The League of Nations to the Permanent Court of International Justice.

In execution of the resolution of the Council of the League of Nations adopted on October 4th, 1922, of which a certified copy is annexed hereto, [1]) and by virtue of the authorisation given by this resolution,

The Secretary-General of the League of Nations has the honour to present to the Permanent Court of International Justice the request of the Council that the Court will, in accordance with Article 14 of the Covenant of the League, give an advisory opinion on the question referred to it by paragraph (*a*) of the resolution above mentioned, and will give effect, as far as is possible and convenient, to the request of paragraph (*b*) of the resolution relating to the date and procedure of the hearing of the question.

The Secretary-General has also the honour to enclose herewith, but merely for the information of the Court pending the submission of statements by the two Governments concerned, a copy of the memorandum [2]) by which the present matter was originally submitted to the Council.

(*Signed*) ERIC DRUMMOND,
Secretary-General.

Geneva, November 6th, 1922.

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1) See pages 7, 8 et 9.
2) Not reproduced.

PERMANENT COURT OF INTERNATIONAL JUSTICE.

1923.
February 7th.
File F. c.V.
Docket II. 1

SECOND (EXTRAORDINARY) SESSION.

Present:

MM. LODER, *President*,
WEISS, *Vice-President*,
Lord FINLAY,
MM. NYHOLM,
MOORE,
ANZILOTTI,
HUBER, } *Judges*,
MM. BEICHMANN,
NEGULESCO, } *Deputy Judges*.

ADVISORY OPINION No. 4.

I.

On October 4th, 1922, the Council of the League of Nations adopted the following resolution (*Official Journal* of the League of Nations, 3rd year, No. 11 (Part 2), page 1206; French Counter-Case, pages 48 and 49):

(*English text*)

"The Council has examined the proposals made by Lord Balfour and M. Léon Bourgeois on the subject of the following question, placed on its agenda of August 11th at the request of the Government of His Britannic Majesty:

"'Dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8th, 1921, and their application to British subjects, the French Government having refused to submit the legal questions involved to arbitration.'

"The Council, noting that friendly conversations have taken place between the representatives of the two Governments and that they have agreed on the proposals to be made to the Council ;

"Expresses its entire adhesion to the principles contained in these proposals, and has adopted the following resolution :

"(*a*) The Council decides to refer to the Permanent Court of International Justice, for its opinion, the question whether the dispute referred to above is or is not by international law solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant) ;

"(*b*) And it requests the two Governments to bring this matter before the Permanent Court of International Justice, and to arrange with the Court with regard to the date on which the question can be heard and with regard to the procedure to be followed ;

"(*c*) Furthermore, the Council takes note that the two Governments have agreed that, if the opinion of the Court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the Governments.

"(*d*) The Secretary-General of the League will communicate paragraphs (*a*) and (*b*) to the Court."

(*French text*)

"Le Conseil a examiné les propositions faites par Lord Balfour et M. Léon Bourgeois au sujet de la question suivante, portée à son ordre du jour du 11 *août, sur la demande du Gouvernement de Sa Majesté britannique :*

"Différend entre la France et la Grande-Bretagne au sujet des décrets de nationalité, promulgués à Tunis et au Maroc (zone française) le 8 *novembre* 1921, *et de leur application aux ressortissants britanniques, le Gouvernement français ayant refusé de soumettre à l'arbitrage la question juridique."*

"Le Conseil, prenant acte que des conversations amicales ont eu lieu entre les représentants des deux Gouvernements et que ceux-ci sont tombés d'accord sur les propositions à faire au Conseil,

"Exprime son entière adhésion aux principes contenus dans ces propositions et a adopté la résolution suivante :

"(a) *Le Conseil décide de soumettre à la Cour permanente de Justice internationale, pour avis, la question de savoir si le différend ci-dessus est ou n'est pas, d'après le droit international, une affaire exclusivement d'ordre intérieur* (*article* 15, *paragraphe* 8, *du Pacte*) ;

"(b) *Et il prie les deux Gouvernements de porter cette question devant la Cour permanente de Justice internationale et de s'entendre avec elle en ce qui concerne la date à fixer pour son examen et la procédure à suivre.*

"(c) *En outre, le Conseil prend acte que les deux Gouvernements sont d'accord pour que, si l'avis de la Cour sur la question ci-dessus est qu'il ne s'agit pas d'une affaire d'ordre intérieur, l'ensemble de l'affaire soit soumis soit à l'arbitrage, soit à un règlement juridique dans les conditions que les Gouvernements détermineront d'accord.*

"(d) *Le Secrétaire général de la Société est chargé de communiquer à la Cour les alinéas* (a) *et* (b)."

