

# The Origins of the Law of Provisional Measures before International Courts and Tribunals

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## Abstract

This article seeks to revisit the origins of one of the most important tools of modern (i.e. post-1946) international litigation, provisional measures of protection. Notwithstanding the focus of most contemporary commentary on the decisions of the International Court of Justice and other important tribunals, especially since the decision of the former in *LaGrand (Germany v. United States)*, ICJ Reports 2001, the commonly understood conception of interim relief in international disputes arises from the Permanent Court of International Justice (1922-1946) and several earlier, now-forgotten, international courts and tribunals, most notably the first Central American Court of Justice (1907-1918) and the mixed arbitral tribunals formed to resolve investor-state disputes following the First World War. Within these early precedents, moreover, domestic analogies may perhaps, hesitantly, be detected albeit in a manner that verges on speculation. If this be the case, then the signal achievement of the Permanent Court was the merging of two previously separate traditions of interim relief – the domestic and the international – to create the first “modern” law of provisional measures capable of dealing appropriately with a wide range of international disputes, interstate and otherwise.

## I. Introduction

In reading the first indication of provisional measures by the Permanent Court of International Justice – the Order of 8.1.1927 made in the *Sino-Belgian Treaty* case<sup>1</sup> – it is clear that its author, President *Max Huber*, was drawing from an already coherent corpus of rules on the provision of interim relief in international disputes. The order, moreover, makes reference to concepts that would be familiar to most modern observers, such as preservation of the rights of the parties pending resolution of the dispute,<sup>2</sup> the requirement of irreparable harm,<sup>3</sup> and the idea that the order so given was without prejudice to the merits.<sup>4</sup> The familiarity only grows when examin-

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<sup>1</sup> *Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v. China)*, PCIJ Ser. A, No. 8 (1927).

<sup>2</sup> *Sino-Belgian Treaty* (note 1), 6.

<sup>3</sup> *Sino-Belgian Treaty* (note 1), 7.

<sup>4</sup> *Sino-Belgian Treaty* (note 1), 7.

ing the Permanent Court's later consideration of provisional measures, which is of a steadily increasing sophistication.<sup>5</sup>

The jurisprudence of the Permanent Court, therefore, comes not at the beginning of the development of provisional measures as a distinct area of inquiry and not at the end – but somewhere in the middle. The aim of this paper is to trace developments prior to 1946 and the emergence of the modern (post-war) system of international dispute settlement. In so doing, it will establish that far from being a post-1946 phenomenon, the law of provisional measures was already well articulated by the time that the Permanent Court ceased to exist. The value of such a historical exegesis is considerable. Article 41 of the Statute of the International Court of Justice is not only the basis of that Court's competence to order interim relief, but of other international courts and tribunals as well.<sup>6</sup> It is itself an almost direct copy of Article 41 of the Permanent Court's Statute. The provision, however, can be described as procedurally skeletal at best, and much of the Court's modern practice, e.g. the need for *prima facie* jurisdiction, the acceptable purpose of provisional measures, the concept of urgency, the notion that provisional measures may not act as an interim judgment and so forth, instead arise as part of a *jurisprudence constante* that accumulated within the Court's practice over time. As will be seen, these concepts almost invariably have their roots in the practice of the Permanent Court and other pre-1946 courts and tribunals. If they are to be understood to their fullest extent, this earlier material takes on additional importance as a yardstick by which the progress of the modern law may be measured – and, if necessary, criticized.

By way of structure, the paper will first briefly consider the development of concepts of interim relief in municipal courts, and give a snapshot of how these had developed by the latter part of the 19<sup>th</sup> century and thus made available to international courts and tribunals in the early 20<sup>th</sup> century (II.). It will then relate the experience of the early international courts and tribunals, most notably the experience of the first short-lived Central American

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<sup>5</sup> *Factory at Chorzów (Indemnities)* (Germany v. Poland), PCIJ Ser. A, No. 12 (1927); *Legal Status of the South-Eastern Territory of Greenland (Norway v. Denmark)*, PCIJ Ser. A/B, No. 48 (1932); *Administration of the Prince von Pless (Germany v. Poland)*, PCIJ Ser. A/B, No. 54 (1933); *Polish Agrarian Reform and the German Minority (Germany v. Poland)*, PCIJ Ser. A/B, No. 58 (1933); *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ Ser. A/B, No. 79 (1939).

<sup>6</sup> See, *inter alia*, the UN Convention for the Law of the Sea, 10.12.1982, 1833 U.N.T.S. 3, Art. 290 (with respect to those institutions capable of being seized under Art. 287, but principally the International Tribunal for the Law of the Sea, and Annex VII arbitral tribunals), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18.3.1965, 575 U.N.T.S. 159, Art. 47 (with respect to investor-state arbitrations under the International Centre for the Settlement of Investment Disputes).

Court of Justice and the mixed arbitral tribunals which were a feature of the inter-war landscape (III.). Finally, it will survey how these earlier tribunals influenced the drafting of the Statute of the Permanent Court of International Justice, and chart the further development of provisional measures in the jurisprudence of that body (IV.).

## II. Municipal Law Origins

The notion that the administration of justice requires that relief be available to safeguard contested rights *pendente lite* is not a modern invention.<sup>7</sup> Provisional measures were known in the ancient civil procedure codes<sup>8</sup> and were further well represented in Roman law, principally through the concept of the *interdict*, an order requiring the person to whom it was addressed to do or not do a particular thing – although principally a form of final relief, in the context of the contested ownership of property this could be made to bear provisional characteristics.<sup>9</sup> Provisional measures were also

<sup>7</sup> E. Dumbauld, *Interim Measures of Protection in International Controversies*, 1932, 33 et seq.

<sup>8</sup> See e.g. the Law Code of Gortyn, which provided that in cases where ownership of a slave was contested, the slave could not be “led away”. The code was uncovered at the site of a Greek city-state on Crete, and is one of the most complete extant reproductions of a Hellenic legal code. H. J. Roby, *The Twelve Tables of Gortyn*, *Law Quarterly Review* 2 (1886), 135 et seq.; R. F. Willetts, *The Law Code of Gortyn*, 1967; J. Davies, *The Gortyn Code*, in: M. Gagarin/D. J. Cohen, *The Cambridge Companion to Ancient Greek Law*, 2005, 305 et seq. The earlier Babylonian Code of Hammurabi (c. 1772 BCE) contains substantial commentary as to the procedure to be followed in cases of contested ownership of property, but does not make any provision for relief *pendente lite*. W. L. King, *The Code of Hammurabi*, 1915, §§ 9-12. There is evidence that during the Middle Babylonian Period (c. 1532-1000 BCE), parties were able to distrain persons pending settlement of a dispute over the purchase of a slave, though this may not have taken the form of a formal procedure. K. Slanski, *Middle Babylonian Period*, in: R. Westbrook, *A History of Ancient Near Eastern Law*, Vol. 1, 2003, 485 et seq., 492. Although the Egyptian legal code exhibited considerable procedural complexity, there is no evidence of interlocutory relief, at least on the basis of the sparse materials available, see A. Théodoridès, *The Concept of Law in Ancient Egypt*, in: J. R. Harris, *The Legacy of Ancient Egypt*, 2<sup>nd</sup> ed. 1971, 291 et seq., especially in relation to Papyrus Berlin 9010 (Old Kingdom, Dynasty VI, c. 2345 BCE), 295 et seq. and Papyrus Brooklyn 35.1146 (Middle Kingdom, Dynasty XIII, c. 1785 BCE), 303 et seq.; R. Jasnow, *Old Kingdom and First Intermediate Period*, in: R. Westbrook, *A History of Ancient Near Eastern Law*, Vol. 1, 2003, 93 et seq., 108 et seq.; R. Jasnow, *Middle Kingdom and Second Intermediate Period*, in: R. Westbrook (note 8), 254 et seq., 267; R. Jasnow, *New Kingdom*, in: R. Westbrook (note 8), 289 et seq., 308 et seq.; R. Jasnow, *Third Intermediate Period*, in: R. Westbrook (note 8), 793 et seq.

<sup>9</sup> See *Justinian*, *Institutes*, tr: A. B. Moyle, 4<sup>th</sup> ed. 1906, IV. xv., 1 et seq.; *Gains*, *Institutes*, tr: W. M. Gordon/O. F. Robinson, 1988, IV., 143 et seq. Further R. W. Lee, *The Elements of*

known to exist in canon law,<sup>10</sup> with the *Corpus iuris canonici* of 1585 containing the rule of *ut lite pendente nihil innovetur* (Title XVI): “whilst a lawsuit is pending, no new element may be introduced”.<sup>11</sup>

But the principal traditions of interim relief in municipal law arise with the emergence of the common and civil law approaches. Both traditions developed a strong doctrine of relief *pendente lite*, on the basis that the effective protection of private rights is the *quid pro quo* for the prohibition of self-help by individuals, albeit in slightly different directions. The common law through equity developed the concept of the interlocutory injunction,<sup>12</sup> being an order directed *in personam* to one of the parties to preserve contested property *in statu quo* pending a further order or the resolution of the dispute. It was constrained by certain substantive requirements, such as the proof of a *prima facie* case on the merits, the notion that relief would not be granted if damages would suffice, and the concept of the balance of convenience, in which the likely injury or damage which would be suffered by the plaintiff if the injunction were not granted was weighed against the likely inconvenience or cost for the defendant if it was.<sup>13</sup>

Similar developments within civilian jurisdictions were necessarily more multifarious, but the great period of civil procedure codification in the 19<sup>th</sup> century produced a number of broadly similar forms of interim relief. The prevalent means of securing the enforcement of claims in civil law is and remains the preliminary seizure and attachment of assets in the case of money claims, or sequestration when dealing with moveable or immoveable objects.<sup>14</sup> However, basically all civilian jurisdictions also provide for measures granting interim performance or regulating the *status quo*. Three jurisdic-

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Roman Law, rev. ed. 1946, 10 et seq.; W. W. Buckland/A. D. McNair, Roman Law and Common Law: A Comparison in Outline, 2<sup>nd</sup> ed. 1965, 421.

<sup>10</sup> E. Dumbauld (note 7), 40 et seq.

<sup>11</sup> *Corpus iuris canonici*, 1585, II. xvi. 1. The principle remains unchanged in the 1917 (Canon 1725, 5<sup>o</sup>) and 1983 (Canon 1512, 5<sup>o</sup>) reinventions of the *Corpus iuris canonici*.

<sup>12</sup> On the emergence of the concept, see D. W. Raack, A History of Injunctions in England Before 1700, Ind. L. Rev. 61 (1985/1986), 539 et seq.; J. Leubsdorf, The Standard for Preliminary Injunctions, Harv. L. Rev. 91 (1978), 525 et seq.

<sup>13</sup> See J. M. Paterson, Kerr on Injunctions, 6<sup>th</sup> ed. 1927, 15 et seq. Also J. Leubsdorf (note 12), 536. The current leading view of the test for the grant of an interlocutory injunction arises from the judgment of Lord Diplock in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396 (HL). Further J. McGhee, Snell’s Equity, 32<sup>nd</sup> ed. 2010, 542 et seq.

