will suffice to show that these arguments cannot be regarded as sound.

10. – The question whether the Austro-German Customs Union contemplated by the

Vienna Protocol must be considered as an act susceptible of endangering Austria's independence is to my mind quite a different question and a much more important one.

While the question discussed above relates to the legal consequences which would ensue from the Vienna Protocol and is accordingly purely a question of law, the one with which I am now concerned is a question of fact. In accord[68/35]ance with what has been said above (supra, No. 7), the question amounts to asking whether, in view on the one hand of the respective positions of Austria and Germany, and in view, on the other hand, of the consequences which the Customs Union would have on Austria's economic life, it can reasonably be foreseen that a dangerous situation would ensue for the independence of Austria.

We are therefore definitely concerned with a particular instance and, I must add, an instance which derives all its importance from the fact that we are dealing with the relations between Germany and Austria. It is quite probable that a similar customs union, or even a closer union between Austria and Czechoslovakia, would not have raised the slightest difficulty. It is not Austria's right to enter into customs unions in general with which we are concerned. In my view, this right is unquestionable, and I freely admit that it was recognized by the Council in its Resolution of December 9th, 1925. But we are concerned with this Customs Union and this Customs Union alone.

Before going on to deal with the question I have just raised, I must make the following observations.

Everything points to the fact that the answer depends on considerations which are for the most part, if not entirely, of a political and economic kind. It may therefore be asked whether the Council really wished to obtain the Court's opinion on this aspect of the question and whether the Court ought to deal with it.

As regards the first point, it seems to follow from the observations repeatedly set forth above, and especially from Nos. 1 and 7, that it is scarcely possible to answer the Council's question as to the applicability of Article 88 of the Treaty of Saint-Germain to the case before us without also resolving both the question of law indicated in No. 9 and the question of fact mentioned in No. 10. These two questions are on all fours, and the compatibility of the contemplated customs regime with Article 88 cannot be established unless they have both been resolved.

This being the case, the conclusion at which I have arrived after much careful reflection

is that the Court must either refuse to give the opinion asked for, or it must give it on [69/36] the question as a whole. I grant that the Court may refuse to give an opinion which would compel it to depart from the essential rules governing its activity as a tribunal (Advisory Opinion No. 5, p. 29), but I am unable to admit that the Court can answer a question other than that which has been put to it or confine itself to answering a part of that question. To my mind that would be an abuse of its powers.

It must now be asked what would be the relation of the Court's opinion on the question of fact mentioned above to the jurisdiction conferred on the Council of the League of Nations by Article 88 of the Treaty of Saint-Germain.

It has already been observed (supra, No. 1) that the question on which the Court's opinion is asked relates to the applicability of Article 88. That question is therefore a preliminary question as regards the Council's jurisdiction under that article. The question put to the Court is intended to establish whether, if the act in question falls under the scope of Article 88, Austria is bound either to abstain from it or to place the Council in a position in which it can exercise the discretionary powers conferred upon it by that article. It is therefore quite a different question from that which the Council would have to resolve if, that incompatibility being admitted, Austria were to ask for its consent.

On the other hand, there seems to be no doubt that the right of the Council under Article 88 to grant or withhold its consent also includes the right to decide whether the act it is called upon to authorize is really calculated to endanger Austria's independence. It would conflict with the meaning and the spirit of Article 88 if the Council were on this point bound by the opinion of any other body.

Accordingly, the only result of the Court's opinion on the above-mentioned question of fact-supposing of course that it was accepted by the Council-would be to settle the question of the applicability of Article 88 to the case in point. It would, however, in no way restrict the Council's discretionary powers, and Austria would remain free to use any means she might think fit in order to prove to the Council [70/37] that the proposed customs regime is not calculated to endanger her independence.

The Court's conclusion on this point is therefore of a provisional nature.

11. – The answer to the question whether the customs regime contemplated in the 1931 Protocol is, owing to its reasonably probable consequences, calculated to endanger Austria's independence, depends in my opinion upon the following considerations.

In the first place, account must be taken of the movement already in existence in Germany and Austria, the aim of which is to effect the political union of the two countries. Here we are confronted with a well-known fact and one therefore which the Court could take into consideration even if it had not been advanced by the interested Parties. This fact was, however, invoked on several occasions, and I do not think it was contested. Moreover, it is at the root of Article 80 of the Treaty of Versailles and Article 88 of the Treaty of Saint-Germain: indeed these articles were only adopted to cheek the movement towards the union of Germany and Austria, a movement which showed signs of very rapid development after the War.

