WORLD LAW

We return in this issue to a primary function of this section of the Journal, that of presenting current information, not excluding commentary, regarding the judgments, important orders, and advisory opinions of the World Court. There follow, accordingly, digests of two recent World Court judgments, the one disposing of preliminary objections by Thailand to the jurisdiction of the Court in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), rendered 26 May 1961; the other the final judgment in the Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), rendered 18 November 1960.

These two judicial pronouncements, both dealing with border problems, present a number of noteworthy circumstances. Both parties in both cases have accepted the "ipso facto and without special agreement" jurisdiction of the Court under Article 36, paragraph 2, of the Statute. Incidentally, in both cases each side retained of counsel a renowned United States lawyer. In both cases the Court reached unanimous concurrence, save for the ad hoc judge of the losing party in the latter. In the former, the parties, though the personnel of the Court contained a national of neither, did not avail themselves of the provisions of Article 31, paragraph 3, of the Statute of the Court, enabling each to "choose a person to sit as judge." In this respect they followed the example of Belgium and the Netherlands in the Case Concerning Sovereignty over Certain Frontier Land,1 previously digested in this section.2 It seems pertinent to remark that the foregoing facts appear to add point to the frequent criticism of the institution of litigant-nation appointees to the World Court bench in particular cases, as an anachronism and as inconsistent with the fundamental principle of third-party judgment.

The Temple of Preah Vihear case further presents the interesting circumstance of defendant's essential reliance upon the judgment of the Court in 1959 in the Case Concerning the Aerial Incident of July 27, 1955 (Israel v. Bulgaria)3 to render ineffective its declaration of 1950 recognizing the Court's jurisdiction under Article 36, paragraph 2. In that judgment the Court had held that a state becoming party to the present Statute, by virtue of membership in the United Nations acquired

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2 1960 DUKE L.J. 252.
in 1955, did not thereby accept compulsory jurisdiction by virtue of Article 36, paragraph 5, though it had, at the time of the expiration of the Statute of the predecessor Permanent Court of International Justice, accepted such jurisdiction without time limit under that Statute. It is perhaps the most clear-cut attempt to date, by a litigant before the World Court, to base its case upon a previous decision of the Court. The Court, however, sharply distinguished the previous facts and circumstances from those presently before it and sustained its jurisdiction to proceed to the merits in the later case.

The King of Spain's arbitral award, the subject-matter of the other case here digested, had been made more than half a century previously, but had not been carried into effect by the party (Nicaragua) obligated by it to do so. Honduras sought and obtained the judgment of the World Court to bring about such fulfillment. While in no technical sense an appeal or an application for Mandamus, the stated competence of the Court not extending to either appellate or injunctive jurisdiction, the actual outcome in some respects resembles both kinds of relief and perhaps suggests useful lines of development for the jurisdiction of the Court in the future.

—The Editors

CAMBODIA v. THAILAND: PRELIMINARY OBJECTIONS

THE DISPUTE before the World Court in this case grew out of the conflicting claims of the parties to the ownership of the region of the Temple of Preah Vihear on their joint frontier. It is, as the Court

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

It is to be expected that the judgment on the Merits, if and when made, will be reported in this section of the JOURNAL.


The Court was composed of President Winiarski; Vice-President Alfaro; Judges Badawi, Moreno Quintana, Wellington Koo, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Koretsky, Tanaka, Bustamante y Rivero, and Morelli.

Cambodia is one of the small minority of states recently admitted to the United Nations that have accepted the jurisdiction of the Court under Art. 36, paragraph 2, of the Statute.

The English text of the judgment is authentic.
saying, "a dispute about territorial sovereignty." Plaintiff based its invocation of the jurisdiction of the Court upon the combined effect of its own acceptance of compulsory jurisdiction by declaration dated 9 September 1957, coupled with the declaration made by Thailand on 20 May 1950. Cambodia also relied upon certain treaty provisions entered into between France acting on behalf of the former territory of French Indo-China (of which Cambodia had been a component part) and Siam (Thailand). However, the Court, after considering the preliminary objections of Thailand was able to come to a decision on the former basis alone, and did not pass upon the latter. In as much as Thailand had raised the objections mentioned, denying that the Court had jurisdiction to decide the case, the Court's task in the present proceedings was limited to determining whether or not it possessed competence to hear the case on the merits.