<sup>14</sup> A. Bruns, Provisional Measures in European Civil Procedure Laws – Preservation of Variety or Need for Harmonisation, in: R. Stürner/M. Kawano, Comparative Studies on Enforcement and Provisional Measures, 2011, 183 et seq. Orders to prevent the dissipation of assets are of course well known in the English common law, principally through the so-called *Mareva* or “freezing” injunction arising from the decision in *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd’s Rep 509 and now contained within Part 25 of the Civil Procedure Rules 1998 (UK).

tions – France, Germany and Switzerland – may be considered broadly representative of the whole. In France, the *Code de procédure civile* (CPC) of 1806 endorsed the pre-revolutionary practice of relief *en référé*, where the president of the tribunal could make urgent and immediately enforceable interlocutory orders without prejudice to the merits.<sup>15</sup> Applications for such relief could be made to the president of the relevant tribunal at a special hearing.<sup>16</sup> The measures so ordered could not prejudice the principal action<sup>17</sup> and were not susceptible to immediate objection, although an appeal could be filed within two weeks of the order being given.<sup>18</sup> The provisions on relief *en référé* were phrased in extremely general terms, enabling the procedure to be used in a wide range of cases.<sup>19</sup> Relief was for the most part directed by the applicant, reflecting the general principle that litigation was the tool of the parties – whilst the court could do less than what was asked for, it could not do more, and was thus bound by the principle of *ne ultra petita*.<sup>20</sup>

In Germany, the *Zivilprozessordnung* (ZPO)<sup>21</sup> of 1877 included multiple forms of interim relief in Book 8, Chapter 5, entitled *Arrest und einstweilige Verfügung* (seizure and injunction). In these, *Dumbauld*<sup>22</sup> identifies four classes of provisional measure: (1) pure seizure or *Arrest* securing the execution of a money claim or a claim liable to be transformed into a money claim;<sup>23</sup> (2) an injunction or *einstweilige Verfügung*, granted in light of “the concern that a change of the *status quo* might frustrate the realization of the right enjoyed by a party, or might make its realization significantly more difficult”;<sup>24</sup> (3) another species of injunction for the provision of a “temporary status”, to be granted “[where] necessary in order to avert significant disadvantages, to prevent impending force, or for other reasons, in particu-

<sup>15</sup> CPC § 806. Further *E. Dumbauld* (note 7), 71, 75 et seq.; *P. E. Herzog/M. Weser*, *Civil Procedure in France*, 1967, 238 et seq.

<sup>16</sup> CPC, §§ 807, 808.

<sup>17</sup> Though this did not mean that they could not cause irreparable harm to the subject of the litigation, or cause damage that could not be remedied by the final judgment, *E. Dumbauld* (note 7), 75.

<sup>18</sup> CPC, § 809.

<sup>19</sup> *P. E. Herzog/M. Weser* (note 15), 239.

<sup>20</sup> *E. Dumbauld* (note 7), 75.

<sup>21</sup> On the development of the ZPO, see *P. Oberhammer/T. Domej*, *Germany, Switzerland, Austria* (ca. 1800-2005), in: C. H. van Rhee, *European Traditions in Civil Procedure*, 2005, 103. The ZPO was also widely exported, with its 1877 iteration forming the basis for the 1890 codification of civil procedure by Japan during the Meiji Restoration: *W. Röhl*, *Law of Civil Procedure*, in: *W. Röhl*, *History of Law in Japan Since 1869*, 2004, 655 et seq.

<sup>22</sup> *E. Dumbauld* (note 7), 42 et seq.

<sup>23</sup> ZPO, § 916.

<sup>24</sup> ZPO, § 935.

lar in the case of legal relationships of a long-term nature existing”;<sup>25</sup> and (4) a form of practice arising under (3) which provides provisional satisfaction with respect to an undetermined money claim, and therefore amounts to an interim judgment.<sup>26</sup> Significantly, the *Staatsgerichtshof* saw fit to use these measures in managing disputes between the individual German *Länder*, most relevantly in the *Lübeck Bay* case of 1925,<sup>27</sup> where the Court ordered that Mecklenburg-Schwerin refrain from exercising fisheries or police jurisdiction in the contested area until such time as the merits could be addressed by reference to ZPO § 940.<sup>28</sup>

The Swiss codification essentially amalgamated French and German thinking on civil procedure, with the process further complicated by the relative independence of the individual cantons within the Confederation.<sup>29</sup> In the 18<sup>th</sup> century, however, Switzerland developed a code of civil procedure for use in federal matters,<sup>30</sup> which incorporated elements acceptable to the Francophone and German-speaking cantons. The Code provided in § 199 for the grant of interim relief by the examining magistrate or the *Bundesgericht*, with the president empowered to issue the necessary orders if the latter had not convened. Under the terms of the Code, such measures could be ordered: (1) to protect a threatened asset; (2) to prevent alteration to the cause of action or subject of litigation; and (3) to prevent imminent and not easily repairable damage, i.e. that which cannot be made good through monetary relief.<sup>31</sup> It provided that “provisional decrees [are] intended merely to ensure the existing conditions and should therefore not go further than is necessary for that purpose”.<sup>32</sup> Finally, the Code provided that orders so given were without prejudice to the resolution of the question at issue, and could not alter the legal status of the parties. Where the

<sup>25</sup> ZPO, § 940.

<sup>26</sup> *E. Dumbauld* (note 7), 43.

<sup>27</sup> The *Staatsgerichtshof* ordered provisional measures in inter-state matters on several other occasions, but none of these preceded the order of President *Huber* in the *Sino-Belgian Treaty* case, and could not have influenced his decision. *E. Dumbauld* (note 7), 84 et seq.

<sup>28</sup> *State of Lübeck v. State of Mecklenburg-Schwerin*, 25.10.1925, RGZ 111, Appendix, 21. The operative part of the order provides:

“[T]he state of Mecklenburg-Schwerin is prohibited from exercising sovereign fishing rights and maritime policing in the Travemünder Bay up to the line from Cömnitzer Tower – Bohnsdorfer Mill – Steinrifftonne – Mouth of the Hartenbeck [River]. The exercise of these rights to the line described stands for this time solely to the Free Hanseatic City of Lübeck.”

<sup>29</sup> As reflection of this, as many as 92 Swiss codes of civil procedure were enacted between 1819 and 2001. *P. Oberhammer/T. Domej* (note 21), 124.

<sup>30</sup> Federal Law of 22.11.1850.

<sup>31</sup> Federal Law of 22.11.1850, § 199.

<sup>32</sup> Federal Law of 22.11.1850, § 200.

harm apprehended, disappeared or the circumstances justifying the relief changed, the order could be revoked or modified.<sup>33</sup>

Similar provisions appeared in the late 19<sup>th</sup> and early 20<sup>th</sup> century cantonal codes<sup>34</sup> of Bern, Vaud and Fribourg. An additional gloss was added in the contemporaneous statutes of Lucerne, Obwalden and Zug, which provided that provisional measures could be ordered *ex parte* by the president of a competent tribunal where harm (1) was imminent, and (2) could only be prevented by timely judicial action. This introduced the requirement of urgency in a manner reminiscent of the French practice of relief *en référé*. Where the matter was not urgent, a hearing was to be held prior to the order, and the parties were given the opportunity to present submissions.

### III. Development by Early International Courts and Tribunals

Section II of the paper sets out the broad themes of interim relief as they existed in the common and civil law traditions in the late 19<sup>th</sup> and 20<sup>th</sup> century – in other words, at the point at which the nascent courts and tribunals of the international system were beginning to order interim measures. The thinking of these tribunals lead in turn to the 1927 order in the *Sino-Belgian Treaty* case, which inaugurated the dominant strand of jurisprudence on provisional measures in international law today, that of the International Court of Justice.

Prior to the establishment of the Permanent Court, provisional measures were granted on a quasi-regular basis by the Central American Court of Justice and by the mixed arbitral tribunals that emerged from the Treaty of Versailles to adjudicate investor-state and inter-state claims on an *ad hoc* basis. These will now be examined, along with several “false starts” by other institutions.

#### 1. The Early International Codification Projects: 1873-1907

The first consideration of provisional measures at the international level was through the work of the *Institut de droit international*.<sup>35</sup> Founded in

<sup>33</sup> Federal Law of 22.11.1850, § 201.

<sup>34</sup> *E. Dumbauld* (note 7), 53 et seq.

<sup>35</sup> *Sb. Rosenne*, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, 2005, 12 et seq.



1873, the *Institut* – encouraged by the increasing use of arbitration to settle international disputes<sup>36</sup> – adopted as one of its first projects the codification of arbitral procedure, appointing *Levin Goldschmidt* as Rapporteur.<sup>37</sup> During the ensuing debate, an amendment was proposed by *T. M. C. Asser* to insert into the draft code the sentence “[t]he arbitral tribunal may render interlocutory or preparatory judgments”. Precisely what *Asser* meant by *jugements interlocutoires ou préparatoires* is not elaborated in the record,<sup>38</sup> but the proposal was accepted and inserted into the *Institut*’s 1875 draft regulations as Article 19.<sup>39</sup> Later commentary by *Mérignac* interpreted the provision as giving the tribunal jurisdiction to prescribe interim relief, “such as the sequestration of a disputed territory, or [of] captured ships and cargo the seizure of which causes difficulties”.<sup>40</sup>

The work on arbitral procedure by the Hague Peace Conferences of 1899 and 1907 is similarly opaque.<sup>41</sup> The Third Commission of the 1899 Conference – of which *Asser* was a member – was responsible for the preparation of the Convention for the Pacific Settlement of International Disputes,<sup>42</sup> which established the Permanent Court of Arbitration (Title IV, Chapter II) and set out the first internationally agreed code of arbitral procedure (Title IV, Chapter III). This code made no express or implied grant of jurisdiction to order provisional measures.<sup>43</sup> The Convention that emerged from the 1907 Conference (Part IV, Chapter III) similarly made no reference to pro-

<sup>36</sup> See e.g. the mixed claims commissions established by the Jay Treaty of 1794: Treaty of Amity, Commerce and Navigation, 19.11.1794, 52 C.T.S. 243.

<sup>37</sup> AIDI 1 (1974), 31.

<sup>38</sup> Extracted, *Revue de Droit International et de Législation Comparée* 6 (1874), 421 et seq., 588.

<sup>39</sup> Project de règlement pour la procédure arbitrale internationale, AIDI 1 (1975), 126 et seq.

<sup>40</sup> *A. Mérignac*, *Traité théorique et pratique de l'arbitrage international*, 1895, 275. *Sh. Rosenne* (note 35), 13 further notes that the first use of the verb *prescrire* to describe the nature of the interlocutory decision on provisional measures occurred in this passage.

<sup>41</sup> *Sh. Rosenne* (note 35), 13 et seq.

<sup>42</sup> 29.7.1899, 187 C.T.S. 410.

<sup>43</sup> A draft of the code put forward by the Russian delegation provided that “[e]very decision whether final or interlocutory” was to be taken by a majority of the members of the tribunal present: extracted in *J. B. Scott*, *The Reports of the Hague Conferences of 1899 and 1907*, 1917, 104. Again, little information was provided as to the meaning of “interlocutory” in this context. The wording was removed without explanation by the Committee of Examination, and Art. 51 of the Convention simply provided that decisions of the tribunal would be taken by majority vote, *Sh. Rosenne* (note 35), 13.

visional measures,<sup>44</sup> and in no case under either the procedure established in the 1899 or 1907 Conventions was the question of interim relief raised.<sup>45</sup>

## 2. The American Experience: 1902-1918

### a) The Treaty of Corinto

The efforts of the Hague Peace Conferences overlapped in part with the development of international dispute settlement in Central America, a process that ought to be viewed against the background of attempts at unification by the former constituents of the Captaincy General of Guatemala.<sup>46</sup> An early but ultimately unsuccessful example of provisional measures in this context arose from the 1902 Treaty of Corinto<sup>47</sup> between Costa Rica, El Salvador, Honduras and Nicaragua, which provided in Article 2 for the compulsory arbitration of disputes by Central American arbitrators,<sup>48</sup> a system which went considerably further than that agreed at The Hague in 1899.<sup>49</sup> This was reinforced by Article XI, which provided that:

“The governments of the states in dispute solemnly engage not to execute any act of hostilities, preparations for war, or mobilization of forces, in order not to impede the settlement of the difficulty or question by the means established in the present convention.”

