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The individual opinions to the Judgment of the case concerning the Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria) 1939

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Abstract. The article discusses the individual opinions to the Judgement on the Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria) 1939. A review is made of the facts to the case, of sources of jurisdiction and of presented preliminary objections. The attention is focused on the motives stated in the Judgement and arguments contained in judges' individual opinions on the determination as to the jurisdiction of the Court in the presence of several sources.

Keywords: Judgement on the Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria), 1939, individual opinions

Introduction

The Judgement on the Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria), 1939, is especially noteworthy as this is the only Judgement by the Permanent Court of International Justice (PCIJ)[1] where Bulgaria is involved. It is also noteworthy as to the fact that, for the first time, while bringing several grounds for jurisdiction, the Court answers the question of their application. In that context, the facts to the case, the presented grounds for jurisdiction and the preliminary objections of Bulgaria were briefly considered. The Judgement was adjudicated by nine to five votes, with two of the judges having separate opinions, and the dissenting opinion being presented by four judges and the *ad hoc* judge. The purpose of this article is to make a comparison between the reasons for the Judgement adjudicated and the arguments contained in the individual opinions of the judges concerning the application of the Court's several sources of jurisdiction.

[1] Two more Judgements are included in the practice of the Permanent Court of International Justice with regard to Bulgaria, however these are based on Art. 29 of the Statute (abbreviated procedure) and Art. 60 of the Statute (interpretation of a Judgement), as well as on

Topical notes

The institute of individual opinions on the Court Judgement finds its application in the practice of the Permanent Court of International Justice (Dragiev 2012).

Article 57 of the PCIJ Statute[2] and Art. 62 of the Rules of Court[3] regulate the right of judges to present a statement of their personal opinions regarding the Court Judgement.

The provision contained in Art. 57 of the PCIJ Statute enables any judges who dissent with the Judgement to deliver a "separate opinion". However, the Court's case law showcases that such opinions are also presented by judges who have previously voted for the judgement. Thus, regardless of the text of Art. 57, the case law leads to a differentiation of two types of individual opinions: those dissenting and those separate. The dissenting opinions would express a disagreement with the Judgement and the motives thereto, while the separate opinions would mean that despite the judge's support given to the Judgement, he does not agree with its motives[4]. Separate and dissenting opinions were also filed to the Judgement of the case concerning the Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria).

Facts on the Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria)[5]

In 1898, the Sofia Municipality granted a concession for the distribution of electricity for lighting and electricity supply to the French company Société des Grands Travaux de Marseille, which in 1909 transferred its rights to a company called the Electricity Company of Sofia and Bulgaria, established in Brussels, Belgium.

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two advisory opinions (see Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation) 1924; Interpretation of Judgement No. 3 1925; The Greco-Bulgarian "Communities"1930; Interpretation of the Greco-Bulgarian Agreement of December 9th, 1927 (Caphandaris-Molloff Agreement) 1932).

[2] Art. 57 of the PCIJ Statute: "If the judgement does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion" (Statute of the Court 1926, 25).

[3] Art. 62 of the Rules of Court: "The opinions of judges who dissent from the judgement, shall be attached thereto should they express a desire to that effect" (Rules of Court 1922, 28).

[4] PCIJ case law shows that while some judges would deliver Judgements with the so-called dissenting opinions, they would also express their consent with the Judgement (see Dissenting Opinion by M. Negulesco, Rights of Minorities in Upper Silesia (Minority Schools), Collection of Judgements, 1928, P.C.I.J., Series A-N 15). Other judgements delivered with the so-called separate opinion, would feature a dissent with the Judgement. This is the case with the Separate Opinion by M. Anzilotti The Electricity Company of Sofia and Bulgaria, Judgements, Orders and Advisory Opinions, 1939, P.C.I.J., Series A./B. No 77.

[5] If the facts stated on the case are concerned, what was used was the data contained in the Judgement of 4 April 1939 in the case of the Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria) (see Judgement of April 4th, 1939).

During the First World War, the Belgian company's operation was taken over by the Municipality. After the war, on the grounds of Art. 182 of the Treaty of Neuilly[6] (1919), the Joint Arbitration Court revised the concession agreement and delivered two Judgements dated 5 July 1923, and 27 May 1925. The former restored the Belgian company's possession and appointed an expert commission to determine the tariff for the sale price of electricity. Following the submission of a report by the experts, the Joint Arbitration Court ruled on the second Judgement whereby it adopted a formula for determining the electricity tariff (Judgement of April 4th, 1939).