By virtue of the powers conferred upon him in this resolution, the Secretary-General of the League of Nations transmitted to the Court the request of the Council by a letter dated Geneva, November 6th, 1922. To this letter was attached a certified true copy of the resolution, and a memorandum setting forth the circumstances under which the question had been submitted to the Council.

In conformity with Article 73 of the Rules of Court, notice of the request was given to the Members of the League of Nations through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

In compliance with the terms of sub-section (*b*) of the resolution, the President of the Court communicated with the British and French Governments. It was agreed that an extraordinary session of the Court should be held commencing on January 8th, 1923, and that the British and French Governments should deposit their Cases and Counter-Cases with the Court and transmit them direct to each other not later than November 25th and December 23rd respectively, and that there should be an oral exposition of the question before the Court by not more than two representatives of each of these Governments.

Accordingly, the Governments concerned placed the following documents at the disposal of the Court:

1. Case presented on behalf of the Government of His Britannic Majesty to the Permanent Court of International Justice. November 25th, 1922.

2. *Mémoire présenté au nom du Gouvernement de la République française* (24 *novembre* 1922).

3. Counter-Case presented on behalf of the Government of His Britannic Majesty to the Permanent Court of International Justice. December 23rd, 1922.

4. *Contre-mémoire présenté au nom du Gouvernement de la République française* (23 *décembre* 1922).

5. Supplementary Documents (submitted by the British Government on January 6th, 1923).

6. Two series of documents quoted by the Assistant Agent of the French Government during the oral proceedings and transmitted to the Court by letters dated The Hague, January 16th, and Paris, January 24th, 1923, respectively.

A private sitting of the Court took place on January 8th, 1923. Subsequently, public sittings were held at the Peace Palace on January 9th, 10th, 11th, 12th and 13th.

In the course of these sittings, oral statements were made to the Court by the following :

(1) The Right Hon. Sir DOUGLAS HOGG, K.C., M.P., His Britannic Majesty's Attorney-General, on behalf of the British Government ;

(2) M. A. DE LAPRADELLE, Professor of International Law at the University of Paris, on behalf of the French Government ;

(3) The Right Hon. Sir ERNEST POLLOCK, Bart., K.B.E., K.C., M.P., on behalf of the British Government ;

(4) M. D. MÉRILLON, Procureur général près la Cour de Cassation, on behalf of the French Government.

At the termination of the oral proceedings, the representatives of the two Governments, on January 13th, 1923, deposited with the Court their respective final conclusions, which are as follows :

7. *Conclusions finales du Gouvernement français.*

« *Considérant que la question soumise à la Cour pour avis, est, dans sa formule générale, celle de savoir si le différend soulevé par la Grande-Bretagne en ce qui concerne les décrets de nationalité en Tunisie et au Maroc* est ou n'est pas, d'après le droit international, une affaire exclusivement d'ordre intérieur ;

« *Attendu que le Gouvernement anglais après avoir demandé lui-même une décision sur le fond, soutient aujourd'hui que le différend est d'ordre international parce que la solution de la question de fond est subordonnée à l'examen de questions internationales, et qu'il suffit à la Cour de constater cet état matérial du débat, pour répondre négativement à la question posée ;*

« *Mais attendu que réduite à ces termes la question ne présent aucun caractère contentieux, et qu'il était tout à fait superflu de consulter la Cour sur un point constant, que personne ne conteste, en lui demandant un avis qui ne pourrait être que négatif s'il était limité comme le demande le Gouvernement anglais ;*

« *Attendu que la question posée, avec cette alternative « est ou n'est pas », comporte au contraire un examen complet de la question, une réponse affirmative ne pouvant résulter que d'avis formulés sur le fond du débat ;*

« *Considérant en effet que le Gouvernement français ne conclut à l'incompétence de la Société des Nations par une réponse affirmative à la question posée qu'en fondant cette incompétence sur le rejet des exceptions de droit international que le Gouvernement britannique oppose au principe de souveraineté territoriale en matière de nationalité dont il reconnaît lui-même en règle générale le bien-fondé ;*

« *Qu'il est impossible par suite, de comprendre comment la Société des Nations aurait pu demander un avis ou négatif ou affirmatif à la Cour sans lui laisser la faculté de répondre librement dans l'autre alternative ;*

« *Considérant, en conséquence, que la Cour a non seulement la faculté mais encore le devoir, alors surtout qu'il s'agit uniquement d'un avis, d'examiner les questions soumises par les parties dans tout leur développement et de fournir pour le débat définitif toutes les raisons de décider ;*