In 1906, conflict broke out between Honduras and Nicaragua, with the former asserting that the latter had sponsored a revolution within its borders. Honduran troops, moreover, had crossed the Nicaraguan border in pursuit of revolutionaries.<sup>50</sup> Both states immediately placed their armed forces on a war footing. An intervention by the Foreign Minister of Costa

<sup>44</sup> Convention on the Pacific Settlement of International Disputes, 18.10.1907, 205 C.T.S. 233.

<sup>45</sup> *Sb. Rosenne* (note 35), 14.

<sup>46</sup> The history of the region was set out in the award of the King of Spain in *Border Dispute between Honduras and Nicaragua (Honduras v. Nicaragua)*, RIAA 11 (1906), 101. Also *J. B. Scott*, *The Central American Peace Conference of 1907*, AJIL 2 (1908), 121 et seq.

<sup>47</sup> Convention of Peace and Arbitration, 20.1.1902, 190 C.T.S. 537.

<sup>48</sup> A contrary system, the so-called Peace of the Marblehead and San José referred certain disputes to Mexican-American arbitration. Treaty of Peace, 20.7.1906, 202 C.T.S. 217, Art. V; General Treaty of Peace and Friendship, Arbitration and Commerce, 25.9.1906, 202 C.T.S. 428, Art. III. The latter grandfathered in the arbitral procedure of the Treaty of Corinto (including Art. XI) until such time as a further procedure could be agreed. Further: World Peace Foundation Pamphlet Series 7 (1917), 115 et seq.

<sup>49</sup> World Peace Foundation (note 48), 114 et seq.; *E. Dumbauld* (note 7), 92 et seq.

<sup>50</sup> US Foreign Relations, Vol. 2, 1907, 607 et seq.

Rica, *Luis Anderson*, saw the matter referred to arbitration under the Treaty of Corinto, with a tribunal empaneled at San Salvador on 1.2.1907.<sup>51</sup> The following order was issued:

“The court considers [...] that its principal duty is to see that the judgment it is going to deliver should become effective, removing thereby any circumstance which in any manner should distract the competitors from the faithful execution and fulfillment of all and each of the clauses of the Corinto Pact of 1902 [...]”

Whereas and in accordance with Article XI, the tribunal directed El Salvador to:

“[Request] in the most friendly manner from the Governments of Honduras and Nicaragua the most immediate disarmament and disbandment of forces, so that affairs may return to the peaceable status which the arbitral *compromis* contemplates.”<sup>52</sup>

The tribunal’s order is recognizable as a form of interim relief, intended to preserve the *status quo* between the parties and prevent escalation of the dispute. It was not well received. Whilst Honduras indicated that it was willing to comply with the terms of the order, Nicaragua saw disarmament as a humiliation and refused to comply, alleging new offences by Honduras.<sup>53</sup> El Salvador and Honduras, for their part, saw Nicaragua’s recalcitrance as a fundamental breach of the Treaty of Corinto, and terminated the agreement. The tribunal accordingly dissolved, citing a failure of the parties to desist from “warlike preparations pending the arbitration”.<sup>54</sup>

## b) The Central American Court of Justice

Following the termination of the Treaty of Corinto, the dispute between Honduras and Nicaragua was brought to an end through the good offices of Mexico and the United States.<sup>55</sup> One of the principal consequences of this mediation was the realization that further multilateral efforts were required to guarantee peace in the region. This led to the convening of the Central American Peace Conference in Washington, DC, in late 1907 “in order to

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<sup>51</sup> World Peace Foundation (note 48), 120 et seq.

<sup>52</sup> Extracted in World Peace Foundation (note 48), 120 et seq. Further *E. Dumbauld* (note 7), 94.

<sup>53</sup> *E. Dumbauld* (note 7), 94.

<sup>54</sup> See the letter of 11.2.1907 from US President *Theodore Roosevelt* to Nicaraguan President *José Santos Zelaya*, US Foreign Relations (note 50), 616.

<sup>55</sup> US Foreign Relations (note 50), 606 et seq.; World Peace Foundation (note 48), 123.

devise the means of preserving the good relations among [the Central American Republics] and bring about permanent peace in those Countries”.<sup>56</sup>

The delegates in Washington were influenced by the proceedings of the recently adjourned 1907 Hague Conference, and particularly by the latter’s incomplete project for the creation of a Permanent Court of Arbitral Justice.<sup>57</sup> Although a Honduran proposal to revive the failed Federal Republic of Central America created sharp division between the participants,<sup>58</sup> an alternative proposition by El Salvador for the creation of a regional judicial institution was approved, and prompted the drafting of the Convention for the Establishment of a Central American Court of Justice<sup>59</sup> as one of the nine instruments that emerged from the negotiations.<sup>60</sup> This included Article XVIII, which provided:

“From the moment in which any suit is instituted against one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties, fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *statu quo* pending a final decision.”

The report of the Nicaraguan delegates described Article XVIII as a provision intended to give the Court the necessary authority to do that which it was unable to do under the Treaty of Corinto, i.e. order the withdrawal of armed forces, the return of property and the temporary suspension of measures liable to cause grave harm.<sup>61</sup> Thus, Article XVIII does not appear to have been developed by express reference to any municipal concept of provisional measures, but rather from the immediate desire to prevent the escalation of armed conflict pending adjudication, which would have been relatively fresh in the minds of the Washington delegates. Its express reference to ensuring that “the difficulty shall not be aggravated” is therefore an entirely new *international* development, and derives not from the need to

<sup>56</sup> Central American Peace Protocol, extracted in US Foreign Relations (note 50), 644 et seq., Preamble. On the Conference generally, see the report of 20.3.1908 of *William Buchanan*, the US delegate to the Conference, US Foreign Relations (note 50), 665 et seq. Also *J. B. Scott* (note 46); *L. Anderson*, *The Peace Conference of Central America*, AJIL 2 (1908), 144 et seq.; *E. Dumbauld* (note 7), 95 et seq.

<sup>57</sup> *L. Anderson* (note 56), 146; *M. O. Hudson*, *The Central American Court of Justice*, AJIL 26 (1932), 759 et seq.; *Sb. Roseme* (note 35), 17.

<sup>58</sup> US Foreign Relations (note 50), 669 et seq.

<sup>59</sup> 20.12.1907, 206 C.T.S. 78.

<sup>60</sup> US Foreign Relations (note 50), 673 et seq.

<sup>61</sup> *E. Dumbauld* (note 7), 95 et seq.

prevent private self-help as between individuals, but rather to separate warring states.

Other relevant provisions of the Convention included Article XXIII, which required that all final or interlocutory decisions of the Court had to be rendered via a concurrence of at least three members, and Article XXIV, which provided that all decisions of the Court were to be reduced to writing and signed by all the judges. The compulsory character of interim relief under Article XVIII was rendered somewhat uncertain by Article XXV, however, as this provision only expressly mentioned the final judgments of the Court as binding.<sup>62</sup>

The ambit of Article XVIII was further modified by the terms of the Court's governing regulations, as adopted on 20.12.1907.<sup>63</sup> Article 17 (4) of the Regulations of the Central American Court provided that its ordinary jurisdiction included the power to fix measures in accordance with Article XVIII, and to modify, suspend or revoke them according to the circumstances. As such, the Court clearly considered that an express power to grant interim relief included by implication the power to amend or rescind it as required. Article 1 of its Procedural Ordinance of 6.11.1912<sup>64</sup> further subjected requests for provisional measures to the ordinary procedure of the Court.

Notwithstanding the complexity of its procedure, the Central American Court of Justice was in the final analysis a failure.<sup>65</sup> In hindsight, its jurisdiction was too wide to be effective,<sup>66</sup> including all questions and controversies arising between the parties that could not be resolved through high-level negotiation (Article I), as well as cases where a national of one state party alleged denial of justice by the government of another (Article II). In addition, the Court had jurisdiction to determine any question mutually submitted by its signatory governments, or by one of them and one of its citizens or the citizen of another (Article III). More importantly, the conference was in part driven by a US desire to establish a permanent mechanism of dispute resolution in the region, as hinted by *Elihu Root* in his opening address to the Convention.<sup>67</sup> As identified by *Scott*, the agreement was only given force by the fact that "the two great Republics to the north [...] [were] prepared by peaceful and proper means to guarantee [the] execu-

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<sup>62</sup> *Sb. Rosenne* (note 35), 18.

<sup>63</sup> AJIL Supp. 8 (1914), 179 et seq.

<sup>64</sup> AJIL Supp. 8 (1914), 194 et seq.

<sup>65</sup> Generally *M. O. Hudson* (note 57); *J. Allain*, *A Century of International Adjudication: The Rule of Law and Its Limits*, 2000, ch. 3.

<sup>66</sup> *J. Allain* (note 65), 70 et seq.

<sup>67</sup> US Foreign Relations (note 50), 697 et seq.

tion”<sup>68</sup> of the Court’s decisions. In reality, what *Scott* (an incurable optimist) meant was that the credit of the Court was only made good by the fact that its judgments were putatively backed by the hegemonic clout of the US<sup>69</sup> – when the activities of the Court, perhaps inevitably, came to conflict with the US national interest, this support was withdrawn and the Court allowed to fail, closing its doors finally in 1918.<sup>70</sup> Nonetheless, the Court does provide several early precedents for the award of provisional measures, engaging its jurisdiction under Article XVIII on several occasions. These cases may now be considered in turn.

aa) *Honduras v. El Salvador and Guatemala*

The Court’s first case followed almost immediately the conclusion of its Convention. In essence, disturbances in Honduras were seen to constitute a threat to international peace. Revolutionaries sponsored by El Salvador and Guatemala were suspected of inflaming the situation. On 8.7.1908, the Court took the remarkable step of telegraphing the disputants and suggesting that the dispute be submitted to the Court.<sup>71</sup> This was taken up, with Honduras and Nicaragua submitting the dispute to the Court on 10.7.1908.<sup>72</sup> The Court then moved on 13.7.1908 to issue interlocutory decrees fixing the *status quo* between the parties and imposing extensive rules of conduct upon them.<sup>73</sup> In the main, these measures were directed towards the cessation of military activity and the progressive drawing down of armed forces. The Court seems to have done this *proprio motu*, and in apparent defiance of the words “at the solicitation of any one of the parties” as they appeared in Article XVIII. Whatever their legitimacy, however, the orders appeared to have had the desired effect, and the revolution quickly subsided.<sup>74</sup>

<sup>68</sup> *J. B. Scott* (note 46), 143. In a later paper, *Scott* referred to the US as the Court’s “sponsor”. *J. B. Scott*, *The Closing of the Central American Court of Justice*, *AJIL* 12 (1918), 380 et seq.

<sup>69</sup> And to a far lesser extent, Mexico, which appears to have been willing to follow the US lead, *J. Allain* (note 65), 69, 77.

<sup>70</sup> *J. Allain* (note 65), 78 et seq. Also *M. O. Hudson* (note 57), 777 et seq.

<sup>71</sup> *Editorial Comment*, *The First Case before the Central American Court of Justice*, *AJIL* 2 (1908), 835 et seq.

<sup>72</sup> Interestingly, this was also the first time in international dispute settlement that documents initiating proceedings were communicated to a court or tribunal via telegram, *Editorial Comment* (note 71), 838.

<sup>73</sup> Extracted in *Editorial Comment* (note 71), 838 et seq.