The adopted formula was applied until 1934, when a dispute arose between the parties over the price of coal. While the price quoted by the company was 330 Bulgarian leva, the price determined by a decision of the State Administration of Mines of 24 November 1934 was 360 Bulgarian leva. While the Belgian party's proposal was that the dispute should be referred again to the Mixed Arbitral Tribunal, Sofia Municipality announced it had already referred the District Court of Sofia. The judgement of that court was appealed by both parties to the Court of Appeal of Sofia, which confirmed the judgement delivered by the District Court in so far as it was in favour of the Municipality and annulled the judgement in favour of the company. The company appealed the judgement delivered to the Supreme Court of Cassation (SCC). The relations between the parties were further complicated by the adopted Ordinance-Law on Income Tax of 1936, which imposed a different tax on electric companies producing electricity and those who purchased it[7].

By letter dated 24 June 1937, the Belgian Minister Plenipotentiary in Sofia informed the Bulgarian authorities that the dispute was within the scope of the Treaty of conciliation, arbitration and judicial settlement (23 June 1931) (1931 Treaty) and therefore could be unilaterally referred to PCIJ.

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[6] Art. 182 of the Treaty of Neuilly, which states: "Concessions, guarantees of receipts, and rights of exploitation in Bulgarian territory as fixed by the present Treaty in which nationals of the Allied and Associated Powers, or companies or associations controlled by such nationals, are interested may in case either of abnormal conditions of working or of dispossession resulting from conditions or measures of war be extended on the application of the interested party, which must be presented within three months from the coming into force of the present Treaty, for a period to be determined by the Mixed Arbitral Tribunal, which shall take account of the period of dispossession or of abnormal conditions of working.

All arrangements approved or agreements come to before the entry of Bulgaria into the war between the Bulgarian authorities and companies or associations controlled by Allied financial groups are confirmed. Nevertheless, periods of time, prices and conditions therein laid down may be revised having regard to the new economic conditions. In case of disagreement the decision shall rest with the Mixed Arbitral Tribunal" (Treaty of Neuilly 1920, 69).

[7] Art. 30 of the Ordinance-Law on Income Tax: "The persons selling electricity will pay:

a) for sold electricity produced by themselves (produced by the taxpaying producer) or purchased from other tax paying sources at a rate of 10 stotinki per 1 sold kWh;

b) for electricity sold from foreign sources (not produced by the taxpaying seller), which do not pay the tax - 60 stotinki per kilowatt hour sold"(see *State Gazette*, issue 24 of 3 February 1936) [in Bulgarian].

The Bulgarian authorities replied that the dispute between the Municipality and the company was within the exclusive jurisdiction of the Bulgarian courts.

On 16 March 1938, the SCC rejected the company's appeal, but before that decision was made, Belgium appealed to the PCIJ.

Judgement on the Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria)

The application to the PCIJ was submitted on 26 January 1938 whereby the Court was asked to accept that Bulgaria had failed to fulfil its international obligations, namely: the introduction of a coal tariff by the State Administration of Mines (24 November 1934), whereby the Municipality was enabled to violate the implementation of the decisions of the Mixed Arbitral Tribunal of 1923 and 1925; rulings of the District Court and the Court of Appeal of Sofia, which do not correspond to those of the Mixed Arbitral Tribunal; the promulgation of the Ordinance-Law on Income Tax, which introduced a different tax for enterprises that sell electricity of their own production and those that sell electricity that is not produced by them (Judgement of April 4th, 1939, 65-66).

The Belgian Government referred to two sources certifying the jurisdiction of the Court. First, the Treaty of conciliation, arbitration and juridical settlement between Belgium and Bulgaria of 23 June 1931, which came into force on 4 February 1933. Second, the Declaration of Belgium of 10 March 1926 and the Declaration of Bulgaria of 12 August 1921 on the recognition of the obligatory jurisdiction of the Court.

With preliminary objections, the Bulgarian Government challenged the jurisdiction of the Court under both the contract and the declarations. The Court stated that "in the first place it should consider whether the objections raised by the Bulgarian Government to the jurisdiction of the Court under the Treaty are well-founded or not. Should they prove well-founded, the Court will then consider the objections raised by the Government under the declarations above mentioned. Only if both these sets of objections are alike held to be well-founded will the Court decline to entertain the case" (Judgement of April 4th, 1939, 76).