« *Considérant, le débat ainsi posé, qu'il convient d'abord de relever que la question de souveraineté d'une nation pour légiférer en matière de nationalité sur son territoire domine la situation et n'est d'ailleurs pas contestée, et que l'application de ce principe au différend soulevé par le Gouvernement anglais ne peut être contredite ou suspendue que par une règle formelle de droit international applicable aux faits de la cause ou par une stipulation des traités ou conventions internationaux existant entre les parties ;*

« *Attendu, à ce second point de vue, que, pour la Tunisie il n'existe plus, en l'état actuel des rapports internationaux et quelles que puissent être les éventualités de l'avenir, aucun traité entre la Grande-Bretagne et le Gouver-*

nement tunisien donnant à la Grande-Bretagne aucun droit vis-à-vis de la Tunisie en dehors de la France et de son protectorat sur la Tunisie ;

« *Que les seuls traités dont puisse se prévaloir le Gouvernement anglais sont ceux existant entre la France et la Grande-Bretagne et qu'à cet égard le seul droit réservé à la Grande-Bretagne est celui d'être traitée en Tunisie comme elle le serait en France ;*

« *Considérant que si, au Maroc, la même législation n'est pas encore en vigueur, les droits de la France y résultent suffisamment, comme pour la Tunisie, du régime de protectorat reconnu par toutes les Nations ;*

« *Qu'en conséquence la solution véritable de la question dépend de la fixation, par l'autorité judiciaire compétente qui est dans le grand débat actuel la Cour de Justice internationale, de la nature et de l'étendue en droit international, du régime de protectorat établi par une Nation d'ordre supérieur sur un Etat non encore développé mais pourtant souverain et aspirant au développement sur son territoire des institutions qui sont l'œuvre de la civilisation et du progrès social ;*

« *Considérant qu'il importe au premier chef, dans l'intérêt de toutes les Nations qui possèdent ou posséderont un protectorat ou même un des nouveaux mandats de la Société des Nations, très voisins du protectorat, qu'il soit enfin établi par l'avis autorisé de la Cour de Justice, sinon un statut complet, du moins une règle générale de principe applicable aux divers protectorats qui peuvent d'ailleurs présenter des modalités de détails différentes ;*

« *Attendu que cette règle générale doit s'inspirer avant tout du but élevé du protectorat lequel ne comporte nullement, dans la pensée du protecteur une annexion déguisée, mais principalement une œuvre de civilisation augmentant dans le mouvement économique et social du monde les ressources générales de l'ensemble des nations, avantage auquel toutes sont également intéressées ;*

« *Que pour obtenir ce résultat il apparaît comme nécessaire que l'assentiment des nations soit acquis, par la reconnaissance seule du protectorat, à toutes les mesures réalisant dans une féconde unité la communauté de législation entre les deux pays protecteur et protégé, et l'assimilation progressive du protégé aux mœurs et aux lois du pays protecteur* ;

« *Que cette conséquence est virtuellement comprise dans la formule de reconnaissance employée par tous les Etats, formule énergique et claire portant « que les traités et conventions de toute nature en vigueur entre la France et l'Etat adhérent sont étendus à la Tunisie, et que l'Etat adhérent s'abstiendra de réclamer, pour ses Consuls, ses ressortissants et ses établissements en Tunisie, d'autres droits et privilèges que ceux qui leur sont acquis en France* » ;

« *Qu'en ce qui concerne le Maroc, l'article premier du Traité de protectorat porte que le Gouvernement de la République française et Sa Majesté le Sultan sont d'accord pour instituer au Maroc un nouveau régime comportant les réformes administratives, judiciaires, scolaires, économiques, financières et militaires, que le Gouvernement français* jugera utile d'introduire *sur le territoire marocain* ;

« *Que cette formule d'une généralité absolue comprenant toutes les branches de l'activité humaine et tous les actes de la vie nationale, fait du Maroc (zone française) un territoire étroitement assimilé au territoire français, dans la seule limite voulue par la France, et qu'en l'approuvant par une adhésion formelle, les autres Etats s'engagent nécessairement à subir la législation arrêtée d'accord entre le protecteur et le protégé* ;

« *Qu'en tous cas, le droit de légiférer sur la nationalité d'étrangers installés sur son sol est un droit souverain auquel il ne peut être renoncé sans une déclaration formelle, et que rien dans les arrangements anglo-marocains, qui visent uniquement les intérêts économiques ou les droits*

de juridiction ne permet de penser que le Maroc a entendu par simple voie de conséquence renoncer à son droit souverain de maître du territoire ;