<sup>74</sup> *Editorial Comment* (note 71), 841; *Editorial Comment*, *The First Decision of the Central American Court of Justice*, *AJIL* 3 (1909), 434 et seq.; *M. O. Hudson* (note 57), 769; *J. Allain* (note 65), 74. This may have been due to the fact that the US made it unofficially

In its final award,<sup>75</sup> the Court responded to a Guatemalan argument that the Honduran complaint and the request for provisional measures based upon it were inadmissible due to a failure to exhaust negotiations in the following terms:

“[T]he function assigned to this Court by article XVIII [...] of arresting [...] the course of an armed conflict by determining, from the very moment the claim is filed, the situation in which the contending governments are to remain pending the rendition of an award, presupposes the right to have recourse to the court without delay in matters of urgency, as occurred in the case under consideration, and if we accepted the [Guatemalan] view of the matter, the humanitarian and unquestionably utilitarian purpose for which this important article was inserted would be essentially frustrated, the article being reserved perhaps for emergencies of minor risk and significance or converted perhaps into a simple error of wish.

[T]his error becomes obvious, moreover, if we observe that it would often shut off the nations from the path of judicial controversy, compelling them to accept war or humiliation as the only alternative.”<sup>76</sup>

This passage provides insight as to how the Court viewed its jurisdiction under Article XVIII of the Convention. Plainly, it did not consider the admissibility of the claim<sup>77</sup> as relevant to the grant of provisional measures. This conclusion, however, was based on the Court’s origins in the Treaty of Corinto and on “humanitarian and utilitarian” concerns. Fundamentally, from the perspective of the Court the purpose of measures ordered under Article XVIII was the summary prevention or termination of armed conflict *pendente lite*. The Court may have acted differently if the issue under consideration was a non-violent request for a maritime delimitation or a complaint over transboundary environmental harm, both common bases for provisional measures in the modern era of international dispute settlement.

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known that it expected unquestioning compliance with the Court’s orders, *J. Allain* (note 65), 77.

<sup>75</sup> *Honduras v. El Salvador & Guatemala*, Award of 19.12.1908, AJIL 3 (1909), 729 et seq. Only three judges of the Court signed the award, rendering it non-compliant with Art. XXIV of the Convention – however, no protest appears to have been raised.

<sup>76</sup> *Honduras v. El Salvador & Guatemala* (note 75), 730.

<sup>77</sup> Although given the wording of Art. I of the Convention, the Guatemalan complaint would better be phrased as an attack on the Court’s jurisdiction. Later cases arguing a similar point adopted this characterization.

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bb) The *Bryan-Chamorro* Treaty Cases

The Article XVIII jurisdiction of the Central American Court would only again be activated in its final two cases.<sup>78</sup> Both concerned the so-called *Bryan-Chamorro* Treaty, under which Nicaragua purported to grant to the US in perpetuity and free from encumbrance “the exclusive proprietary rights necessary and convenient for the construction, operation, and inter-oceanic canal by way of the San Juan River”.<sup>79</sup> The central complaint of the other Central American republics was that the Treaty essentially subverted Nicaraguan sovereignty such that it became a US cat’s-paw, frustrating further attempts to unify the Isthmus.<sup>80</sup>

On 24.3.1916, Costa Rica commenced an action in the Central American Court against Nicaragua, alleging that the obligations assumed by the latter under the *Bryan-Chamorro* Treaty contradicted Costa Rica’s rights under several other international instruments.<sup>81</sup> In particular, Costa Rica alleged that the Treaty violated the 1858 Treaty of Limits<sup>82</sup> concluded between Costa Rica and Nicaragua and asked that it be annulled. Costa Rica’s rights with respect to San Juan del Norte and Salinas Bay were also said to be in jeopardy. Furthermore, on lodging its application Costa Rica invoked Article XVIII and requested interim relief providing that “with relation to a canal across Nicaraguan territory, and with relation to anything that may interfere generally with the waters of that Republic, that the *status quo* of the right that existed in Costa Rica prior to the *Bryan-Chamorro* Treaty [...] be maintained”.<sup>83</sup> On 1.5.1916, the Court accepted jurisdiction over the matter, and awarded interim relief.<sup>84</sup> Judge *Nevas*, the Nicaraguan representative on the Court, appended a dissenting opinion to the majority’s order. That

<sup>78</sup> For an overview of the balance of the Court’s docket, see *M. O. Hudson* (note 57), 768 et seq.

<sup>79</sup> Treaty concerning the Construction of an Interoceanic Canal through the Territory of the Republic of Nicaragua, 5.8.1914, 1 I.E.L.R. 554, Art. I. Further *G. A. Finch*, *The Bryan Peace Treaties*, AJIL 10 (1916), 344 et seq.

<sup>80</sup> *G. A. Finch* (note 79), 345. In reality, however, the US had functioned as *de facto* suzerain over Nicaragua since 1911 – the *Bryan-Chamorro* Treaty only formalized the terms of this arrangement, *J. Allain* (note 65), 79 et seq.

<sup>81</sup> *Costa Rica v. Nicaragua*, Award of 30.9.1916, AJIL 11 (1917), 181 et seq., 192 et seq.

<sup>82</sup> 15.4.1858, 118 C.T.S. 439. Art. 6 of the Treaty of Limits gave Costa Rica perpetual freedom of navigation along the San Juan River, whilst Art. 8 required Nicaragua to consult with Costa Rica in relation to any proposed programme of “canalization or transit”. Art. 6 would come to be re-litigated by the International Court in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Reports 2009.

<sup>83</sup> *Costa Rica v. Nicaragua* (note 81), 202.

<sup>84</sup> US Foreign Relations, 1916, 841. It held, however, that its jurisdiction could be not extended so as to restrain the US, as it was not a party to the litigation. US Foreign Relations (note 84), 202.



opinion argued that the matter should have been dismissed and provisional measures denied, noting that Costa Rica had failed to surmount the negotiation threshold contained in Article I of the Convention.<sup>85</sup> The majority had reached the opposite conclusion on this point.<sup>86</sup>

By engaging in this dialogue, Judge *Nevas* and the majority might be thought to have invoked an early form of the *prima facie* jurisdiction test that features in the modern law of provisional measures. But this was not the case. The Court's actions instead reflected the peculiar requirements of Articles 16 and 17 (1) of the Regulations of the Court, and Article 7 of its Ordinance of Procedure, which gave the Court the power to assess the requirement of negotiation at the point at which the suit was filed. The focus of the Court was therefore not on its capacity to order provisional measures<sup>87</sup> but on its jurisdiction to determine the merits – although Judge *Nevas* argued that jurisdiction over the merits was a vital precondition to interim relief.<sup>88</sup>

The Court's approach in *Costa Rica v. Nicaragua* would appear to contradict its earlier pronouncement in *Honduras v. El Salvador and Guatemala* that provisional measures represented a question precedent to and separate from jurisdiction over the merits. In accounting for this apparent shift, it may be noted that neither the Court's Regulations nor its Ordinance of Procedure had entered into force when that statement was made. Moreover, the ramifications of the Court's decision to shackle itself via the Regulations and the Ordinance were limited by the fact that the only real barrier to its jurisdiction under the Convention was the negotiation requirement, and applicants were required to provide evidence of this at the time of application.<sup>89</sup> Accordingly, an assessment of Article I could take place shortly after the dispute was first brought, and timely interim relief provided if required.

Nicaragua refused to appear before the Court or acknowledge its decision. On 22.6.1916 it exchanged ratifications of the *Bryan-Chamorro* Treaty

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<sup>85</sup> US Foreign Relations (note 84), 844 et seq.

<sup>86</sup> US Foreign Relations (note 84), 841.

<sup>87</sup> Which were in any event given a separate jurisdictional basis under Art. 17 (3) of the Regulations.

<sup>88</sup> US Foreign Relations (note 84), 845.

<sup>89</sup> Art. 63 of the Ordinance of Procedure required that “[t]he plaintiff shall present, together with the libel that initiates the action, the evidence upon which he shall base his claim”. This evidentiary requirement presumably included all elements of the claim, including proof that Art. I of the Convention was satisfied. Art. 6 of the Ordinance set out the evidentiary threshold required *vis-à-vis* Art. 17 of the Regulations and Art. I of the Convention, with Art. 10 providing that interim relief would only be considered on provision of the required proof.

with the US.<sup>90</sup> On 30.9.1916, the Court rendered judgment on the merits, further confirming its jurisdiction and largely upholding Costa Rica's claim, although it refused to annul the Treaty.<sup>91</sup> Nicaragua refused to accept the judgment.<sup>92</sup>

Running parallel to *Costa Rica v. Nicaragua* was a similar complaint filed by El Salvador on 28.8.1916. For its part,<sup>93</sup> El Salvador argued that Article II of the *Bryan-Chamorro* Treaty, which granted a concession for the purposes of establishing a US naval base, violated its rights of condominium in the Gulf of Fonseca<sup>94</sup> arising from its status as a "historic bay". It was further asserted that the Treaty violated Article II of the General Treaty of Peace and Amity<sup>95</sup> concluded alongside the Court's constitutive instrument, as well as Article II of the Constitution of Nicaragua. Pending determination of the complaint, El Salvador requested that "in conformity with the text and spirit of Article XVIII [...], the Court fix the situation in which the Government of Nicaragua must remain and that the things treated of in the *Bryan-Chamorro* Treaty be conserved *in statu quo* pending a final decision".<sup>96</sup>

On 6.9.1916, the Court admitted the claim and ordered provisional measures in the same manner as in *Costa Rica v. Nicaragua*, holding that an exchange of correspondence between the Nicaraguan and El Salvadorian Foreign Ministers was sufficient demonstration that prior settlement was impossible, establishing Article I jurisdiction. It further ordered that the *status quo* be maintained until the matter was determined.<sup>97</sup> To this, Judge *Nevas* appended a dissenting opinion, again arguing that the requirement of negotiation had not been met.<sup>98</sup> Following the filing of the pleadings and an amendment of El Salvador's position, the Court issued judgment on 9.3.1917,<sup>99</sup> affirming its jurisdiction, upholding the El Salvadorian claim,

<sup>90</sup> US Foreign Relations (note 84), 848 et seq.

<sup>91</sup> *Costa Rica v. Nicaragua* (note 81), 229. Further C. C. Hyde, *Costa Rica v. Nicaragua*, AJIL 11 (1917), 156 et seq.

<sup>92</sup> US Foreign Relations (note 84), 888.

<sup>93</sup> US Foreign Relations (note 84), 853 et seq.

<sup>94</sup> The Court's judgment in this respect was also considered by a Chamber of the International Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, ICJ Reports 1992.

<sup>95</sup> 20.12.1907, 206 C.T.S. 72.

<sup>96</sup> US Foreign Relations (note 84), 862.

<sup>97</sup> *Anales de la Corte de Justicia Centroamericana*, Vol. 5, 229 et seq.

<sup>98</sup> *Anales de la Corte de Justicia Centroamericana*, Vol. 6, 7 et seq.

<sup>99</sup> In contrast to its position in *Costa Rica v. Nicaragua*, Nicaragua appeared before the Court, although it confined its arguments to reiterating its challenge to the Court's Art. I jurisdiction, and substantially refused to address the merits. *El Salvador v. Nicaragua*, Award of 9.3.1917, AJIL 11 (1917), 674 et seq., 686.

and cementing its provisional measures as a permanent state of affairs.<sup>100</sup> Again, Nicaragua refused to acknowledge the Court's decision as legitimate<sup>101</sup> and immediately afterwards indicated its refusal to renew its 10-year mandate, precipitating the Court's closure under Article XXVII of its Convention.<sup>102</sup>

### c) Provisional Measures in the *Bryan* Treaties

A development contemporaneous to the *Bryan-Chamorro* Treaty cases was the conclusion of Treaties for the advancement of peace concluded between the US and a series of states at the instigation and direction of Secretary of State *William Jennings Bryan*.<sup>103</sup> The *Bryan* Treaties generally aimed to refer all international disputes between the US and a contracting party to a commission for investigation and report when diplomatic efforts to resolve the dispute had failed and no other method of compulsory arbitration was available.<sup>104</sup> Pending the release of the commission's report, moreover, the parties were obligated not to declare war or otherwise initiate hostilities.<sup>105</sup>

The standard form of the *Bryan* Treaties made no provision for provisional measures as ordered by a commission. Exceptionally, however, the Treaties with China,<sup>106</sup> France<sup>107</sup> and Sweden<sup>108</sup> each contained a common Article 4, which provided in part:

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<sup>100</sup> *El Salvador v. Nicaragua* (note 99), 730:

[T]he Government of Nicaragua is under an obligation – availing itself of all possible means provided by international law – to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant Republics in so far as it related to the matters considered in this section [...].