This movement, which is based upon community of race, language and culture, and thus upon a very strong sentiment of common nationality, is further strongly encouraged by the difficult situation in which Austria was placed by the treaties of peace and which impelled her to seek the possibility of existence and development in union with other countries. Here again we are dealing with facts well known to all and established in the present proceedings.

It is in the light of these facts that we must ask what reasonably probable effects the Customs Union would have upon Austria's independence.

In view of the great disproportion in the economic strengths of Germany and Austria, it must be regarded as reasonably probable that Austria's economic life would sooner or later become dependent upon Germany's. Even if, in the absence of reliable information (and I must admit that insufficient light has been thrown on this aspect of the question), we [71/38] leave this point on one side, the Customs Union would beyond all dispute assimilate the economic life of these two countries, and its effect would therefore be to conform and strengthen the movement towards the incorporation of Austria within a single big German State. This movement would be supported by one of the strongest forces in social life, namely economic solidarity. I admit that economic union does not necessarily lead to political union, but its influence is very decidedly in that direction. Accordingly, if the tendency towards political unity already exists and is as active and powerful as it is in Germany and Austria, it seems to me quite reasonable to suppose that so close an economic union as that which would follow from a system of free trade between two

countries surrounded by formidable customs barriers would be likely to turn the scales in favour of that movement. From this point of view, the Austro-German Customs Union must, in my opinion, be considered a fact which might compromise Austria's independence within the meaning of Article 88 of the Treaty of Saint-Germain.

Adopting this standpoint, I cannot attach great importance to the clauses in the Vienna Protocol which seek to loosen the bonds between the two countries and especially to safeguard Austria's right to withdraw from the Union. I quite agree that this Customs Union has had all possible regard for the independence of the two countries, and there is no doubt that the authors of the Protocol had this aim in view. Man's will, however, has only a limited influence over social forces like those which are urging Austria towards fusion with Germany, and in all probability the consequences of the union would ensue despite the precautions taken in the Protocol.

It is quite another question whether the danger to Austria's independence could not be eliminated by conditions placed upon its conclusion: in my opinion, for example, the danger would disappear or would be very much reduced as soon as Germany and Austria ceased to be the sole members. This consideration, however, does not apply in the present stage of the proceedings when we have only to determine whether the regime as it stands comes within the scope of Article 88, although it might play a part in any subsequent proceedings before the Council.

Arguing still from the same standpoint, I find it difficult to attach importance to the fact that other customs unions have been regarded as perfectly compatible with the independence of States and have in fact exercised no appreciable influence over that independence. Everything depends upon the situation of the States which contracted these unions and, as these situations are never the same, the utmost care has to be taken in arguing from one case to another. The only pertinent historic precedent would appear to be the German Zollverein, owing to the analogy between the present situation of Germany and Austria and the situation of the various German States in the XIXth century. I do not wish to exaggerate its importance, but it seems to me that the Zollverein played a by no means unimportant part in paving the way for German unity.

It may be asked whether there is not some contradiction in requiring that a State should exist and at the same time putting it in a position which makes its existence extremely difficult. I do not dispute that, but my duty as a judge is to take Article88 and to apply it as it stands according to its letter and its spirit. And when I consider the real danger threatening Austria's independence against which this article is especially directed, and when I consider that, in order to avert this danger, Article 88 requires Austria, in the absence of the consent of the Council of the League of Nations, to abstain from "any act which might directly or indirectly or by any means whatever compromise her independence", it is, I confess, difficult for me to admit that an act such as the Customs Union contemplated in the Vienna Protocol does not come within the scope of this provision, and that it can be accomplished without the Council's authority. Further, I would ask what value and [73/40] relevance the second sentence in Article 88 would retain if it did not apply in this case.

12. For these reasons, I have come to the conclusion that the Austro-German Customs regime, provided for in the Vienna Protocol of March 19th, 1931, would be incompatible with Article 88 of the Treaty of Saint-Germain, because it would be an act coming within the scope of the second sentence of that article, and that Austria is therefore obliged to abstain from it or to ask the consent of the Council of the League of Nations.

This being said, I have no hesitation in admitting that the said regime would also be incompatible with the Protocol of Geneva, which only applies the provisions of Article 88 to the matters there in issue.

From this point of view, and from this point of view only, I find it possible to accept the conclusion of the present Opinion.