« *Considérant enfin que la clause du traité franco-italien qui confère aux Italiens le droit de conserver à perpétuité leur nationalité, traité qui reconnaît ainsi formellement le droit pour la France de légiférer et de traiter en Tunisie sur la nationalité des étrangers fixés sur le territoire tunisien, ne saurait être revendiquée par le Gouvernement anglais pour ses sujets, parce qu'elle constitue une Convention synallagmatique dans l'intérêt des deux parties intéressées et nullement un avantage pour l'une d'elles, mais que cette revendication apparaît au contraire comme la reconnaissance du droit de la France de légiférer sur le territoire tunisien d'accord avec le Gouvernement ;*

« *Par ces motifs, desquels il résulte qu'aucune raison de droit international ne saurait s'opposer au principe primordial de la souveraineté territoriale en matière de nationalité.*

« *Il plaira à la Cour*

« *Emettre l'avis*

« *Que la réponse à la question posée par le Conseil de la Société des Nations doit être résolue par l'affirmative.*"

8. *Final conclusions submitted by the British Government.*

"Considering that the question submitted to the Court is that contained in the resolution adopted by the Council on the 4th October, 1922 ; and

"Whereas it appears from paragraphs (*a*) and (*c*) of the said resolution that the whole dispute is not now submitted to settlement by the Court, but only the preliminary question whether the dispute is by international law solely a matter of the domestic jurisdiction of France ; and

"Whereas it appears from the Cases and Counter-Cases submitted by the two Governments and from the arguments addressed to the Court that each Government relies partly on questions of the existence or abrogation of treaties and of the construction of the terms of such treaties; and

"Whereas questions of treaty obligation are by international law necessarily outside the exclusive domestic jurisdiction of any one State,

"Therefore the Court will be pleased to say

"That the answer to the question put by the Council is in the Negative."

II.

The question stated in sub-section (*a*) of the above-mentioned Council resolution was submitted to the Court under the following circumstances:

On November 8th, 1921, a Decree was promulgated by the Bey in Tunis, the first article of which enacts as follows:

> "*Est Tunisien, à l'exception des citoyens, sujets ou ressortissants de la Puissance protectrice autres que nos sujets, tout individu né sur le territoire de Notre Royaume de parents dont l'un y est né lui-même, sous réserve des dispositions des conventions ou traités liant le Gouvernement tunisien.*"

On the same day, the President of the French Republic issued a Decree of which the first Article was as follows:

> "*Est Français tout individu né dans la Régence de Tunis de parents dont l'un, justiciable au titre étranger des tribunaux français du Protectorat, est lui-même né dans la Régence, pourvu que sa filiation soit établie en conformité des prescriptions de la loi nationale de l'ascendant ou de la loi française avant l'âge de 21 ans.*

"Si ce parent n'est pas celui qui, en vertu des règles posées par la législation francaise, donne à l'enfant sa nationalité, celui-ci peut, entre sa vingt-et-unième et sa vingt-deuxième année, déclarer qu'il renonce à la qualité de Français.

"Cette déclaration sera reçue dans les formes et sous les conditions déterminées par les articles 9 et suivants du décret du 3 octobre 1910."

Both Decrees were published in the Tunisian *Journal officiel* on the same day, the decrees of the Bey preceding the French decree.

Similar legislation was introduced at the same time in Morocco (French zone). A dahir issued by His Shereefian Majesty, dated November 8th, 1921, containing only one Article, by it provides as follows:

"Est Marocain, à l'exception des citoyens, sujets ou ressortissants de la Puissance protectrice autres que nos sujets, tout individu né dans la zone française de notre Empire, de parents étrangers dont l'un y est lui-même né."

On the same date, the President of the French Republic promulgated a decree of which Article 1 is thus expressed:

"Est Francais tout individu né dans la zone française de l'Empire chérifien de parents dont l'un, justiciable au titre étranger des tribunaux français du Protectorat, est lui-même né dans cette zone, pourvu que sa filiation soit établie en conformité des prescriptions de la loi nationale de l'ascendant ou de la loi française, avant l'âge de vingt et un ans.

"Si ce parent n'est pas celui qui, en vertu des règles posées par la législation française, donne à l'enfant sa nationalité, celui-ci peut, entre sa vingt-et-unième et sa vingt-deuxième année, déclarer qu'il renonce à la qualité de Français.

"Cette déclaration sera reçue dans les formes et sous les conditions déterminées aux articles 8 et suivants du décret du 29 avril 1920."

The dahir was published on December 6th, 1921, in the *Bulletin officiel* of the French zone of Morocco, and a copy of the Presidential Decree was attached to it.