<sup>101</sup> See the letter of 24.11.1917 from the Nicaraguan Minister of Foreign Affairs, *José Andrés Urtecho*, to the other Central American governments, rearguing both *Bryan-Chamorro* Treaty cases at length. US Foreign Relations, 1917, 1104. Further *J. Allain* (note 65), 85 et seq.

<sup>102</sup> See the letter of 10.3.1917 from *Urtecho* to the Central American governments, US Foreign Relations (note 101), 30. Also *M. O. Hudson* (note 57), 781; *J. Allain* (note 65), 88 et seq.

<sup>103</sup> Generally *G. A. Finch* (note 79); *H.-J. Schlochauer*, *Bryan Treaties (1913-1914)*, in: R. Wolfrum, MPEPIL, 2007. See also the *Editorial Comments* in AJIL 7 (1913), 566 et seq., 823; AJIL 8 (1914), 565 et seq., 853. The Treaties may be found collected in *J. B. Scott*, *Treaties for the Advancement of Peace between the United States and Other Powers, 1920*. Those treaties in effect before 1917 may be found in AJIL Supp. 10 (1916), 263 et seq.

<sup>104</sup> *G. A. Finch* (note 79), 882.

<sup>105</sup> *G. A. Finch* (note 79), 883.

<sup>106</sup> 15.9.1914, AJIL Supp. 10 (1916), 268 et seq.

<sup>107</sup> 15.9.1914, AJIL Supp. 10 (1916), 278 et seq.

<sup>108</sup> 13.10.1914, AJIL Supp. 10 (1916), 304 et seq.

“In case the cause of the dispute should consist of certain acts already committed or about to be committed, the commission shall as soon as possible indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report.”

No indication appears in the preliminary materials as to why a provision on interim relief was included in these agreements specifically,<sup>109</sup> and *Finch*'s overview of the *Bryan* Treaties does not clarify the point.<sup>110</sup> *Rosenne*<sup>111</sup> argues that measures indicated under Article 4 would not have been binding due to Article 5, which provided in part that the parties “reserve full liberties as to the action to be taken on the report of the commission”. This argument is not free from difficulties, however, as Article 5 appears to contemplate the behaviour of the parties *on* or *after* the receipt of the commission's report.<sup>112</sup> No express comment is made on the expected behaviour of the parties *before* the report was so rendered, although it would be strange if provisional measures ordered by the commission were binding when the judgment was not. But, as noted by *Jessup*, the primary purpose of the *Bryan* Treaties was not the settlement of disputes *per se*, but the avoidance of war through the calculated imposition of a “cooling off” period.<sup>113</sup> This would tend to weigh in favour of Article 4 measures being considered binding.<sup>114</sup> In any event, a definitive answer is unlikely to be provided, as only one of the *Bryan* Treaties entered into force, and it did not make provision for interim relief.<sup>115</sup>

#### d) Assessing the American Experience

A variety of perspectives exists on the development of provisional measures in the Americas during the period considered. One view is that of *Dumbauld*, who described both the Treaty of Corinto and the Convention establishing the Central American Court as having established “fruitful

<sup>109</sup> *Sh. Rosenne* (note 35), 20.

<sup>110</sup> *G. A. Finch* (note 79), 888.

<sup>111</sup> *Sh. Rosenne* (note 35), 20.

<sup>112</sup> This would appear to be affirmed by the clearer wording of other *Bryan* Treaties (which admittedly did not provide for interim relief), to wit “[t]he high contracting parties reserve the right to act independently on the subject-matter of the dispute after the report of the commission shall have been submitted”, *G. A. Finch* (note 79), 889 (citing the Treaties with Bolivia, Costa Rica, the UK, Guatemala, Honduras, Italy, Paraguay, Peru, Portugal and Uruguay).

<sup>113</sup> World Peace Foundation Pamphlets Series 12, 1989, 671.

<sup>114</sup> *E. Dumbauld* (note 7), 100 et seq.

<sup>115</sup> *Re Letelier and Mofitt (Chile v. US)*, ILR 88 (1992), 727.

precedents” in the sphere of provisional measures.<sup>116</sup> The alternative view, advanced by *Guggenheim*<sup>117</sup> and *Rosenne*,<sup>118</sup> sees the putatively “non-binding” interim relief provisions of the *Bryan* Treaties as a reaction to the overreach of the Central American Court in attempting to address political disputes through legal means. *Rosenne*, notably, states that the decline of the Court was hastened by “[t]he Court’s insistence on issuing orders on provisional measures, apparently on its own initiative”.<sup>119</sup>

In addressing the overall significance of the Central American experience the better view – perhaps predictably – lies somewhere in the middle of these two positions. In the first place, it may be said that the jurisprudence on provisional measures that emerged from the Central American courts of the early 20<sup>th</sup> century did not overtly draw on municipal law, but rather the desire to forestall conflict between the various republics of the Isthmus. As such, the Central American experience produced a line of jurisprudence regarding interim relief that was distinctively international. The measures so ordered were fruitful, to be sure, but were not as influential as *Dumbauld* would suggest. The tribunals did not focus on considerations such as the preservation of particular rights prior to litigation, but solely on freezing the situation between international actors so as to prevent violent self-help and escalation of the dispute.<sup>120</sup> This resulted in a jurisprudence that was noticeably more primitive than that which emerged from earlier municipal systems and which would later emerge from the Permanent Court of International Justice: in all of the cases considered by the Central American tribunals, provisional measures were justified by very thin analyses, particularly where the parties were already engaged in conflict, as in the *Honduras v. Nicaragua* arbitration under the Treaty of Corinto and *Honduras v. El Salvador and Guatemala* before the Central American Court. The (relative) complexity of the *Bryan-Chamorro* Treaty cases may be attributed first to the fact that the parties were not hurtling towards war when the actions were brought, and second, to the later introduction of the Regulations and Ordinance of Procedure by the Court, which required that Article I jurisdiction be established prior to the grant of provisional measures.

<sup>116</sup> *E. Dumbauld* (note 7), 99.

<sup>117</sup> *P. Guggenheim*, Hague Recueil 40 (1932), 648, 670.

<sup>118</sup> *Sh. Rosenne* (note 35), 20 et seq.

<sup>119</sup> *Sh. Rosenne* (note 35), 19. This statement is curious, given that measures were only awarded *proprio motu* in *Honduras v. El Salvador and Guatemala*, with the only complaint being that they were unnecessary.

<sup>120</sup> Whilst municipal law systems saw such preservation of the *status quo* as worthy of interim relief, this objective was not focused on to the exclusion of all others, see above Chapter II.

In the second place, the *Bryan* Treaties did not emerge in opposition to the experience of the Central American tribunals as suggested by *Guggenheim* and *Rosenne*, but rather incorporated aspects of that practice into certain agreements. All of the *Bryan* Treaties – concluded prior to the controversial *Bryan-Chamorro* Treaty cases – included a direction similar to that found in Article XI of the Treaty of Corinto (i.e. that armed conflict should not occur prior to the release of the commission’s report) and certain others incorporated a common Article 4 similar to Article XVIII of the Convention establishing the Central American Court, granting the commission the capacity to order binding interim relief *proprio motu*.<sup>121</sup> The *Bryan* Treaties, in turn, would serve as inspiration to the drafters of the Statute of the Permanent Court,<sup>122</sup> grafting the experience of the Central American tribunals onto the institution that would establish the modern law of provisional measures.

### 3. Provisional Measures and Inter-War Arbitration

#### a) Inter-State Arbitration Treaties

Further development of the law of provisional measures was occasioned by the growth of arbitration as a form of dispute settlement between the European states in the inter-war period. To this end, a large number of Treaties for the pacific settlement of international disputes were concluded,<sup>123</sup> beginning with the 1921 agreement between Switzerland and Germany<sup>124</sup> establishing procedures of conciliation and arbitration. Article 18 provided:

“The Contracting Parties shall undertake during the course of the arbitration or conciliation proceedings to refrain as far as possible from any action liable to have a prejudicial effect on the execution of the award or on the acceptance of the proposals of the [conciliation commission]. They shall refrain from any act of vi-

<sup>121</sup> The continued good credit of the Central American tribunals in this respect may be seen in the Treaty to Avoid or Prevent Conflicts between the American States, 3.5.1923, 33 L.N.T.S. 36 which replicated Art. XI of the Treaty of Corinto in Art. I, and Art. XVIII of the Convention establishing the Central American Court in Art. V of its Appendix. *E. Dumbauld* (note 7), 101 et seq. This agreement was signed without reservation and ratified by the US, which would have had the power to excise both provisions had it found them offensive.

<sup>122</sup> *Sb. Rosenne* (note 35), 20.

<sup>123</sup> Generally *G. Habicht*, *Post-War Treaties for the Pacific Settlement of International Disputes*, 1931.

<sup>124</sup> Treaty of Conciliation, Arbitration and Compulsory Adjudication, 3.12.1921, 12 L.N.T.S. 277.

olent self-help in connection with the conciliation proceedings until the expiration of the time limit fixed by the [conciliation commission] for the acceptance of its proposals.

At the request of one of the Parties, the Tribunal may order provisional measures to be taken in so far as the Parties are in a position to secure their execution, through administrative channels; the [conciliation commission] may also formulate proposals to this effect.”<sup>125</sup>

Article 18 would become something of a feature in subsequent German Treaties, and also in other agreements of this kind.<sup>126</sup> Its debt to the Central American experience is relatively clear, although it has a slightly different emphasis, expressly seeking to preserve the execution of the award, rather than preventing further deterioration in the *status quo*. Its language is also somewhat weaker, only requiring that the *status quo* be preserved “as far as possible”, and seemingly limiting interim relief to that which the parties could undertake “through administrative channels”.

A further iteration of the formula expressed in Article 18 appears in the Locarno Treaties concluded between Germany and several other European powers in 1925.<sup>127</sup> Article 19, common to each of these agreements, demonstrates the influence of the League of Nations and the Permanent Court on the system of international dispute settlement, giving each the capacity to intervene in the dispute so as to order provisional measures. The spirit of this provision was in turn adopted in Article 33 of the 1928 General Act for the Pacific Settlement of International Disputes,<sup>128</sup> although this omits reference to action taken by the League.

These provisions indicate that interim relief was considered very much to be a part of the inter-war landscape of dispute settlement as a continuation of the Central American experience mediated through the *Bryan* Treaties, the League Covenant and the Statute of the Permanent Court. However, as they were not relied upon in practice and did little to illuminate the requirements of interim relief in either a procedural or substantive sense they possessed little influence on the development of the law of provisional

<sup>125</sup> The difference in language seen in the final clause of Art. 18 indicates that provisional measures “proposed” by the conciliation commission were not binding, as opposed to measures “ordered” by an arbitral tribunal. *E. Dumbauld* (note 7), 126.