(Signed) D. Anzilotti

[74/41] Dissenting Opinion of M. Adatci, Mr. Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M. Schücking, Jonkheer Van Eysinga and M. Wang

The question which is put to the Court by the Council asks whether the regime to be established under the Vienna Protocol would be compatible with Article 88 of the Treaty of Saint-Germain as well as with the Geneva Protocol No. 1 of 1922.

On the first point, the Opinion of the Court contains, in its statement of reasons, the following passage:

> "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."

On the second point, the Opinion of the Court states, in its operative part, that a regime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, would not be compatible with Protocol No. 1 signed at Geneva on October 4th, 1922.

The undersigned are unable to concur in this conclusion. In their opinion and for reasons which will appear hereafter, the regime which it is proposed to establish under the Vienna Protocol is compatible both with Article 88 and with the Geneva Protocol No. 1 of 1922.

The views at which the undersigned have arrived as to the purpose and meaning of the various instruments referred [75/42] to, viz. Article 88 of the Treaty of Saint-Germain, the Geneva Protocol No. 1 of 1922 and the Vienna Protocol of 1931, are not profoundly different from that which the other members of the Court have reached. The undersigned agree with the opinion that the regime to be set up under the Vienna Protocol would not involve Austria in the loss of her independence, i.e. it would not constitute an alienation of it. They share, speaking broadly, the view in the Opinion of the Court as to the nature and extent of the obligation accepted by Austria to abstain from acts which might compromise or threaten her independence. Nor is there anything in the outline which that Opinion gives of the regime to be set up under the Vienna Protocol which the undersigned desire to contradict. What they do not find in the Opinion of the Court is any explanation as to how and why that regime would threaten or imperil Austria's independence.

The undersigned regard it as necessary first of all to indicate what they believe to be the task assigned to the Court in this case. The Court 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. This question is in effect whether the proposals embodied in the Vienna Protocol are or are not compatible with the obligations assumed by Austria in the two other international instruments referred to in the question. That question is purely legal in the sense that it is concerned with the interpretation of treaties.

The position was accurately summed up in the words of M. Briand at the meeting of the Council of the League on May 19th, 1931, when he said:

> "In reality, nothing is simpler than the situation now before us. By means of Mr. Henderson's proposal, to which we have all agreed, we have defined our attitude on a point of law which formed, so to speak, the preliminary question. The point at issue was as follows. Some of us said: "You [76/43] cannot conclude this Protocol because your international obligations prohibit you from doing so"; to which others replied: "No: we have established this Protocol in the exercise of our sovereign national rights, without in any way disregarding our treaty obligations." Which of the two arguments is right?
>
> Such was the problem before us, and naturally our thoughts turned towards that institution which gives the Council legal advice in difficult cases. The Permanent Court of International justice, having before it the texts, will tell us what is the law."

The decision of the Court 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.

In order to appreciate the true meaning of the principle enunciated in Article 88 of the Treaty of Saint-Germain, it is necessary to set out at somewhat greater length than is done in the Opinion of the Court the circumstances which prevailed at the time when this article of the Treaty was formulated. It is only by so doing that the language of this provision can be understood.

Article 80 of the Treaty of Versailles had already proclaimed the principle that the independence of Austria was inalienable save with the consent of the Council of the League. The incident in connection with Article 61, paragraph 2, of the Constitution of Weimar, the

subsequent interchange of notes between the Allied Powers and the German delegation at Paris, the terms of the Allied letter to the Austrian delegation at Paris, dated September 2nd, 1919, and the draft article (now Article 88) which the Allies then insisted on inserting in the Treaty of Saint-Germain, show the purpose which the Allied Powers had in view in framing that provision. It was to ensure the continued existence of Austria as a separate State. [77/44]

This purpose was achieved by securing the assent of all Parties to the Treaty, including that of Austria herself, to the principle that the independence of Austria must not be alienated or compromised save with the consent of the Council.

"Independence" is a term well understood by all writers on international law, though the definitions which they employ are diversified. A State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, i.e. if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails.

Restrictions on its liberty of action which a State may agree to do not affect its independence, provided that the State does not thereby deprive itself of its organic powers. Still less do the restrictions imposed by international law deprive it of its independence.

The difference between the alienation of a nation's independence and a restriction which a State may agree to on the exercise of its sovereign power, i.e. of its independence, is clear. This latter is, for instance, the position of States which become Members of the League of Nations. It is certain that membership imposes upon them important restrictions on the exercise of their independence, without its being possible to allege that it entails an alienation of that independence.