The Bulgarian objections on the 1931 Treaty emphasized on: "the silence" of the Belgian Government on the rights in terms of which the Parties thereto were in conflict (Judgement of April 4th, 1939, 77); "the premature and irregular application" lodged by Belgium into the Court prior to the final judgement of SCC (Judgement of April 4th, 1939, 78); failure to comply with Article 3 of the Treaty to resolve the dispute by judicial or administrative authorities of the party concerned (Judgement of April 4th, 1939, 78).

The Court held that the Belgian application had not been made in accordance with the terms of the 1931 Treaty and that there were therefore no grounds for the Court's jurisdiction.

The Judgement emphasized that "The negative result arrived at by the examination of the first source of jurisdiction does not however dispense the Court from the duty of considering the other source of jurisdiction invoked separately and independently from the first" (Judgement of April 4th, 1939, 80).

The fact that the dispute does not fall among those specified in Article 36 of the Statute is an objection by which Bulgaria disputed the competence of the PCIJ both on the basis of the 1931 Treaty and on the declarations, but the Court accepted that it was not preliminary.

The other objection the Court's competence was attacked by based on the declarations emphasized on the reservation *ratione temporis* contained in the Belgian declaration.

The declaration of Bulgaria of 12 August 1921 was of indefinite duration and it recognized the obligatory Court's jurisdiction in terms of any state which had assumed the same obligation, with no special agreement. The Belgian declaration of 10 March 1926 was for a period of 15 years referred to "any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification" (Judgement of April 4th, 1939, 81).

The Parties thereto agreed that the date of the dispute was 24 June 1937, which was when the Belgian Party notified the Bulgarian authorities that the dispute would be referred to PCIJ.

According to the Bulgarian Government, in case it were assumed that the Belgian declaration dated 10 March 1926 created a legal relation between the countries according to Article 36 of the Statute, then the situation having led to the dispute would be dated prior to the date in question. The decisions of the Mixed Arbitral Tribunal (1923-1925) were assumed to be such a situation and, with the formula adopted on determining the electricity distribution tariff being "the centre point of the dispute" in particular (Judgement of April 4th, 1939, 81). Furthermore, it was also alleged that since the situation arising from this formula was prior to the date of the Belgian declaration, the Bulgarian Government considered that the dispute arisen fell outside the jurisdiction of the Court.

The Court assumed that there was no connection between the dispute in question and the judgements of the Mixed Arbitral Tribunal. The judgements of the Tribunal indeed established a situation between the Belgian company and the Bulgarian authorities dating prior to 10 March 1926, however the dispute did not arise therefrom. According to the Court, "The only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction ... are those which must be considered as being the source of the dispute ... a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact" (Judgement of April 4th, 1939, 82). In this particular case, the Court held that the subsequent acts whereby the application of the formula was altered had entailed the dispute. Here is a list of such acts: The Decision of the State Administration of Mines of 24 November 1934, the Judgement of the District Court of 24 October 1936 and the Judgement of the Court of Appeal of 27 March 1937.

On 4 April 1939, the Court, by nine votes to five, decided to reject Bulgaria's preliminary objections concerning violations of its international obligations in terms of the introduction of a coal price and the issuance of judgements contrary to the judgements of the Mixed Arbitral Tribunal, and stated that they would be ruled on according to the substance of the dispute. The Court upheld

the objections to the Ordinance-Law on Income Tax of 1936, as its application was not the subject of the dispute, and dismissed the action in that regard.

Due to disagreement with the grounds of the Judgement, separate opinions were presented by Judge Visscher and Judge Erich.

Separate opinions on the Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria)

Judge Visscher expressly stated that he had supported the Judgement delivered, however he dissented with its motives on the jurisdiction of the Court. The arguments presented emphasized on the fact that the 1931 Treaty and the declarations of the states under Article 36(2) of the Statute were held by the Court as separate and independent sources of jurisdiction, however they were "two co-ordinated instruments ... and should be applied not as alternatives, but concurrently" and that "the combined application of the declarations ... cannot involve any contradiction" (Separate Opinion by M. De Visscher 1939, 136, 138). Nevertheless, it is important to clarify that the declarations of the States are in force during the term of the Treaty, and therefore considers that "when they signed that Treaty, the two States did not intend to establish a new source of jurisdiction" (Separate Opinion by M. De Visscher 1939, 136).