The British Government's attention was drawn to the above-mentioned decrees by its agents at Tunis and Tangiers. Lord Hardinge, His Britannic Majesty's Ambassador in Paris, addressed two Notes, dated January 3rd and 10th, 1922, to M. Poincaré, President of the Council of Ministers and Foreign Minister of France. (British Case, Appendix 21 (5) and (6).) The first of these notes protests against the application to British subjects of the decrees promulgated in Tunis, whilst the second declared that the British Government was unable in any way to recognise that the decrees put into force in Morocco (French zone) were applicable to persons entitled to British nationality.

As it was not found possible to adjust the divergence in the views of the two Governments by means of the correspondence which took place between them, the British Ambassador at Paris suggested, in a further Note dated February 6th, 1922, to M. Poincaré that the dispute should be referred to the Permanent Court of International Justice, and, in his Note of February 28th (British Case, Appendix No. 21 (8) and (10)), Lord Hardinge added :

> "His Majesty's Government are confident that the intended application of these decrees to British subjects will be withdrawn and instructions given to the French representatives to this effect. Unless the French Government are willing to take this action, His Majesty's Government can only reiterate their demand that the question should be referred to arbitration."

In his reply dated March 22nd (British Case, Appendix No. 21 (11)), M. Poincaré states, with regard to the decrees relating to Tunis, that he is unable to adopt the views of the British Government. He calls special attention to the point that the Arbitration Convention of October 14th, 1903, was not applicable, because the interests of a third Power, Tunis, were affected, and because questions of nationality were too intimately connected with the actual constitution of a State to

make it possible to consider them as questions of an "exclusively juridical" character.

Similarly, with regard to the Decrees relating to Morocco, M. Poincaré, in a letter dated April 7th, 1922 (British Case, Appendix 21 (12)) states that the French Government has, conjointly with the Sultan, the sovereign right to legislate upon the nationality of descendants of foreigners, in virtue of their birth within the territory, directly the foreign Powers which claimed them have, by accepting the Protectorate, renounced all right to the continuance of their *privilèges juridictionnels* and affirms that no application of this sovereign right could be submitted to arbitration.

The British Government, after reiterating its desire for settlement by arbitration (Memorandum of July 14th, 1922; British Case, Appendix 21 (15)) stated that, in the event of a refusal on the part of the French Government, "it would have no alternative but to place the whole question before the Council of the League of Nations in accordance with the terms of the Covenant of the League." Sir M. Cheetham, British Chargé d'affaires at Paris, in a Note to M. Poincaré, dated August 3rd, 1922 (British Case, Appendix No. 21 (22)), expresses himself as follows:

> "I am to add that unless an early and favourable reply is received to the renewed request for arbitration contained in the memorandum handed by me to Your Excellency's Department on 15th July, His Majesty's Government will have no option but to place the question on the agenda of the Meeting of the Council of the League of Nations fixed for 30th August."

M. Poincaré, in a letter to Sir M. Cheetham, dated August 5th, 1922 (British Case, Appendix No. 21 (23)), observes in reply that, if the question in dispute was not one which could be submitted to the Court of International Justice, neither did it appear better suited for submission to the Council of the League of Nations, for it did not fall within the list

of disputes mentioned in Articles 13 and 15 of the Covenant.

Whereupon, Sir M. Cheetham, in a Note dated August 14th, 1922 (British Case, Appendix 21 (24)), informs M. Poincaré that :

> "His Majesty's Government have now no alternative but to submit the dispute which has arisen to the Council of the League of Nations ; and that they are accordingly taking steps with a view to this question being placed upon the agenda for the Council of the League at its forthcoming meeting."

M. Poincaré, in a memorandum dated August 16th, 1922 (British Case, Appendix 21 (29)), once more defines the views of the French Government in the following terms :

> *"D'une sérieuse importance pour l'accomplissement de la mission de l'Etat protecteur, une telle question ne saurait être considérée comme susceptible d'affecter au même degré les intérêts d'une Puissance tierce. Dans les cas de double nationalité d'origine si fréquents dans le droit international, c'est une règle généralement reçue de ne pas exercer la protection diplomatique en cas de contre-réclamation du Souverain territorial. Ainsi, la question de l'application aux Anglo-Maltais de la législation du 8 novembre se présente comme une de celles que le droit international laisse à la compétence exclusive de l'autorité territoriale.*
>
> *"En raison des dispositions très limitées et d'ailleurs facultatives des articles 13 et 14 du Pacte de la Société des Nations, cette question ne saurait de droit relever de la Cour de Justice internationale. Elle ne saurait pas davantage, en présence de la réserve de l'alinéa 8 de l'article 15 du même Pacte, appartenir à l'examen du Conseil de la Société des Nations."*

It was under these circumstances that the dispute was laid before the Council. Great Britain took her stand upon

paragraph 1 of Article 15 of the Covenant, whilst France informed the British Government of her intention to rely upon the provisions of paragraph 8 of the same Article before the Council.