Practically, every treaty entered into between independent States restricts to some extent the exercise of the power incidental to sovereignty. Complete and absolute sovereignty unrestricted by any obligations imposed by treaties is impossible and practically unknown.

The "alienation" of the independence of a State implies that the right to exercise these sovereign powers would pass to another State or group of States.

The word "compromise" in the second sentence of Article 88 implies "involve danger to",

"endanger" or "imperil". For an act to "compromise" the independence of Austria it must be one which would imperil the continued existence [78/45] of Austria as a State capable of exercising within its territory all the powers of an independent State within the meaning of independence given above.

In considering now the interpretation of the Geneva Protocol No. 1 of October 4th, 1922, it is necessary to bear in mind the precarious position of Austria as disclosed by the papers laid before the Court, at the time the Protocol was concluded. There was grave risk that Austria would collapse from internal weakness, particularly in the financial and economic sphere. If Austria collapsed, the affairs of Europe would again be in confusion. It was evidently the intention and the desire of the Powers who were willing to come to Austria's help to keep her in being as a State. They had to guard against two risks: against some measure to which Austria might be driven in her weakness which would be inconsistent with her existence as a State, and against some measure on the part of another Power to secure advantages for herself incompatible with Austria's independent position.

Protocol No. 1 of 1922 achieved both these objects. The Powers pledged themselves to respect Austria's independence and to seek no special or exclusive advantages which might imperil that independence. Austria renews the pledges which she had already given in 1919, the language in which she does so being slightly modified in order to render them more appropriate to the predominantly financial and economic character of the arrangement which was being concluded.

Austria's undertaking is embodied in two paragraphs. The first is in substance no more than a repetition of what she had accepted in the Treaty of Saint-Germain. The second is to make it clear that within the limits of the liberty left to her by that treaty, she had not lost the right to make arrangements for the benefit of her commerce.

The explanation of the inclusion of this latter provision is to be found in the circumstances of the moment. Trade was stagnating. Austria was faced with the need of a loan [79/46] on which interest would have to be paid. Unless her commerce could be stimulated, the burden of the interest of that loan would fall on the guaranteeing Powers. Consequently it was in

the interest of all Parties that no doubt should exist as to Austria's right to make whatever arrangements would be beneficial to her commerce, but always subject to the overriding principle that nothing must be done that would imperil her future existence. The paragraph which affirms Austria's right to make commercial arrangements therefore concludes with the statement: "provided always that she shall not violate her economic independence by granting to any State a special regime or exclusive advantages calculated to threaten this independence".

This last sentence of the second paragraph does not in the opinion of the undersigned extend the obligation which Austria had already accepted in the Treaty of Saint-Germain.

The following considerations all point to that conclusion.

The plain meaning of the language employed does not suggest any such extension; nor does the structure of the paragraph. The paragraph is a saving clause or exception to the broad principle enunciated in the preceding paragraph. This exception concludes with the announcement of a limitation beyond which it is not to operate. If the limitation upon the exception was intended to do more than to revert to the original rule, one would expect to find that intention made clear by the language.

In view of what is said above as to the state of affairs in 1922 and as to the payment of the interest on a loan, any extension of the economic restrictions imposed upon Austria was, in view of the state of affairs in 1922, contrary to the general interest. Nor is there anything in the minutes of the meetings at Geneva at the time which suggests a desire to make any such extension.

The speeches made at the time of the conclusion of the Geneva Protocol state emphatically that no encroachment was being made on the sovereign power of Austria.

That of the Reporter (Lord Balfour) is worth quoting. [80/47]

> "Now, what are the conditions which in our view are required for this scheme of reform? In the first place, we are of opinion that, since it is inevitable that there shall be some external influence acting in cooperation with the Austrian Government, it shall be made quite clear, first to the Austrian people and then to the world at large, that no interested motive presides over the action of any of the guaranteeing Powers, and that we are all mutually engaged one to the other, to the League of Nations and in fact to the world at large, that no interference with Austrian sovereignty, no interference with Austrian economic or financial independence, shall be regarded as tolerable or possible

under the new system.

…

"I think every Austrian citizen may rest assured that while undoubtedly there must be, under the guidance of the League and through the machinery which is going to be provided, a control exercised over the financial policy of Austria, which can only end in the benefit to his country, and that when, at the end of two years, Austria finds herself again a solvent nation, she will be so without having lost one shadow or little of any of that sovereignty or that supremacy over her own affairs which we all desire, and indeed are bound as Members of the League of Nations to preserve."