Next, according to Judge De Visscher, the provisions of the Treaty on which Bulgaria based its objections did not fall within the jurisdiction of the Court, but were intended to extend the methods of amicable settlement of disputes.

That argument is also shared by Judge Erich, who considered that the non-exhaustion of local remedies did not affect the jurisdiction of the Court. In that regard, he stated that the preliminary objections raised did not make a clear distinction as to the jurisdiction of the case and the admissibility of the action (Separate Opinion of M. Erich 1939).

The judge also disagreed with the reasons for the Judgement as to the date of the dispute, holding that it had arisen before the date of the Belgian declaration. In support of this, he cited texts from documents submitted to the Court by Belgium stating that the dispute had arisen from "the tariff" and from "the disputed formula" (Separate Opinion of M. Erih 1939, 142). In that regard, he concluded that although Belgium claimed that the dispute was prompted by acts of the Bulgarian authorities (1934–1937), it was clear that it had arisen from a situation (1925) preceding the ratification of the Belgian declaration (1926).

In conclusion, Judge Erich pointed out that, due to the *ratione temporis* reservation and the denunciation of the 1931 Treaty, Belgium applied to the PCIJ before the SCC's decision that it had an additional source of jurisdiction through the Treaty. Judge Anzilotti had a different opinion on this issue, presenting a dissenting opinion.

Dissenting opinions on the Electricity Company of Sofia and Bulgaria Case (Belgium v. Bulgaria)

Judge Anzilotti believes that Belgium's application was filed prior to SCC's decision as "only the Treaty was applicable between the two States" (Separate Opinion by M. Anzilotti 1939, 88). In this context, he focused the attention on Article 4 of the Treaty, i.e., on the *ratione temporis* reservation and on the 1931 Treaty's duration.

He considered that the provision of Article 4 of the Treaty was of critical importance, as it indicated that all disputes were to be referred for resolution by the PCIJ, and that would include those contained in Article 36 of the PCIJ Statute. Therefore, any disputes that might be referred to the Court under the declarations might be considered on the basis of the Treaty as well. Consequently, he considered that, during the term of the Treaty, the declarations should be suspended in view of "the fact that the new provisions are incompatible with the previous provisions" (Separate Opinion by M. Anzilotti 1939, 92).

Due to the suspension of the declarations, the restrictions contained in them also ceased to apply, i.e., the *ratione temporis* reservation would not apply during the term of the Treaty.

In this regard, it was stated that the Treaty's validity term was five years as of the date of ratification and was to be automatically renewed for a new period of five years, unless it was denounced within six months before the end of the five-year period. The fact that the Treaty was denounced by Bulgaria on 3 August 1937, and respectively terminated on 4 February 1938, did not alter the fact that it was applicable to the submission of the application to the PCIJ on 26 January 1938, even though its submission was only a few days before its termination.

This argument was also shared by Judge Hudson, according to whom the Treaty was in force between Belgium and Bulgaria when the application was submitted to the PICJ, and the relationship between them was governed by it, including matters relating to jurisdiction (Dissenting Opinion of Mr. Hudson 1939). Consequently, it was therefore the only possible source of jurisdiction for the Court in considering the dispute and would take precedence over declarations for the period over which it was in force. Therefore, the restrictions contained in the declarations would not apply to it.

In addition, Judge Hudson stated that the two sources of jurisdiction could not be applied simultaneously and that one of them should be chosen. In order to make that choice, the Court was supposed to apply the general principles of law, such as: the special rule would repeal the general rule, the subsequent rule would repeal the previous one (Dissenting Opinion of Mr. Hudson 1939, 125). In the present case, the Treaty was considered to be such a subsequent and special rule, as it was concluded at a date later than the date of the declarations and would only apply to Bulgaria and Belgium, while the declarations would be applicable to all countries.

Next, Judge Hudson noted that the Belgian declaration contained a text stating that it would not apply in cases where "the Parties have agreed 'to have recourse to another method of pacific settlement'" (Dissenting Opinion of

Mr. Hudson 1939, 131). He accepted the Treaty as such other method, since the disputes referred to therein were identical to those in the declaration.