Thailand excepted to Cambodia's claim that the declaration of 20 May 1950 constituted a valid acceptance by Thailand of compulsory jurisdiction of the Court. "It is solely the validity of Thailand's Declaration that is in issue in the present proceedings."

Thailand had accepted compulsory jurisdiction in 1929 and renewed its acceptance in 1940. The 1950 declaration, quoted by the Court,
was in form a renewal of the earlier ones. Thailand now contended that since, subsequent to the declaration of 1950, there had intervened the judgment of the Court in Israel v. Bulgaria, the language of that declaration, having been based on assumptions shown by that judgment to have been incorrect, had become meaningless. The defendant state, however, in no way denied that, by its declaration of 1950, it fully intended to accept the compulsory jurisdiction of the Court; that is, the International Court of Justice created under the Statute annexed to the Charter of the United Nations effective in 1945. But defendant argued that its intention, though clearly existent, was never carried out as a matter of objective fact because it had all unwittingly drafted the declaration in terms which subsequent events—particularly the Court's decisions just above mentioned—revealed as having been ineffectual to achieve its purpose. Drafted as a renewal it could not operate as an original declaration of acceptance.

The Court began its discussion by analyzing Article 36, paragraph 5, of its Statute, the intention of which was to provide a means whereby, within certain limits, existing declarations of acceptance of the compulsory jurisdiction of the former Permanent Court of International Justice would become ipso jure transformed into acceptances of the compulsory jurisdiction of the present Court, as respects states parties to the present Statute, without having to make new declarations. In Israel v. Bulgaria, however, the Court had held that Article 36, paragraph 5,

did not apply indiscriminately to all States which, having accepted compulsory the jurisdiction of the former Permanent Court, might at any subsequent date become parties to the Statute of the Court, but only to such States as were original parties. The Court furthermore came to the conclusion that on 19 April 1946, the date when the Permanent Court ceased to exist, all declarations in acceptance of the compulsory jurisdiction of the Permanent Court for a period of ten years and on condition of reciprocity. That declaration has been renewed on May 30, 1950, for another period of ten years.

"In accordance with the provisions of Article 36, paragraph 4, of the Statute of the International Court of Justice, I have now the honour to inform you that His Majesty's Government hereby renew the declaration above mentioned for a further period of ten years as from May 3, 1950, with the limits and subject to the same conditions and reservations as set forth in the first declaration of Sept. 20, 1929." Id. at 24.

The conditions and reservations mentioned were irrelevant to the present proceeding before the Court. Paragraph 4 relates to the deposit of declarations with the Secretary-General.

The 1929 declaration is set forth at page 23 of the instant opinion.

13 Note 3, supra.

14 For text see note 4, supra.
which had not already, by then, been "transformed" by the operation of Article 36, paragraph 5, into acceptances of the compulsory jurisdiction of the present Court, lapsed and ceased to be in force, since they would, as from then, have related to a tribunal—the former Permanent Court—which no longer existed. Consequently, so the Court found, all declarations not having been thus transformed by 19 April 1946 ceased as from that date to be susceptible of the process of transformation ipso jure provided by Article 36, paragraph 5.15

It followed that Thailand, not having been an Original Party to the Charter and not having become a Member of the United Nations until after 19 April 1946, could not, by virtue of Article 36, paragraph 5 (applicable only to declarations "still in force"), have transformed any acceptance of jurisdiction and could not in 1950 have extended its 1940 renewal of its acceptance of 1929, which acceptance and renewal had ceased to have any reality when the "old" Court ceased to be. The renewal of an instrument relating only to a non-existent institution was necessarily devoid of legal effect. Whatever its intentions, Thailand accordingly claimed, its declaration of 1950 could not have been an acceptance of jurisdiction under Article 36, paragraph 2 of the Statute, any more than the intentions of a testator could prevail legally if his will were not in the form which the law prescribed.

The Court did not share Thailand's view that its decision in Israel v. Bulgaria wiped out the intended effect of Thailand's 1950 declaration, namely to accept the Court's compulsory jurisdiction.