The fact that Protocol No. 1 was open to the adherence of other Powers which were not Parties to the Treaty of Saint-Germain, and that one such Power did in fact adhere, is no reason for holding that Austria's obligations as set out in the Protocol are something other than a reaffirmation of the obligations contained in Article 88.

All the economic and financial obligations which the Reconstruction scheme of 1922 rendered it necessary for Austria to accept temporarily were set out in Protocols Nos. Il and III signed at the same time as Protocol No.1. No reason is apparent why an economic restriction which formed no essential part of the Reconstruction scheme (or it would have been inserted in Protocols Nos. II and Ill) should have been imposed upon Austria in a Protocol which contains no provision as to the period of its duration.

Lastly, no such extension of Austria's obligations was necessary. The maintenance of her existence as a separate [81/48] State was secured by Article 88, so far as it could be secured by treaty stipulations.

If the above analysis of the Geneva Protocol No. 1 of 1922 is well-founded, it follows that any act which is a violation of the obligations of Austria set out therein must also be a violation of Article 88. Neither of its two paragraphs contains anything which is not already inherent in that article. If the regime to be established under the Vienna Protocol is compatible with Article 88, it cannot in the opinion of the undersigned be incompatible with the Geneva Protocol No. 1 of 1922.

The Opinion of the Court concludes with the statement as regards the Protocol of 1922 that it is difficult to maintain that the regime to be set up under the Vienna Protocol is not calculated to threaten the economic independence of Austria and that it is, consequently, in accordance with the undertakings specifically given by Austria in the Protocol of 1922 with

regard to her economic independence.

This is the paragraph which leads immediately to the final conclusion in the Opinion. The undersigned therefore infer from its language and particularly from the use of the words "economic independence" that it is the final sentence of the second paragraph of the Austrian undertaking in the Protocol with which the other members of the Court find that the regime under the Vienna Protocol is incompatible.

If so, it must mean that it would violate the economic independence of Austria because it would be the grant to Germany of a special regime or of exclusive advantage *calculated to threaten this independence*.

It is not enough that the arrangement should be the grant of a special regime or of exclusive advantages. The grant must be calculated to threaten Austria's independence.

If the proposed regime can be said to be one which is "calculated to threaten" the independence of Austria, it is not the establishment of the regime but the consequences resulting from its establishment which would make that regime incompatible with Austria's obligations.

What Austria has agreed not to do is something which is "calculated to" threaten her independence. It is agreed [82/49] that this covers only responsibility for consequences which can reasonably be foreseen at the moment of the act. (Opinion of the Court, pp. 13-I4.)

No material has been placed before the Court in the course of the present proceedings for the 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.

The conclusion reached by the Court is that it is the regime contemplated by the Vienna Protocol when taken as a whole which it might be difficult to regard as in accordance with Austria's undertakings. That is to say that, taken as a whole, it might constitute a menace to the independence of Austria irrespective of the effect of particular provisions in that instrument, and that, as these results might reasonably have been foreseen by Austria at the time of its

conclusion, the regime is incompatible with Austria's engagements.

If this means that the conclusion of a customs union between two States, irrespective of the details of the arrangement, involves danger to the independence of the States concerned, it is an opinion which the undersigned are unable to accept.

Firstly, as said above, the Court has no evidence before it on which such a conclusion can be based. It is true that in the course of the case assertions have been made which are founded on the fact that a customs union existed between most of the German States during a large part of the XIXth century, and that this customs union in its later and final phase was replaced in 1871 by the German Empire. No satisfactory conclusions, however, can be drawn from the history of the German Zollverein, because there is no possi[83/50]bility of estimating how far the fusion in 1871 was due to the war of 1870 and how far to the *Zollverein*.

Secondly, the consequences of the conclusion of a customs union cannot be estimated without taking into account the specific provisions of the arrangement which it is proposed to set up. There is no fixed type of customs union. Each case must be judged on its own merits.

Furthermore, the undersigned are not prepared to admit that the Vienna Protocol taken as a whole can be regarded as incompatible with the treaty obligations of Austria if no provision in the Protocol taken by itself can be singled out as being incompatible with these obligations.

Their examination of the articles of the Protocol has not disclosed any provision of which the consequences, so far as can reasonably be foreseen, will threaten the independence of Austria, nor is it alleged in the Opinion of the Court that there is any such provision.