<sup>126</sup> See e.g. the Germany-Sweden Agreement, 29.8.1924, 42 L.N.T.S. 125, Art. 23; the Finland-Germany Agreement, 14.3.1925, 43 L.N.T.S. 367, Art. 20; the Estonia-Germany Agreement, 10.8.1925, 62 L.N.T.S. 124, Art. 20. Further *E. Dumbauld* (note 7), 127 et seq.

<sup>127</sup> See the Belgium-Germany Agreement, 16.10.1925, 54 L.N.T.S. 305; the Czechoslovakia-Germany Agreement, 16.10.1925, 54 L.N.T.S. 343; the France-Germany Treaty, 16.10.1925, 54 L.N.T.S. 317; and the Germany-Poland Agreement, 16.10.1925, 54 L.N.T.S. 329. Further *J. Lindley-French*, *Locarno Treaties*, in: R. Wolfrum (note 103), § E.

<sup>128</sup> 26.9.1928, 93 L.N.T.S. 344.

measures by the Permanent Court. At this stage, what was required for the evolution of the law was not further Treaties, but judicial elaboration of underlying concepts.

## b) The Mixed Arbitral Tribunals

Such judicial elaboration – at least at an early stage – would come through the advent of the mixed arbitral tribunals. These were constituted pursuant to the Treaty of Versailles<sup>129</sup> to settle claims between states and natural persons arising out of the First World War. Unlike the *Bryan* Treaties or the inter-state agreements presented above, these tribunals were convened in order to fulfil a pre-existing need and “presented an example of compulsory arbitration not as a Utopian wish but as a practical necessity”.<sup>130</sup> It was part of this sense of practical necessity that the mixed tribunals advanced considerably the notion of interim relief in international dispute settlement.

Article 304 (a) of the Treaty of Versailles provided that “a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Germany on the other hand”. Under Article 304 (b), the jurisdiction of such tribunals was to include “all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and German nationals shall be decided by the Mixed Arbitral Tribunal, always excepting questions which, under the laws of the Allied, Associated or Neutral Powers, are within the jurisdiction of the National Courts of those Powers”, thereby establishing the tribunals as a forum for the hearing of investor-state disputes in a similar manner to other post-conflict claims commissions, preceding modern institutions such as the US-Iran Claims Tribunal and the International Centre for the Settlement of Investment Disputes. The Treaty gave the tribunals so composed considerable latitude in the formulation of their procedural rules, providing in Article 304 (d) that each tribunal was competent to settle its own procedure, subject to the caveat that any rules so adopted were “in accordance with justice and equity”, per § 2 of the Annex to Section VI. Similar provisions were con-

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<sup>129</sup> 28.6.1919, 225 C.T.S. 188.

<sup>130</sup> *E. Dumbauld* (note 7), 130.



tained in the Treaty of Saint-Germain-en-Laye<sup>131</sup> with respect to Austria, and the Treaty of Trianon<sup>132</sup> with respect to Hungary.<sup>133</sup>

Many of the procedural codes so adopted made reference to provisional measures and, moreover, drew on municipal precedents as part of the drafting process. The Franco-German tribunal, for example, based its procedure on the 1911 Code de procédure civile of the Swiss canton of Vaud, no doubt due to the influence of its President, *André Mercier*.<sup>134</sup> The resulting debt to the civilian concept of provisional measures – and particularly as they evolved in Switzerland – may be seen in the regulations.<sup>135</sup> The Franco-German Rules provided in Article 31 that:

“At the request of a party or its agent, the tribunal may, in addition to measures already envisaged by the Treaty, order any precautionary or provisional measures which it considers fair and necessary to protect the rights of the parties.”

Articles 32-36 of the Rules provided a procedural rigor to this basic power which was not seen in earlier international jurisprudence. Provisional measures could be requested prior to the filing of an application, provided that the application was subsequently introduced in the shortest time possible. The respondent was ideally to be heard, and if not, could ask the tribunal to reconsider its decision. Any grant of provisional measures was without prejudice to the merits. Third parties affected by provisional measures had the opportunity to present a petition to the tribunal. The applicant could be required to provide a bond or make a deposit to guarantee any damages resulting from measures ordered. Measures shared the same binding force as a decision of the tribunal.

The Franco-German Rules proved a popular starting point for the other tribunals, and were repeated with only slight variation by, *inter alia*, the Franco-Austrian,<sup>136</sup> Greco-German,<sup>137</sup> German-Thai,<sup>138</sup> German-Czech<sup>139</sup>

<sup>131</sup> 10.9.1919, 226 C.T.S. 8, Art. 258.

<sup>132</sup> 4.6.1920, 6 L.N.T.S. 188, Art. 239.

<sup>133</sup> See also the Treaty of Neuilly-sur-Seine, 27.11.1919, 226 C.T.S. 332, Art. 188 (Bulgaria); Treaty of Lausanne, 24.7.1923, 128 L.N.T.S. 11, Art. 95 (Turkey).

<sup>134</sup> Similarly, *Giuseppe Ciovenda* took account of both Swiss and Austrian law in drafting the procedure of the German-Italian tribunal. The Anglo-German Rules – which made no mention of provisional measures – were derived from a comparison of the civil procedure of the eponymous states. *E. Rabel*, *Rechtsvergleichung und internationale Rechtsprechung*, *RabelsZ* 1 (1927), 5 et seq., 13.

<sup>135</sup> 2.4.1920, 1 TAM 44.

<sup>136</sup> 9.5.1921, 1 TAM 242, Part XII.

<sup>137</sup> 16.8.1920, 1 TAM 61, Part XII.

<sup>138</sup> 22.12.1920, 1 TAM 182, Part XII.

<sup>139</sup> 9.11.1921, 1 TAM 948, Part IX.

and German-Italian<sup>140</sup> tribunals. Other rules, such as those of the Anglo-German<sup>141</sup> and Japanese-German<sup>142</sup> tribunals, made no reference to provisional measures whatsoever. This did not pose a significant difficulty, however, with the Anglo-German Tribunal quick to confirm that it possessed an implied jurisdiction to offer interim relief on the basis that the jurisdiction of the Tribunal extended to such further provisions as related directly, and gave rise to questions related directly, to the provisions expressly establishing the jurisdiction of the Tribunal.<sup>143</sup>

Further elaboration was provided by the decisions of the tribunals themselves.<sup>144</sup> Although the cases largely concern sequestration,<sup>145</sup> a number of points of more general interest present themselves – especially insofar as the tribunals awarded or declined relief on the basis of necessity. In *Electric Tramway Company of Sofia v. Bulgaria and Municipality of Sofia*, the claimant was not concerned about administration of the contested assets, and was interested only in restitution to the extent that it could not obtain damages. As a consequence, the Tribunal held that interim relief could not be obtained.<sup>146</sup> Similarly, in *Central Agricultural Union of Poland v. Poland*, the claimant was uninterested in the return of its land, prompting the Tribunal to remark:

“The tribunal has for now noted that the claimant, leaving out any claim for restitution, is only asking for money and the tribunal has drawn conclusions from this [...] Noting that the claimant is not interested in the management of the enterprise and the only utility which will attend sequestration is to ensure the

<sup>140</sup> 20.12.1921, 1 TAM 796, Arts. 70-80. These add that the measure must consist in sequestration of administration or custody of the disputed property.

<sup>141</sup> 4.9.1920, 1 TAM 109. A lack of a specific provision regarding interim relief appears to have been a feature of the English rules in general: but cf. the Anglo-Austrian Rules, 16.8.1921, 1 TAM 622; the Anglo-Bulgarian Rules, 16.8.1921, 1 TAM 639; and the Anglo-Hungarian Rules, 18.8.1921, 1 TAM 655, which made provision for measures of protection and sequestration to be ordered as part of the procedure on preliminary hearings (common Arts. 60-62).

<sup>142</sup> 12.11.1920, 1 TAM 124. See also the Japanese-Austrian Rules, 1.12.1921, 1 TAM 821.

<sup>143</sup> *Gramophone Co. Ltd. v. Deutsche Grammophon Aktiengesellschaft and Polyphonwerke Aktiengesellschaft*, (1922), 1 TAM 857, 859.

<sup>144</sup> For an overview of the relevant decisions, see *E. Dumbauld* (note 7), 129 et seq.; *J. Sztucki*, *Interim Measures in the Hague Court: An Attempt at Scrutiny*, 1983, 20.

<sup>145</sup> See e.g. *Hallyn v. Basch*, (1920), 1 TAM 10, (Franco-German); *Re Monplanet and Thelier*, (1920), 1 TAM 12, (Franco-German); *Re Majo and Brother*, (1922), 1 TAM 937, (Franco-Bulgarian); *Société Tissages de Proisy v. Farby*, (1922), 2 TAM 338, (Franco-Bulgarian); *Electricity Company of Sofia and Bulgaria v. Municipality of Sofia and Bulgaria*, (1923), 3 TAM 593, (Belgian-Bulgarian).

<sup>146</sup> (1923), 2 TAM 928, 929 (Belgian-Bulgarian).

payment of the partial indemnity [claimed], [t]his use of sequestration is not necessary under Article 45 [of the relevant Rules].”<sup>147</sup>

Another question of interest advanced by the mixed arbitral tribunals concerned the relationship between provisional measures and jurisdiction over the merits. In *Tiedemann v. Poland*, the claimant alleged that as he had acquired Polish nationality, he was protected from liquidation under Polish land expropriation laws under Article 297 (b) of the Treaty of Versailles. A further basis of jurisdiction for the Tribunal was Article 305, which permitted it to award reparation where a competent tribunal issued a decision not in conformity with the terms of the treaty – here, the tribunal in question was the Polish expropriations board.

The claimant requested interim measures from the German-Polish Tribunal to suspend the liquidation, forbid further disposal of the property and determine its value. In response to the respondent’s argument that the Tribunal lacked jurisdiction, he asserted that the test at this stage of the proceedings was not whether the Tribunal possessed jurisdiction *per se*, but rather whether it was manifestly incompetent to decide the merits.<sup>148</sup> The Tribunal noted that at least *some* inquiry as to jurisdiction was necessary when awarding provisional measures, as the relief ordered had to bear some resemblance to that which would be available as a primary remedy. Thus, if the tribunal was empowered only to award damages for the value of the land as opposed to full restoration, it would be far less likely to award provisional measures.<sup>149</sup> When assessing its jurisdiction in relation to provisional measures, the Tribunal rejected its competence under Article 297 (b), but indicated that scope for interim relief existed under Article 305, on the basis that the Tribunal’s jurisdiction under that provision was not manifestly lacking, agreeing in effect with the claimant.<sup>150</sup> However, it was not minded to order provisional measures, on the basis that Article 305 only permitted the parties to be placed in the position they occupied prior to the offending decision where the judgment was rendered by a German court – if the court was of some other nationality, the claimant was only entitled to “redress”.<sup>151</sup>

<sup>147</sup> (1925), 6 TAM 329, 330 (German-Polish).

<sup>148</sup> (1923), 3 TAM 596, 599 et seq.

<sup>149</sup> *Tiedemann v. Poland* (note 148), 599 et seq.

<sup>150</sup> *Tiedemann v. Poland* (note 148), 607.

<sup>151</sup> *Tiedemann v. Poland* (note 148), 608. The Tribunal was to adopt a contrary interpretation in a later ruling on the same case, (1924), 9 TAM 321, 322 et seq. Later still the Tribunal determined that it possessed no jurisdiction over claims against Poland by Polish nationals, *Kunkel v. Poland*, ILR 3 (1925), 263. This caused it to issue a further decision dismissing *Tiedemann v. Poland* for lack of jurisdiction, and holding that its previous holding as to juris-

## IV. The Permanent Court of International Justice

### 1. The Statute of the Permanent Court

In 1919, the participants emerged from the First World War convinced that future peace and international security could only be guaranteed by an international organization backed by a system of laws which could reliably be the subject of adjudication. The early proponents of the League of Nations thus realized that if the League were to be effective, an affiliated judicial institution was essential.<sup>152</sup> It was this impetus that led to the creation of the Permanent Court of International Justice and, through it, the modern understanding of the law of provisional measures, as set out in Article 41 of its Statute and elaborated in its procedural rules and jurisprudence.