Conversations ensued between the parties and with the Council. They resulted by agreement between the Governments concerned in the resolution of October 4th, 1922, which is reproduced at the commencement of this opinion.

An examination of the terms and scope of this resolution is now necessary.

III.

The question before the Court for advisory opinion is as follows :

> "*Whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco* (*French zone*) *on November 8th*, 1921, *and their application to British subjects, is or is not, by international law, solely a matter of domestic jurisdiction* (*Article* 15, *paragraph* 8, *of the Covenant*)."

An examination of the English and French texts of subsection (*a*) of the resolution shows that they differ slightly in wording as between themselves and also from the French and English texts of paragraph 8 of Article 15 of the Covenant, which, moreover, do not exactly correspond.

The French text of the Resolution speaks of a matter "*exclusivement d'ordre intérieur*", whereas the English text reads : "solely a matter of domestic jurisdiction" and thus very closely resembles that used in the Covenant : "a matter which . . . . is solely within the domestic jurisdiction". Finally, the French text of the Covenant is worded as

follows: *"une question que le droit international laisse à la compétence exclusive . . ."*

The Court is of opinion that the expression "solely within the domestic jurisdiction", *"d'ordre intérieur"* and *"à la compétence exclusive"* must in the present case be regarded as having the same meaning.

It should next be observed that the resolution also differs from the text of the Covenant, in that the latter speaks of "a matter which by international law is solely within the domestic jurisdiction" — *"question que le droit international laisse à la compétence exclusive"* — whereas the resolution asks whether the "dispute" between the two Powers is a matter of "domestic jurisdiction" — *"d'ordre intérieur"*. The Court is, however, of opinion that these differences are of no juridical importance.

In effect, the question before the Court is whether the dispute mentioned in the Council's resolution relates to a matter which, by international law, is solely within the domestic jurisdiction of France.

IV.

Under the terms of sub-section (*a*) of the Council's resolution, the Court, in replying to the question stated above, has to give an opinion upon the nature and not upon the merits of the dispute, which, under the terms of sub-section (*c*) may, in certain circumstances, form the subject of a subsequent decision.

The Court therefore wishes to emphasise that no statement or argument comprised in the present opinion can be interpreted as indicating a preference on the part of the Court in favour of any particular solution, as regards the whole or any individual point of the actual dispute.

The analysis of the diplomatic correspondence given under Part II above, and the fact that the Council's resolution in

its sub-section (*a*) refers in parenthesis to paragraph 8 of Article 15 of the Covenant, lead to the conclusion that the question submitted to the Court must be read and answered in the light of the provisions of that paragraph.

The paragraph to which sub-section (*a*) of the Council's resolution expressly refers is as follows :

(*English text*).

> "If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement."

(*French text*).

> « *Si l'une des parties prétend et si le Conseil reconnaît que le différend porte sur une question que le droit international laisse à la compétence exclusive de cette partie, le Conseil le constatera dans un rapport, mais sans recommander aucune solution.*"

Special attention must be called to the word "*exclusive*" in the French text, to which the word "solely" (within the domestic jurisdiction) corresponds in the English text. The question to be considered is not whether one of the parties to the dispute is or is not competent in law to take or to refrain from taking a particular action, but whether the jurisdiction claimed belongs *solely* to that party.

From one point of view, it might well be said that the jurisdiction of a State is *exclusive* within the limits fixed by international law — using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law. But a careful scrutiny of paragraph 8 of Article 15 shows that it is not in this sense that exclusive jurisdiction is referred to in that paragraph.

The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State,

are not, in principle, regulated by international law. As regards such matters, each State is sole judge.

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph. To hold that a State has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such measures.

This interpretation follows from the actual terms of paragraph 8 of Article 15 of the Covenant, and, in the opinion of the Court, it is also in harmony with that Article taken as a whole.

Article 15, in effect, establishes the fundamental principle that any "dispute likely to lead to a rupture" which is not submitted to arbitration in accordance with Article 13 shall be laid before the Council. The reservations generally made in arbitration treaties are not to be found in this Article.

Having regard to this very wide competence possessed by the League of Nations, the Covenant contains an express reservation protecting the independence of States ; this reservation is to be found in paragraph 8 of Article 15. Without this reservation, the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations. Under the terms of paragraph 8, the League's interest in being able to make such recommendations as are deemed just and proper in the circumstances with a view to the maintenance of peace must, at a given point, give way to the equally essential interest of the individual State to maintain intact its independence in matters which international law recognises to be solely within its jurisdiction.