Pointing out that a "decision of the Court has no binding force except between the parties and in respect of that particular case," the Court noted that Israel v. Bulgaria could not in any event have had the effect of invalidating Thailand's 1950 declaration. Its relevancy in Cambodia v. Thailand lay in its statements of the scope of Article 36, paragraph 5, which was found to relate solely to cases in which declarations accepting the jurisdiction of the "old" Court would be deemed to be transformed into acceptances of that of the "new" court, "without any new or specific act on the part of the declarant State other than the act of having become a party to the [latter Court's] Statute." Clearly Thailand's "new and voluntary act," that is, its declaration of 20 May 1950, placed it "in a different position from Bulgaria which had never taken any new step at all" subsequent to its admission to the United Nations.

16 Statute, Art. 59.
18 Id. at 28.
Thailand became a Member of the United Nations in December 1946; its declaration of 1940, incapable of transformation under Article 36, paragraph 5, expired according to its own terms on 6 May 1950, fourteen days before Thailand's "new step" taken for the purpose of accepting the present Court's jurisdiction, hence could never thereafter be transformed as such into an acceptance binding upon Thailand. On 20 May 1950 Thailand was thus completely free to accept or not to accept the jurisdiction of the Court for the future. By its declaration of that date, addressed to the Secretary-General in accordance with Article 36, paragraph 4 of the Statute, Thailand "at least purported to accept, and clearly intended to accept" such jurisdiction. The "sole pertinent question in this case," therefore, was whether by the declaration of 1950 Thailand effectually carried out this intention.

The relevancy of the Israel v. Bulgaria decision derived from its clear negativing of any connection between Article 36, paragraph 5, and Thailand's declaration of 20 May 1950, with the result that the declaration must be deemed to have been made under Article 36, paragraphs 2-4, and to constitute an independent acceptance of the Court's jurisdiction by means of the normal procedure there set forth. The invocation of the decision by Thailand as the basis of the argument that its 1940 renewal of its declaration of 1929 was continued by the declaration of 1950, which latter, accordingly, could relate only to the compulsory jurisdiction of the "old" Court, was found not to be well taken. The principal juridical relevance of such an error as Thailand may have committed in preparing its declaration of 1950 would derive from the fact that the error might affect the reality of the consent supposed to have been given. The Court was unable to see in Thailand's case any factor which could, ex post and retroactively, impair the reality of the consent that Thailand admitted and affirmed to have been fully intended in 1950, namely consent to the compulsory jurisdiction of the present Court. Thailand could hardly, under any conceivable supposition, have intended to consent in 1950 to the jurisdiction of the "old" Court which Thailand knew to have ceased to exist in 1946.

The crux of the matter lay in the question whether the declaration of 1950, though in form a renewal, could accomplish a de novo acceptance of jurisdiction. The "sheer impossibility," said the Court, "that, in 1950, any acceptance could either have been intended, or could in fact

10 Id. at 29.
20 Ibid.
21 Textually set forth at note 8 supra.
have operated, as an acceptance relative to the Permanent Court is a factor to be borne in mind in considering the effect of the 1950 Declaration.\(^{22}\) The Court then noted that in the field of domestic private law, for example the law of wills, formalities are prescribed as essential to the validity of certain transactions. Legal requirement of stated form is the essence of the matter. "Where, on the other hand, as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it."\(^{23}\) In the present case the only required formality for accepting the Court's compulsory jurisdiction is the deposit of a declaration with the Secretary-General.\(^{24}\) This formality was accomplished by Thailand.

Applying the ordinary canons of interpretation\(^{25}\) to Thailand's declaration of 1950, the Court was further confirmed in its finding of the validity thereof as an acceptance of its own compulsory jurisdiction. The Court continued:

To sum up, when a country has evinced as clearly as Thailand did in 1950, and indeed by its consistent attitude over many years, an intention to submit itself to the compulsory jurisdiction of what constituted at the time the principal international tribunal, the Court could not accept the plea that this intention had been defeated and nullified by some defect not involving any flaw in the consent given, unless it could be shown that this defect was so fundamental that it vitiated the instrument by failing to conform to some mandatory legal requirement. The Court does not consider that this was the case and it is the duty of the Court not to allow the clear purpose of a party to be defeated by reason of possible defects which, in the general context, in no way affected the substance of the matter, and did not cause the instrument to run counter to any mandatory requirement of law.

The Court therefore considers that the reference in the Declaration of 1950 to paragraph 4 of Article 36 of the Statute gave the Declaration . . . the character of an acceptance under paragraph 2 of that Article. Such an acceptance could only have been an acceptance in relation to the present Court.


\(^{23}\) Ibid.

\(^{24}\) Art. 36, paragraph 4. Note also paragraph 2.