Judge Eysinga also emphasized that text, accepting that the declaration was "subsidiary" (Dissenting Opinion by Jonkheer van Eysinga 1939, 111), as it did not apply when another method of peaceful settlement of the dispute was agreed. He defined the simultaneous application of two systems, given that the second was adopted with the intention of changing the first, as "a difficult thing to do" (Dissenting Opinion by Jonkheer van Eysinga 1939, 112). In addition, he stated that the *ratione temporis* reservation was applicable to the legal disputes referred to in Article 36 of the Statute, but was not applicable to disputes under Article 4 of the Treaty. Consequently, the jurisdiction of the Court was to be determined by the Treaty alone.

Judge Urrutia also believed the Treaty would take precedence over the declarations. According to his opinion, the Treaty was a continuation of the liabilities of the Parties thereto in the sense of Article 36 of the Statute. Therefore, both sources could not be applied simultaneously to the same dispute, and one of them was supposed to take precedence. "In the present case it is the Treaty, which is a *later law* between the Parties, a *special law*, the text of which is so perfectly clear that there can be no choice of construction, still less any confusion" (Dissenting Opinion by M. Urrutia 1939, 103). The Treaty did not cancel, annul or terminate the effects of the declarations, however, within Treaty's validity, the Court's jurisdiction would be determined only in accordance with its provisions. Consequently, the *ratione temporis* reservation would be inapplicable during the duration of the Treaty.

The Dissenting Opinion by Judge ad hoc Papazoff also emphasized the *ratione temporis* reservation. He stood the opinion that the dispute had arisen from a situation prior to the date of the Belgian declaration, i.e., 10 March 1926, considering such a date the date of the Mixed Arbitral Tribunal's awards. According to his opinion, that was confirmed by the Belgian Memorandum stating that the dispute had arisen from: "the formula contained in the Mixed Arbitral Tribunal's awards", "the disputed formula", "a misapplication of the Mixed Arbitral Tribunal's award" (Dissenting Opinion by Judge ad hoc Papazoff 1939, 147). In addition, he noted that the claimed compensation was for the period 1925–1937, i.e., the dispute would be dated back to as far as 1925. This is why he came to the conclusions that "without the "formula" established by the Mixed Arbitral Tribunal there could have been no dispute" (Dissenting Opinion by Judge ad hoc Papazoff 1939, 147-148).

Conclusion

The Judgement stated that, most importantly, the Court would inspect the objections placed by Bulgaria regarding the 1931 Treaty, and then it would proceed with the objections on the declarations and, only on case both were justified and reasonable, the Court would terminate the proceedings over lack of grounds for jurisdiction. In addition, the Judgement stated that in case the result of the inspection of the first source of competence was negative, the Court

would not be exempted of its obligation to examine the second source separately and independently. Whereby, the Court held that in case several grounds for jurisdiction were presented, it should examine them and rule on each of them.

The separate opinions on the Judgement expressed a disagreement with its motives regarding the jurisdiction of the Court.

They would give priority to the declarations, stating that the parties did not intend to establish a new source of jurisdiction (Judge Visscher) and that the Treaty was an additional source (Judge Erich) used by Belgium before its termination due to the *ratione temporis* reservation contained in its declaration. Judge Erich also disagreed with the date of the dispute, as he considered that it arose from the formula for determining the price of electricity, which had been adopted before the ratification of the declaration.

The fact that the date of the dispute was before the ratification of the Belgian declaration was the main argument in the Dissenting Opinion by Judge Papazoff.

What the other four dissenting opinions had in common was that the judges would not accept the consistent examination of the grounds of jurisdiction presented, but accepted that the Treaty was the only applicable source. There were two reasons to accept that the Treaty had precedence over the declarations. First, they were based on the general principles of law, according to which the special norm would cancel the general norm and the new norm would cancel the precedent one. Second, during the duration of the Treaty, the *ratione temporis* reservation was inapplicable.

From the above it can be concluded that while according to the Judgement, the Court considers and applies the two sources of jurisdiction separately and independently of each other, the separate opinions accept the declarations as applicable, and the dissenting opinions give priority to the Treaty.

In conclusion, it should be noted that the Judgement in the case of the Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria) and the individual opinions on it raise a number of issues related to the jurisdiction of PCIJ in the presence of several sources and present a different point of view of their application.

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