It must not, however, be forgotten that the provision contained in paragraph 8, in accordance with which the Council, in certain circumstances, is to confine itself to reporting that a question is, by international law, solely within the domestic jurisdiction of one Party, is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation.

This consideration assumes especial importance in the case of a matter which, by international law, is, in principle, solely within the domestic jurisdiction of one Party, but in regard to which the other Party invokes international engagements which, in the opinion of that Party, are of a nature to preclude in the particular case such exclusive jurisdiction. A difference of opinion exists between France and Great Britain as to how far it is necessary to proceed with an examination of these international engagements in order to reply to the question put to the Court.

It is certain — and this has been recognised by the Council in the case of the Aaland Islands — that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15.

It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds (*titres*) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (*titres*), the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law.

If, in order to reply to a question regarding exclusive jurisdiction, raised under paragraph 8, it were necessary to give an opinion upon the merits of the legal grounds (*titres*) invoked by the Parties in this respect, this would hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes.

For the foregoing reasons, the Court holds, contrary to the final conclusions of the French Government, that it is only called upon to consider the arguments and legal grounds (*titres*) advanced by the interested Governments in so far as is necessary in order to form an opinion upon the nature of the dispute. While it is obvious that these legal grounds (*titres*) and arguments cannot extend either the terms of the request submitted to the Court by the Council or the competence conferred upon the Court by the Council's resolution, it is equally clear that the Court must consider them in order to form an opinion as to the nature of the dispute referred to in the said resolution — with regard to which the Court's opinion has been requested.

V.

The main arguments developed by the Parties in support of their respective contentions are as follows :

1.

A. The French Decrees relate to persons born, not upon the territory of France itself, but upon the territory of the French Protectorates of Tunis and of the French zone of Morocco. Granted that it is competent for a State to enact such legislation within its national territory, the question remains to be considered whether the same competence exists as regards protected territory.

The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognised by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.

The position in the present case is determined by the international documents enumerated below :

(*a*) As regards Tunis : The Treaty of Casr-Said of May 12th, 1881, between France and Tunis ; the Treaty between the same Powers signed at La Marsa on June 8th, 1883 ; the correspondence between France and Great Britain, 1881—1883 (British Case, Appendix No. 6, and French Counter-Case, pages 77 *et seq.* ; Supplementary Documents submitted by the British Government). (See also the documents referred to under Nos. 2 and 3 below).

(*b*) As regards Morocco : the Treaty of Fez of March 30th, 1912, between France and Morocco ; the Anglo-French Declaration regarding Egypt and Morocco, dated April 8th, 1904 ; Sir Edward Grey's note to

M. Daeschner, dated November 14th, 1911. (French Counter-Case, page 139 ; British Counter-Case, Appendix No. 9) ; letter from M. Kiderlen-Waechter, Secretary of State for Foreign Affairs of the German Empire to M. Jules Cambon, Ambassador of the French Republic at Berlin, dated November 4th, 1911 (read during the hearing by the French Agent).

The question whether the exclusive jurisdiction possessed by a protecting State in regard to nationality questions in its own territory extends to the territory of the protected State depends upon an examination of the whole situation as it appears from the standpoint of international law. The question therefore is no longer solely one of domestic jurisdiction as defined above. (See Part IV.)

B. The French Government contends that the public powers (*puissance publique*) exercised by the protecting State, taken in conjunction with the local sovereignty of the protected State, constitute full sovereignty equivalent to that upon which international relations are based, and that therefore the protecting State and the protected State may, by virtue of an agreement between them, exercise and divide between them within the protected territory the whole extent of the powers which international law recognises as enjoyed by sovereign States within the limits of their national territory. This contention is disputed by the British Government.

The Court observes that, in any event, it will be necessary to have recourse to international law in order to decide what the value of an agreement of this kind may be as regards third States, and that the question consequently ceases to be one which, by international law, is solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

2.

A. Great Britain denies that the Decrees of November 8th, 1921, are applicable to British subjects, and relies in support of her contention upon the Treaties concluded by her with the two States which were subsequently placed under pro-

tectorate (Treaty between Great Britain and Morocco dated December 9th, 1856, and Treaty between Great Britain and Tunis dated July 19th, 1875). By virtue of these Treaties, persons claimed as British subjects would enjoy a measure of extraterritoriality incompatible with the imposition of another nationality.

According to the French contention, as developed in the course of the oral statements, these Treaties, which were concluded for an indefinite period, that is to say, in perpetuity, have lapsed by virtue of the principle known as the *clausula rebus sic stantibus* because the establishment of a legal and judicial regime in conformity with French legislation has created a new situation which deprives the capitulatory regime of its *raison d'être*.