#### a) The Advisory Committee of Jurists

On 13.2.1920, the Council of the League established, pursuant to Article 14 of its Covenant, the Advisory Committee of Jurists to prepare plans for the formation of the Permanent Court and report back to the Council.<sup>153</sup> The Committee took as its basic working text on procedural matters a proposal assembled by five neutral states.<sup>154</sup> An additional memorandum prepared by the League's Secretariat further requested that the Committee consider whether the Court would be competent "to decree, as regards the

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diction was erroneous and not binding upon it, ILR 3 (1926), 402. For some thoughts as to the jurisdiction of the mixed arbitral tribunals in general, see *P. de Auer*, The Competence of the Mixed Arbitral Tribunals, Transactions of the Grotius Society 13 (1927), xvii et seq.

<sup>152</sup> *M. O. Hudson*, The Permanent Court of International Justice 1920-1942, 1943, 93; *Sb. Rosenne* (note 35), 21. As it happened, this turned out to be a necessary but not sufficient condition for success.

<sup>153</sup> *M. O. Hudson* (note 152), 114 et seq.; *J. B. Elkind*, Interim Protection: A Functional Approach, 1981, 43 et seq.; *Sb. Rosenne* (note 35), 22 et seq. The proceedings of the Committee were published shortly after the conclusion of its work: Procès-Verbaux of the Proceedings of the Committee, 1920 (Procès-Verbaux). A collection of documents presented to the Committee was also published: Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice, 1920 (Documents). Both are available at <<http://www.icj-cij.org>>. For a reassessment of the Committee and its work, see *O. Spiermann*, "Who Attempts too Much Does Nothing Well": The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice, BYIL 73 (2002), 187 et seq.

<sup>154</sup> Denmark, Norway, Sweden, the Netherlands and Switzerland. All members of the Committee were required to respond to the text individually: Procès-Verbaux (note 153), 342 et seq.

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subject-matter of the dispute, the fixation of the *status quo* pending its decision”, and further referred the Committee to, *inter alia*, Article XVIII of the Convention establishing the Central American Court of Justice.<sup>155</sup> Another influence that was not mentioned in the memorandum but mentioned by the Committee *ex post facto* was Article 4 of the *Bryan* Treaties with China, France and Sweden.

The Committee’s Draft Statute of 19.7.1920<sup>156</sup> set out a proposal for awarding interim relief in Article 2*bis*. This arose from a suggestion by the Brazilian member of the Committee, *Raoul Fernandes*, that intended to replicate the procedural effect of the Roman Law *interdict*<sup>157</sup> as reflected in the *Bryan* Treaties. The proposal was adopted in principle during debate, although a separate suggestion by *Fernandes* that interim relief “be supported by effective penalties” was rejected as “unwise”.<sup>158</sup> Article 2*bis* emerged from the Drafting Committee as follows:

“If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that the circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.”<sup>159</sup>

Following further discussion and additional minor amendments, the provision was included in the Committee’s Draft Statute of 22.7.1920 as Article 39.<sup>160</sup>

In its report to the Council, the Committee appended a lengthy commentary to Article 39, noting that the Committee was indebted to the *Bryan* Treaties. It further noted that it did not consider provisional measures ordered under Article 39 to be binding on the parties and further asserted – in the present author’s view erroneously – that the *Bryan* Treaties shared this characteristic.<sup>161</sup> A further connexion was made with the work of the

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<sup>155</sup> The Committee was also referred to Art. 12 of the 1918 Draft Convention prepared under the Phillimore Plan, and Art. 34 of an alternative German proposal: Documents (note 153), 127.

<sup>156</sup> Procès-Verbaux (note 153), 524.

<sup>157</sup> Procès-Verbaux (note 153), 608 et seq.:

“In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may, provisionally and with the least possible delay, order adequate provisional measures be taken, pending the final judgment of the Court.”

<sup>158</sup> Procès-Verbaux (note 153), 637.

<sup>159</sup> Procès-Verbaux (note 153), 567 et seq.

<sup>160</sup> Procès-Verbaux (note 153), 681.

<sup>161</sup> Procès-Verbaux (note 153), 735 et seq.:

“There is no question here of a definite order, even of a temporary nature, which must be carried out at once. Great care must be exercised in any matter entailing the limitation of sov-

League's Advisory and Technical Committee for Communications and Transit,<sup>162</sup> which the Committee had felt demonstrated commendable prudence, albeit in an institutional as opposed to a judicial capacity.<sup>163</sup>

## b) Adoption of the Statute

From the Committee, the Draft Statute was presented to the first Assembly of the League in 1920, which in turn passed the document to its Third Committee for consideration. Before a further Sub-Committee of the latter,<sup>164</sup> the substance of the provision remained intact, although the word "indicate" was substituted for "suggest" in the English text and the introductory phrasing removed so that all possible cases would be covered, i.e. to include omissions infringing international rights as well as acts.<sup>165</sup> Similarly, in the passage "measures which should be taken", "should" was replaced by "ought to". Several other minor amendments were also made. The provision adopted as Article 41 of the Statute on 13.12.1920 reads as follows:

"The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council."

This reproduction of Article 41 is not entirely a happy one. In the first place, the printer's error "reserve" has been introduced in place of "pre-serve".<sup>166</sup> In the second, the French and English versions of the text are "not in total harmony",<sup>167</sup> an error that was carried over to the Statute of the In-

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foreign powers. It is sufficiently difficult to ensure compliance with a definite decision; it would be much more difficult to ensure the putting into effect of a purely temporary decision. [...] [T]he Bryan treaties, from which the idea of giving such a power to the Court is borrowed, were also very prudent in their expressions, and only gave the Court the right of suggesting the measures to be taken provisionally, pending the report of the international commission of inquiry, entrusted with the task of reporting on the dispute."

<sup>162</sup> Procès-Verbaux (note 153), 735.

<sup>163</sup> On provisional measures in the practice of the League, see *E. Dumbauld* (note 7), 103 et seq.

<sup>164</sup> *Huber* was one of the members of the Sub-Committee. On its proceedings, see *M. O. Hudson* (note 152), 198 et seq.; *Sb. Rosenne* (note 35), 26 et seq. See also the discussion in *LaGrand (Germany v. US)*, ICJ Reports 2001, 501.

<sup>165</sup> This was earlier proposed by *Ricci-Busatti* of Italy in the Advisory Committee of Jurists and rejected: Procès-Verbaux (note 153), 619. The Locarno Treaties achieved the same objective through the addition of words, *E. Dumbauld* (note 7), 129. See also the German request for interim relief in *Factory at Chorzów (Indemnities)* (note 5), 6 et seq.

<sup>166</sup> *M. O. Hudson* (note 152), 199.

<sup>167</sup> *LaGrand* (note 164), 502. See also *Arbitral Award of 31 July (Guinea-Bissau v. Senegal)*, Order of 2.3.1990, ICJ Reports 1990, 78 (Judge *ad hoc* *Thierry*).

ternational Court of Justice and creates confusion as to whether measures ordered under Article 41 are to be considered binding – although the contemporary view was that they were not.<sup>168</sup> This provision is not the only instance of disagreement between the two equally authentic versions of the Statute, but whilst some attempt was made in 1945 by the Washington Committee of Jurists and the San Francisco Conference to resolve the various discrepancies, Article 41 remained untouched.<sup>169</sup>

When the Statute of the Permanent Court was appended to its Protocol of Signature,<sup>170</sup> it reflected a model of provisional measures referable to the prototypical experiences of the *Bryan* Treaties and the Central American Court before it. Those prototypes – notwithstanding *Fernandes*' references in the Committee to the *interdict* – owed their existence to a single objective: to preserve the *status quo* between the parties and prevent inter-state disputes from descending into armed conflict. Unlike municipal concepts of interim relief developed in the common and civil law, neither Article 41 nor the jurisprudence on which it was based gave any guidance of how provisional measures were to be ordered in practice. Article 41 was thus unfit for purpose when dealing with more complex questions of interim relief. Moreover, it had been drafted on the understanding that the Permanent Court would enjoy compulsory jurisdiction *vis-à-vis* the parties, an aspiration that was abandoned in favour of a requirement of consent *ad litem* when the Committee's Draft was submitted to the Assembly for approval.<sup>171</sup> From its earliest cases on provisional measures, therefore, the Permanent Court elaborated upon the bare words of Article 41 through its jurisprudence.

In 1929, the amendment of the Statute was discussed by the reconvened Committee. It was decided, however, that Article 41 remains as it was, due principally to the fact that a large number of treaties had incorporated interim measures by the Court into their procedures.<sup>172</sup> As such, the Committee was loath to risk affecting these agreements through the amendment of the provision.<sup>173</sup>

<sup>168</sup> See e.g. the views of the Court's Registrar *Å. Hammarskjöld*, *Quelques aspects de la question des mesures conservatoires en droit international positif*, ZaöRV 5 (1935), 5 et seq. Further *Sh. Rosenne* (note 35), 27 et seq.

<sup>169</sup> *Sh. Rosenne* (note 35), 27.

<sup>170</sup> 16.12.1920, 6 L.N.T.S. 379.

<sup>171</sup> *Sh. Rosenne* (note 35), 27.

<sup>172</sup> For an overview of these agreements, see *J. Sztucki* (note 144), 4.

<sup>173</sup> Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes, 1929, 63 et seq.

## 2. The Procedural Rules of the Permanent Court

### a) The 1922 Rules

The first interaction between the Court and Article 41 came with the adoption of its first set of procedural rules in 1922.<sup>174</sup> Article 57 of the 1922 Rules of Court, entitled “Interim Protection” gave little guidance as to how Article 41 was to operate, providing only that “[w]hen the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President”, and further noting that “[a]ny refusal by the parties to conform to the suggestions of the Court or of the President, with regard to such measures, shall be placed on record”.

The *procès-verbaux* of the meetings to draft the 1922 Rules reveal a great deal about how the Court itself viewed Article 41 – though this is by no means clear from the final product. The original Draft Rules prepared by the League Secretariat for the Court’s consideration contemplated the further articulation of Article 41, including a provision apparently based on the procedure of the mixed arbitral tribunals.<sup>175</sup> However, this was discarded by the Court’s Committee of Procedure on the basis that because provisional measures were non-binding, there was no need for special procedures regulating their issue, beyond noting that a failure to abide by the Court’s directive could lead to an award of damages.<sup>176</sup> The draft article prepared by the Secretariat was therefore substituted for the provision that became Article 57 of the final orders, and remained uncontroversial for the remainder of the Court’s deliberations.<sup>177</sup>

<sup>174</sup> Rules of Court, 24.3.1922, PCIJ Ser. D, No. 1 (1<sup>st</sup> ed. 1922).

<sup>175</sup> Preparation of the Rules of Court, 30.1.1922, PCIJ Ser. D, No. 2 (1922), Annex 1 (c), Art. 35. The provision in question functioned as a stripped down version of the usual formulation, and so resembled the Austrian-Belgian Rules, 19.10.1920, 1 TAM 171, Art. 45. Under the proposed Art. 35, provisional measures could be requested by either party or ordered *proprio motu*, the party against whom the measures were ordered was entitled to a hearing, and third parties damaged by the order could request reconsideration of the issue.