The undersigned accept the statement (Opinion, p. 18) that the regime which it is proposed to set up under the Vienna Protocol fulfils the requirements of a customs union, but in their opinion it is a union which is organized on the basis of a customs association, and not on that of a customs fusion; that is to say, each of the States concerned preserves the right to enact its own legislation on customs matters and to enforce that legislation in its own territory by its own customs service. There is no fusion of the two customs territories, no fusion of the customs services, no constitution of a common fund.

What is provided for is an assimilation of the tariff and economic policies of the two

countries (Preamble), i.e. each of the two countries will have its own policy, but the two will coincide.

The two countries are to agree on a customs law and a customs tariff to be put into force in the two customs areas, and no changes are to be made in that law or tariff except by agreement (Art. II). The effect of this is that when the text of the law or of the amendments has been agreed, they [84/51] will be enacted in Austria by Austrian legislation, and in Germany by German legislation.

There are to be no import or export duties on goods exchanged between the two countries, except as may be agreed in the proposed treaty (Art III).

In Austria, the customs duties are to be levied by the Austrian customs authorities, just as in Germany they will be levied by the German authorities. After deducting the expenses the proceeds are to be divided between the two countries in an agreed proportion (Art. VI).

It is not easy to see how any of these early articles in the Vienna Protocol can be described as being calculated to threaten the independence of Austria, seeing that none of them could be carded out unless Austria continued to exist as a separate State with her own territory, her own legislature, her own legislation on customs matters, and her own customs authorities enforcing her customs law and her customs tariff. The Government of the one State is in no way subordinated to the Government of the other.

Articles IX and X relate to commercial treaties. Under Article IX, each Government retains in principle the right to conclude with third States commercial treaties on its own behalf (Art. IX, No. 1). Such treaties can, however, be negotiated jointly, if thought well, but if negotiated jointly, they are to be concluded in the form of separate treaties coming into force simultaneously (Art. IX, No. 3). Article X imposes on each Party the duty of taking steps to bring its existing commercial treaties into harmony with the new regime.

Certainly these provisions do not appear to subordinate Austria as one of the contracting States to the control of her partner in a way which could be said to imperil her independence.

[85/52]

There is, however, in Article IX, No. 2, a provision which obliges each of the States, if commercial treaties are negotiated separately, to "see that the interests of the other contracting Party are not violated in contravention of the tenor and purpose of the treaty to be concluded ". It has been suggested in the arguments that this provision would so restrict Austria's liberty to conclude whatever treaties might be most conducive to her own benefit as to be inconsistent with the preservation of hw economic independence.

The undersigned are not prepared to admit that a provision requiring a State to bear in mind the interests of another State to the extent prescribed by Article IX (2), can be said to imperil the existence of that State or to be calculated to threaten its independence. Any such idea would be directly opposed to the modern movement in favour of increased recognition of the interdependence of States in economic matters. It may be well to mention in this connection that one of the objects of the proposed commercial convention which was signed at Geneva on March 24th, 1930 and of which Austria was a signatory, followed the same principle when it endeavoured to avoid any serious injury by one of the High Contracting Parties to the economic interest of another. It has been so understood by some of the States concerned, as for instance in the Regional Agreement signed at Oslo on December 22nd, 1930.

Article XI provides for the institution of an arbitral committee organized on the basis of parity. This committee is to settle differences of opinion as to the interpretation and application of the proposed treaty, and also to bring about a compromise in cases where agreement is necessary between the two Parties. The undersigned do not consider that any arrangement which provides for the friendly settlement of differences which may arise between two States, whether those differences are justifiable or not, can in these days be said to be calculated to threaten the independence of either of the States concerned. [86/53]

Article XII gives each State the right to denounce the proposed treaty. If it could be held that the mere establishment of the regime proposed in the Vienna Protocol involved Austria in the loss of her independence, the power to denounce the treaty would be of no importance, for Austria would already have lost what she had undertaken to preserve. This is not, however, the case. The Opinion of the Court is that the establishment of the regime is calculated to threaten

that independence, i.e. it is only because of the consequences of the establishment of the proposed regime that it is relied on as being incompatible with Austria's obligations. In this case the right to denounce the treaty is of importance, because it enables Austria to ward off those consequences. Should she find that her independence is imperilled by entering the customs union, she can always avoid that danger by denouncing the treaty.