The remainder of the Declaration must be construed in the light of that cardinal fact, and in the general context of the Declaration; and the reference to the 1929 and 1940 Declarations must, as was clearly intended, be regarded simply as being a convenient method of indicating without stating them in terms, what were the conditions upon which the acceptance was made.26

Thus the Court rejected the preliminary objection of Thailand and found that it had jurisdiction to adjudicate the dispute submitted to it on 6 October 1959 by the application of Cambodia.

The finding of the Court was unanimous. Vice-President Alfaro and Judge Wellington Koo appended declarations to the effect that their concurrence must not be construed as concurrence in the judgment of the Court in *Israel v. Bulgaria*. Judge Sir Gerald Fitzmaurice and Judge Tanaka made a joint declaration in which they included the following:

Since... the objection [of Thailand] necessarily presupposes the correctness of the conclusion reached in the *Israel v. Bulgaria* case, the view that this conclusion was in fact incorrect would, for any one holding that view, furnish a further reason for rejecting the objection, and a much more immediate one than any of those contained in the present Judgment.

This is precisely our position since, to our regret, we are unable to agree with the conclusion which the Court reached in the *Israel v. Bulgaria* case as to the effect of Article 36, paragraph 5, of the Statute. We need not give our reasons for this, for they are substantially the same as those set out in the Joint Dissenting Opinion of Judges Sir Hersch Lauterpacht and Sir Percy Spender, and of Judge Wellington Koo. ...27

Judge Sir Percy Spender and Judge Morelli appended separate opinions.

Judge Spender, who had joined in a dissenting opinion in *Israel v. Bulgaria*, found the task of asserting jurisdiction in the present case a simple one. He did not think there was any doubt that Thailand's belief as of 20 May 1950 was as stated by it. That belief "accorded with the view commonly held at that time as to the meaning and effect of Article 36, paragraph 5."28 The terms of Thailand's letter of that date to the Secretary-General were not reasonably consistent with any other conclusion. There were no requirements of form for the recognition of the Court's jurisdiction. The letter should be so interpreted as to

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27 *Id.* at 37. The joint declaration also discussed briefly Thailand's second preliminary objection, in the course of which, *Id* at 38, reference was made to the view expressed by Sir Hersch Lauterpacht in the case of South West Africa Voting Procedure, [1955] I.C.J. Rep. at 90-93.
28 *Id.* at 39.
harmonize with, not to thwart, the purpose Thailand had at that time. The words of the letter were intended to indicate that the declaration accepting the jurisdiction of the "old" Court had been transformed, upon Thailand's becoming in 1946 a party to the new Statute, into acceptance of the jurisdiction of the "new" Court by virtue of the operation of Article 36, paragraph 5, of the new Statute. The 1950 declaration was drafted, indeed, after Thailand had received a letter from the Registrar of the Court, calling attention to its declaration of 1940, "considered as being still in force (Article 36, paragraph 5, of the Statute of the present Court)," by which declaration Thailand "recognized as compulsory the jurisdiction of the [present] Court in the circumstances provided for in Article 36..." The Registrar added that the acceptance of 1940, which was valid for a period of ten years, would expire on 2 May 1950.

Adhering as he did to the dissenting opinion referred to, Judge Spender had no difficulty in finding that Thailand's letter of 20 May 1950 was a valid declaration of acceptance under Article 36, paragraph 2, of the present Statute. The use of the word renew was only natural under the circumstances.

Judge Morelli considered that it would have been preferable for the Court to concentrate upon what he believed to be the essential point in the contention of Thailand as presented in the preliminary objections, namely, that the 1950 declaration, purporting to renew for a further period of ten years Thailand's declaration of 1929, was "wholly ineffective" because the declaration of 1929, renewed by that of 1940, had lapsed on the dissolution of the "old" Court, 19 April 1946; accordingly the 1950 declaration had done nothing but attempt to renew what could not be renewed because non-existent, and so was devoid of legal effect. He devoted a meticulous analysis of Thailand's statement of its case to an exposure of the incorrectness of this contention deduced from the Court's Israel v. Bulgaria holding (1959).