It is clearly not possible to make any pronouncement upon this point without recourse to the principles of international law concerning the duration of the validity of treaties. It follows, therefore, that in this respect also the question does not, by international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

B. As regards Tunis more especially, France contends that, following upon negotiations between the French and British Governments, Great Britain formally renounced her rights of jurisdiction in the Regency (Note from Lord Granville to M. Tissot dated June 20th, 1883, British Case, Appendix No. 6; French Counter-case page 82; Order in Council of December 31st, 1883), and that by the Franco-British Arrangement of September 18th, 1897, she accepted a new basis for the relations between France and herself in Tunis. It appears from the Cases and Counter-Cases that the two Governments take different views with regard to the scope of the declarations made by Great Britain in this respect and also with regard to the construction to be placed upon the Arrangement of 1897.

The appreciation of these divergent points of view involves, owing to the very nature of the divergence, the interpretation

of international engagements. The question therefore does not, according to international law, fall solely within the domestic jurisdiction of a single State, as that jurisdiction is defined above.

C. As far as Morocco is concerned, it is certain that Great Britain still exercises there her consular jurisdiction. France argues that Great Britain, by consenting to the Franco-German Convention of November 4th, 1911, with regard to Morocco, agreed to renounce her capitulatory rights as soon as the new judicial system contemplated by the Convention had been introduced.

The British Government, on the contrary, contends that the Franco-German Convention of 1911 — its adhesion to which was conditional upon the internationalisation of the town and district of Tangiers, a condition which has not yet been fulfilled — was not an agreement for the suppression of the capitulatory regime: in this respect, the relations between France and Great Britain are, it is said, still governed by the second of the Secret Articles of the Anglo-French Declaration of April 8th, 1904 (British Counter-Case, Appendix No. 7).

In the case of Morocco also, therefore, as in the case of Tunis, there is a difference with regard to the interpretation of international engagements. The international character of the legal situation follows not only from the fact that the two Governments concerned place a different construction upon the obligations undertaken, but also from the fact that Great Britain exercises capitulatory rights in the territory of the French Protectorate in Morocco. Again, from this standpoint, the question does not, according to international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

3.

Apart from all considerations which relate to the protectorate and to the capitulations in Tunis, Great Britain relies, as regards that country, upon the most-favoured-nation clause (Anglo-French Arrangement of September 18th, 1897,

and the Notes of March 8th and May 23rd, 1919, exchanged between the French and British Governments on the subject of that Arrangement; see British Case Appendix 9, and French Counter-Case, page 64), in order to assert a claim to benefit by Article 13 of the Franco-Italian Consular Convention of September 28th, 1896. This Article expressly contemplates the preservation of their nationality by Italian subjects in Tunis. France, however, denies that the most-favoured-nation clause relied upon by Great Britain is applicable in the present case, because of the exclusively economic bearing of that clause and because of the synallagmatic character of the Franco-Italian Convention.

It follows that the question is one which, by international law, does not fall solely within the domestic jurisdiction of a single State as defined above.

4.

According to the French Government, paragraph 2 of Article 1 of the Arrangement of September 18th, 1897, should be interpreted as a formal recognition by Great Britain of the competence of France to legislate with regard to the situation of persons in Tunis, and more particularly with regard to their nationality, under the same conditions as in France. This construction is disputed by the British Government.

Since, even assuming the French contention to be correct, the question whether France possesses such competence in this respect would still depend, as regards Great Britain, on the construction to be placed upon the most-favoured-nation clause mentioned under No. 3, this question is not, according to international law, solely a matter of domestic jurisdiction as defined above.

The Court, not having to enter into the merits of the dispute, confines itself to consideration of the facts set down under Nos. 1, 2, 3 and 4.

In the opinion of the Court, these facts suffice, even when considered separately, to prove that the dispute arises out of

a matter which, by international law, is not solely within the domestic jurisdiction of France as such jurisdiction is defined in this opinion.

FOR THESE REASONS :

THE COURT IS OF OPINION *that the dispute referred to in the Resolution of the Council of the League of Nations of October 4th, 1922, is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant), and therefore replies to the question submitted to it in the* NEGATIVE.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this seventh day of February, nineteen hundred and twenty-three, in two copies, one of which is to be deposited in the archives of the Court and the other to be forwarded to the Council of the League of Nations.

(*Signed*) LODER,
President.

(*Signed*) Å. HAMMARSKJÖLD,
Registrar.

M. Altamira took part in the deliberations of the Court concerning the present opinion but had to leave The Hague before the terms of the opinion were finally settled.

(*Initialled*) L.
Å. H.