This examination of the various provisions of the Vienna Protocol leads the undersigned to the conclusion that none of its provisions, when considered individually, are inconsistent with the maintenance of Austria's position as a separate and independent State.

The numerous restrictions on Austria's liberty of action resulting from the Treaty of Saint-Germain are well known: so are those imposed in 1922 by Protocols Nos. II and Ill at the time of the Austrian Reconstruction scheme. They affected Austria in matters military, financial or economic, which touch most closely on the national sovereignty. None of them were reciprocal in character. Yet they were all regarded as compatible with Austria's sovereignty and independence. A *fortiori* it seems to follow that a customs regime, such as that proposed in the Vienna Protocol, organized on a basis of parity and reciprocity, does not prejudice the independence of Austria.

For these reasons, the undersigned are of the opinion that a regime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, would be compatible both [87/54] with Article 88 of the Treaty of Saint-Germain and with Protocol No. 1 signed at Geneva on October 4th, 1922.

(*Signed*) M. Adatci;
(*Signed*) F.B. Kellogg;
(*Signed*) Rolin-Jaequemyns;
(*Signed*) Cecil J. B. Hurst;
(*Signed*) W. Schucking;
(*Signed*) V. Eysinga;
(*Signed*) Wang Chung-Hui

[98/65] Annex 2a

I

The Vice-Chancellor of Austria to the Minister
for Foreign Affairs of the German Reich

[*Translated by the Registry.*]

VIENNA, March 19th, 1931

Your Excellency,

As a result of our conversations early this month during your visit to Vienna, I have the honour to inform Your Excellency that the Austrian Government has welcomed the plan to assimilate the economic and tariff regimes of Austria and Germany and has unanimously approved the Protocol as annexed hereto, laying down the principles for the agreement to be concluded.

I have, etc.

(*Signed*) Scirober

II

The Minister for Foreign Affairs of the
German Reich to the Vice-Chancellor Of Austria

[*Translated by the Registry*]

BERLIN, March 19th, 1931

Your EXCELLENCY,

With reference to our conversations early in March, while I was in Vienna, I have the honour to inform you that the Government of the Reich has welcomed the plan for assimilating the tariff and commercial regimes of Austria and Germany and has unanimously approved the Protocol laying down the principles of the Treaty to be concluded, in the text attached hereto.

I have, etc.

(*Signed*) Curtius

[67/99]

III

Austro-German Protocol of March 19th, 1931

[*Translation*]

In pursuance of the conversation which took place in Vienna at the beginning of March, 1931, the German Government and the Austrian Government have agreed to enter forthwith into negotiations for a treaty to assimilate the tariff and economic policies of their respective countries on the basis and within the limits of the following principles.

I.

(1) While completely maintaining the independence of the two States and fully respecting the obligations undertaken by them towards other States, the treaty is intended to initiate a reorganization of European economic conditions by regional agreements.

(2) More especially both Parties will, in the treaty, unconditionally declare their willingness to enter into negotiations for a similar arrangement with any other country expressing such a desire.

II.

(1) Germany and Austria will agree on a tariff law and a customs tariff which shall be put into force in both customs areas concurrently with the treaty and for the period of its validity.

(2) During the validity of the treaty, amendments to the tariff law and the customs tariff may only be effected by agreement between the two Parties.

III.

(1) As long as the treaty remains in force, the exchange of goods between the two countries shall not be subject to any import or export duties.

(2) In the treaty the two Governments will come to an agreement as to whether internal customs duties will be necessary, and, if so, for what specified categories of goods and for what period. [100/67]

IV.

In the treaty the two Governments will reach an agreement for a provisional arrangement

regarding the turnover tax and the exchange of those goods for which, at the present time, monopolies or excise duties prevail in either of the two countries.

V.

(1) The Customs Administration of each of the two countries shall be independent of that of the other and shall remain under the exclusive control of its own Government. Furthermore, each country shall bear the expenses of its own Customs Administration.

(2) Both Governments, whilst fully respecting the above principle, will enact special measures of a technical character to provide for the uniform execution of the tariff law, the customs tariff and the other tariff regulations.

VI.

(1) In the German customs area the customs duties shall be levied by the German Customs authorities and in the Austrian customs area by the Austrian Customs authorities.

(2) After deducting the special expenses arising out of the application of the treaty, the amount of the duties received shall be apportioned between the two countries according to a quota.

(3) In the agreements to be reached regarding this point, care will be taken not to prejudice the liens on customs revenues existing in either country.