Calling attention to a "quite different" contention advanced by Thailand in the oral proceedings, namely that the 1950 declaration purported to maintain in force the 1929-1940 obligation to submit to the "old" Court's jurisdiction in order to achieve through Article 36, paragraph 5, acceptance of the jurisdiction of the "new" Court, Judge Morelli pronounced this latter contention "ictu oculi unfounded." He listed as reasons: (a) the reference in the 1950 declaration to Article 36,

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20 Id. at 41.
29 Id. at 44.
paragraph 4, of the new statute proves that that declaration is made on the basis of Article 36, paragraph 2, of the new Statute; (b) the absurdity of the idea of seeking by indirection what could so simply have been achieved by an application based on Article 36, paragraph 2; (c) the impossibility of the proposition, since Article 36, paragraph 5, refers to earlier declarations and does not contemplate a declaration made subsequent to the date of the present statute.

Referring to Thailand's statement above mentioned, Judge Morelli asserted that acceptance of the Court's 1959 interpretation of Article 36, paragraph 5, entailed denial that the clause was operative with respect to the Thailand 1950 declaration; in this respect the position of Thailand must be considered analogous to that of Bulgaria. So far as concerns Cambodia v. Thailand, and generally in case of a declaration renewing an earlier declaration, the relationship between the two declarations must be determined. The new declaration, just because it is a new one, is independent, even though its content is determined by reference to the earlier. Such reference need not bring about identity of content. The very idea of renewal implies some difference in the matter of time factors. Thus,

the moment from which the new declaration begins to produce its effects does not need to coincide with the moment when the effects of the earlier declaration cease. On the contrary, it is quite possible for a declaration which states the intention to "renew" an earlier declaration to date the beginning of its effects from a moment subsequent to that at which the effects of the renewed declaration terminated; the consequence of this is to break the continuity of the periods covered by the two declarations. In the same way, the effects of the new declaration may begin before the moment stated in the earlier declaration as the moment at which its effects are to terminate; in other words, the new declaration may replace the declaration that it is renewing for a portion of the latter's duration.

This is the situation in the present case. The declaration of 3 May 1940, renewing the declaration of 20 September 1929 for a ten-year period as from 7 May 1940, expired on 6 May 1950. Yet the declaration of 20 May 1950 renewed the declaration of 1929 for a further period of ten years as from 3 May 1950.\(^1\)

A renewal, rightly so termed, may, moreover, depart from the renewed instrument in other ways: for instance, that of 1950 relates to the jurisdiction of the present Court, that of 1929 to the "old" Court. It is possible to renew a declaration which, because void, has never produced

\(^{1}\) *Id.* at 47.
any effects, as well as one which is no longer in force at the time of renewal.

Prior to the time when Thailand’s 1950 declaration became ineffective, the previous declarations had come to an end; this would have been true even if Article 36, paragraph 5, had been operative with respect to it. The fact was well known to Thailand that when the 1950 declaration became effective that the declaration desired to be renewed had ceased to be in force.

Accordingly Thailand’s argument based on the impossibility of renewing the declarations accepting the jurisdiction of the “old” Court by means of the declaration of 1950 is without foundation. By that declaration Thailand accepted the jurisdiction of the International Court of Justice, the “new court,” but on conditions determinable by reference to the “old” Court declarations.

HONDURAS v. NICARAGUA

Though both parties accepted the jurisdiction of the World Court pursuant to Article 36, paragraph 2, of the Court’s Statute, plaintiff, in instituting the present case, relied on the Washington Agreement of 21 July 1957 between the parties with regard to the procedure to be followed in submitting the dispute to the Court. The following submission in plaintiff’s Application, quoted in the Court’s judgment, indicates the nature of the controversy:

May it please the Court:

* * *

To adjudge and declare, whether the Government of Nicaragua appears or not, after considering the contentions of the Parties:

1. that failure of the Government of Nicaragua to give effect to the arbitral award made on 23 December 1906 by His Majesty the King of Spain constitutes a breach of an international obligation within the meaning of

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[1] [1960] I.C.J. Rep. 192. The date of the arbitral award was 23 Dec. 1906; that of the Court’s judgment, 1 Nov. 1960. The Court was composed of President Klaestad, Vice-President Zafrulla Khan, Judges Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Moreno Quintana, Córdova, Wellington Koo, Spiropoulos, Sir Percy Spender, and Alfaro, Judges ad hoc Ago and Urrutia Holguín. Of counsel for Nicaragua in this case was M. Gaetano Morelli, who, subsequently elected to the Court, delivered the separate (concurring) opinion in Cambodia v. Thailand, digested just above.