VII.

(1) No import, export or transit prohibitions shall exist as between Germany and Austria. Such exceptions as may prove to be requisite for reasons of public security, public health or matters of a similar nature shall be specified in the treaty as precisely as possible.

(2) In place of the Agreement on the Diseases of Animals concluded between Germany and Austria on July 12th, 1924, the two Governments will conclude and put into force as soon as possible, and in any case not later than one year after the entry into operation of the treaty, a fresh agreement regulating the traffic in animals and animal products between [101/68]Germany and Austria in accordance with the regulations which govern internal traffic in Germany and Austria, the same conditions being given.

VIII.

The rights appertaining to individual and juridical persons of the one Party in the territory of the other in respect of domicile, industry, taxation, etc., shall be regulated in the treaty on the basis of the relevant provisions of the Austro-German Commercial Treaty now in force. On the same basis regulations will also be agreed upon concerning railway and shipping traffic between the two Parties.

IX.

(1) Each of the two Governments, even after the entry into operation of the treaty, shall retain in principle the right to conclude commercial treaties with third States on their own behalf.

(2) In the relevant negotiations with third States, the German and the Austrian Governments will see that the interests of the other contracting Party are not violated in contravention of the tenor and purpose of the treaty to be concluded.

(3) So far as it seems opportune and possible with a view to effecting a simple, speedy and uniform settlement of the commercial relations with third States, the German Government and the Austrian Government will conduct joint negotiations for the conclusion of commercial treaties with third States. Even in this case, however, Germany and Austria will each on its own behalf, sign and ratify a separate commercial .treaty and will only arrange for a simultaneous exchange of the ratifications with the third State in question.

X.

The two Governments will, at a suitable time, take the steps necessary to bring into accord with one another and with the tenor and purpose of the treaty, to be concluded, the existing commercial treaties concluded by Germany and Austria with third States so far as they contain tariff rates fixed by commercial treaties with other countries or so far as they would interfere with the execution of the existing import and export prohibitions and other regulations for the exchange of goods. [102/69]

XI.

(1) To ensure a smooth working of the treaty, an Arbitral Committee composed of

members of the two Parties on the lines of complete parity shall be provided for. This Committee will have to deal with the following matters:

(a) settlement by arbitration of differences of opinion arising between the two Parties as to the interpretation and application of the treaty;

(b) to bring about a compromise in cases where the treaty provides for a special agreement between the two Parties or in which, according to the tenor of the treaty, the realization of the intentions of the one Party depends upon the consent of the other, provided that in such cases agreement cannot be reached between the two Parties.

(2) A decision of the Arbitral Committee in cases (a) and (b) referred to above have binding effect on both Parties, a majority of votes being sufficient. The President of the Committee shall have a casting vote. Complete parity in choosing the President shall be provided for in the treaty.

(3) Should either of the Governments be of the opinion that a decision of the Arbitral Committee in any of the cases mentioned under 1 (b) infringes its vital economic interests, it shall be entitled to terminate the treaty at any time on giving six months' notice. Such notice of termination may also be given during the first period of three years mentioned under XII (2).

XII.

(1) The treaty to be concluded shall be ratified and shall enter into operation at the end of a period to be fixed in the treaty which extends from the date of the exchange of ratifications.

(2) The treaty may be denounced at any time upon one year's notice, but not so as to terminate it before the end of the third year after its entry into operation except in the case mentioned under XI (3).

(3) Notice may only be given in virtue of a law of the country denouncing the treaty.

[103/70]

Annex 3

Letter from the British Government to the Secretary-General of the League Of Nations

Foreign Office, S.W. 1, April 10th, 1931

Sir,

I am directed by Mr. Secretary Henderson to request that you will insert in the agenda of the Sixty-Third Session of the Council of the League of Nations the following item:

"Austro-German Protocol for the establishment of a Customs Union."

2. The Members of the Council, whose attention has doubtless been drawn to the above Protocol, will probably be aware that doubts have been expressed whether the regime which it contemplates would be compatible with the obligations of the Austrian Government under the Protocols of October 4th, 1922.

3. Seeing that the last named Protocols were negotiated under the auspices of the Council, His Majesty's Government in the United Kingdom consider it of the highest importance that all such doubts as have been expressed should be cleared up at the earliest possible moment, and with this object they think it appropriate that the matter should be examined by the Council itself.

(*Signed*) Orme Sargent