<sup>176</sup> Preparation of the Rules of Court (note 175), Annex 21 (b), Art. 35. Also: Preparation of the Rules of Court (note 175), 77 (*Finlay and Nyholm*).

<sup>177</sup> Preparation of the Rules of Court (note 175), 617.



## b) The 1931 Rules

Article 57 was untouched by the amendment of the Rules in 1926.<sup>178</sup> However, a comprehensive overhaul of the Court's procedure in 1931, as prompted by the 1929 recommendations of the Advisory Committee of Jurists, saw the Article significantly modified both in substance and procedure. Article 57 in the 1931 Rules was modified to read:

“An application made to the Court by one or both of the Parties, for the indication of interim measures of protection, shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency, and if the Court is not sitting it shall be convened without delay by the President for the purpose.

If no application is made, and if the Court is not sitting, the President may convene the Court to submit to it the question whether such measures are expedient.

In all cases, the Court shall only indicate measures of protection after giving the parties an opportunity of presenting their observations on the subject.”<sup>179</sup>

The *procès-verbaux* of this series of meetings provide further clues as to the Court's perception of Article 41 of its Statute.<sup>180</sup> Its deliberations were based on a new draft of Article 57 by Judge *Fromageot*,<sup>181</sup> who identified two live issues in the Court's practice and procedure: first, the role of the President in the award of provisional measures when the Court was not sitting; and second, the question of whether the Court could award interim relief *proprio motu*.<sup>182</sup>

With respect to the first issue, it was pointed out that the 1922 formulation of Article 57 placed a heavy burden on the President – one that might have political consequences.<sup>183</sup> Concerns were further raised that the provision as worded might be inconsistent with Article 41 of the Statute, which permitted interim relief by the Court alone.<sup>184</sup> Thus, the provision was changed so as to permit the urgent convening of the Court with a view to obtaining a decision *en banc*.<sup>185</sup>

With respect to the second issue, the point was made that Article 41 of the Statute did not expressly require that provisional measures be ordered

<sup>178</sup> Amended Rules of Court, 31.7.1926, PCIJ Ser. D, No. 1 (rev. 1<sup>st</sup> ed., 1926).

<sup>179</sup> Rules of Court, 21.2.1931, PCIJ Ser. D, No. 1 (2<sup>nd</sup> ed., 1931).

<sup>180</sup> Summarized by *J. B. Elkind* (note 153), 59 et seq.

<sup>181</sup> Modification of the Rules, PCIJ Ser. D, No. 2 (1931), Add 2, Annex 35.

<sup>182</sup> Modification of the Rules (note 181), 181 et seq.

<sup>183</sup> Modification of the Rules (note 181), 182 (*Anzilotti*).

<sup>184</sup> Modification of the Rules (note 181), 184 et seq. (*Rolin-Jaequemyns*), 185 (*Rostworowski*), 186 (*Fromageot*).

<sup>185</sup> Modification of the Rules (note 181), 188 et seq.

only on application by the parties.<sup>186</sup> What the Court feared, however, was a crisis of legitimacy.<sup>187</sup> The decision was made, therefore, to omit any reference to measures *proprio motu* in Article 57 (leaving the point ambiguous), and instead introduce a requirement that the parties be heard.

Two further items of interest also emerge from the *procès-verbaux*. First, the Court appears to have considered it uncontroversial that measures ordered under Article 41 of the Statute were not binding.<sup>188</sup> Vice-President *Guerrero* noted, however, that thanks to the League of Nations, “the notion of sovereignty had been substantially abridged since the days of the *Bryan Treaties*”,<sup>189</sup> rendering it regrettable that the Court’s capacity to order interim relief was effectively frozen in a pre-League model. Judge *van Eysinga* expressed similar regrets in light of the role played by effective provisional measures in the maintenance of peace,<sup>190</sup> a point with which Judge *Schücking* concurred, drawing an analogy with the *Reichskammergericht* of the Holy Roman Empire, a tribunal which was notorious for the glacial pace of its proceedings but which through its interim measures “staved off many a crisis, by depriving disputes of their acuteness”.<sup>191</sup> It is not without irony that the Court considered provisional measures ordered under the *Bryan Treaties* to be non-binding, despite sharing the same attribute by design. Nonetheless, the Court clearly considered that its options were limited, and so set about enhancing the moral obligation for states to comply with measures ordered through the urgent convening of the entire Court where required,<sup>192</sup> and the provision of a hearing to both parties.<sup>193</sup> Some comfort was afforded by the League Council’s competence to enforce provisional measures if necessary.

Finally, the Court gave some insight into its views of the utility of municipal law analogies in the award of provisional measures. Judge *Schücking* noted that the *proprio motu* question could be resolved by analogy with German civil procedure. If the parties were considered to be conducting the action through the Court, then provisional measures could not be awarded *sua sponte*. If, however, the Court was seen as actively involved in the resolution of the dispute – the German procedure of *Offizialverfahren* – then this presumably included the power to award provisional measures of its

<sup>186</sup> Modification of the Rules (note 181), 186 (*Fromageot*), 186 et seq. (*Negulesco*).

<sup>187</sup> Modification of the Rules (note 181), 186 (*Hurst*).

<sup>188</sup> Modification of the Rules (note 181), 183 (*Hammarskjöld*, Registrar), 183 (*Fromageot*), 183 (*Schücking*).

<sup>189</sup> Modification of the Rules (note 181), 184.

<sup>190</sup> Modification of the Rules (note 181), 184.

<sup>191</sup> Modification of the Rules (note 181), 185.

<sup>192</sup> Modification of the Rules (note 181), 183 (*Hurst*).

<sup>193</sup> Modification of the Rules (note 181), 184 (*Guerrero*).

own volition.<sup>194</sup> Domestic analogies were again raised by Judge *Negulesco* when considering the overall purpose of provisional measures: some systems, he said, regarded interim relief as preserving rights prior to adjudication, whilst others sought to protect or re-establish the *status quo*.<sup>195</sup> In response to this, Judge *Schücking* drew a further analogy with the German system, which as described above provided for both the former (*Arrest*) and latter (*einstweilige Verfügung*) functions considered by Judge *Negulesco*, noting that measures of protection as described in Article 41 appeared to fall into the latter category.<sup>196</sup> Judge *Anzilotti* forestalled the discussion, however, noting that “[t]he position and interests of Parties which were States were very different from those of an ordinary debtor and creditor” and that “to attempt to define the conception of measures of protection in international proceedings would be more likely to complicate the question than to solve it”.<sup>197</sup> It was left to the jurisprudence of the Court to provide criteria for the predictable and regular issue of provisional measures.

### c) The 1936 Rules

Prior to the practical cessation of its activities in 1939, the Court engaged in a further revision of its Rules in 1936,<sup>198</sup> aiming to address the balance of the comments made by the Committee of Jurists in 1929. The deliberations of the Court<sup>199</sup> resulted in an Article with greater articulation than the 1922 and 1931 Rules, with the overt purpose of the revision being to codify the Court’s practice.<sup>200</sup> The provision, re-numbered as Article 61, provided:

“1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates and the interim measures of which the indication is proposed.

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<sup>194</sup> Modification of the Rules (note 181), 185 et seq.

<sup>195</sup> Modification of the Rules (note 181), 192.

<sup>196</sup> Modification of the Rules (note 181), 193.

<sup>197</sup> Modification of the Rules (note 181), 194.

<sup>198</sup> Rules of Court, 11.3.1936, PCIJ Ser. D, No. 1 (3<sup>rd</sup> ed. 1936).

<sup>199</sup> Summarized by *M. O. Hudson* (note 152), 290 et seq.; *J. B. Elkind* (note 153), 69 et seq.

<sup>200</sup> Elaboration of the Rules, PCIJ Ser. D, No. 2 (1936), Add. 3, 5. As part of this process, the Court was divided into Commissions to consider certain issues. The Third Commission was charged with the consideration of Art. 57, with its work then inserted into a unified draft prepared by a central Coordination Commission. The Court as a whole then considered the Coordination Commission’s draft.

2. A request for the indication of provisional measures shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

3. If the Court is not sitting, the members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision.

4. The Court may indicate interim measures of protection other than those proposed in the request.

5. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts.

6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene its members in order to submit to the Court the question whether it is expedient to indicate such measures.

7. The Court may at any time by reason of a change in the situation revoke or modify its decision indicating interim measures of protection.

8. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies a decision indicating interim measures of protection.

9. When the President has occasion to convene the members of the Court, [judges *ad hoc*] shall be convened if their presence can be assured by the date fixed by the President for hearing of the parties.”

The content of Article 61 is by now uncontroversial, despite the appearance during the Court’s deliberations of a strongly argued counter-proposal by Count *Rostworowski*.<sup>201</sup> This criticized the 1922 and 1931 Rules on the basis that the first gave the President acting alone the power to order provisional measures whilst the second required the entire Court to be convened without any consideration to exigencies of law or fact speaking to the likely success of the application, potentially giving rise to frivolous or vexatious requests. Other members of the Court, however, were concerned that requiring the Court to be empanelled prior to the indication of measures might prejudice an application and lead to further damage to the *status quo*.<sup>202</sup> On voting, the Court refused to reintroduce the power of the President to order provisional measures,<sup>203</sup> but brokered a compromise position

<sup>201</sup> Elaboration of the Rules (note 200), Appendix 6.

<sup>202</sup> Elaboration of the Rules (note 200), 285 (*Schücking*), 287 et seq., (*Fromageot*), 288 (*Anzilotti*), 288 (*Rolin-Jaequemyns*).

<sup>203</sup> *Huber* as President held the casting vote, and was in favour of the proposal personally. As his casting vote was the tie-breaker though, he refused to use it to alter the *status quo*. Elaboration of the Rules (note 200), 288.

whereby the President could order temporary interim relief until such time as the Court could be empaneled – such relief, however, could not be awarded *proprio motu*.<sup>204</sup>

Count *Rostworowski* further argued that the Court be generally prevented from ordering measures *proprio motu*, concerned that it might raise the implication that measures could be indicated without a case being brought.<sup>205</sup> The other members of the Court, however, took note of the fact that such a power was not outside the confines of Article 41 of the Statute, and voted to introduce what became Article 61 (6), providing expressly for the awarding of measures on the initiative of the Court alone.<sup>206</sup> In this, the Court went well beyond its previous practice, as reflected in the debates over Article 57 in the 1931 Rules and in the final provision itself.

### 3. The Jurisprudence of the Permanent Court

Notwithstanding the articulation of the law of provisional measures seen in Article 61 of the Permanent Court's 1936 Rules and the considered debate that this provision and its predecessors occasioned between its members, it is to be remembered that both phenomena were driven by the experience derived from the cases brought before the Court. This reasoning can in part be seen in Judge *Urrutia's* reservations when considering the issue of *proprio motu* orders in the context of the 1931 Rules, *viz.* that “the question whether the Court could [so] act [...] appeared to him so grave that it would be a mistake to regulate it in advance by a general rule; it would be wiser to leave it for decision when a case actually arose”.<sup>207</sup> The Court's approach – as reflected in the steadily increasing complexity of its procedure – was to develop the law when required to do so, and then to codify any advancements made.

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<sup>204</sup> Elaboration of the Rules (note 200), 291.

<sup>205</sup> Elaboration of the Rules (note 200), 912.

<sup>206</sup> Elaboration of the Rules (note 200), 297.

<sup>207</sup> Modification of the Rules (note 181), 187.

### a) The *Sino-Belgian Treaty Case*

The *Sino-Belgian Treaty case*<sup>208</sup> concerned the Treaty of Peace, Commerce and Navigation<sup>209</sup> concluded between Belgium and China in 1865. The agreement granted Belgium certain rights of extraterritorial jurisdiction in China, as well as most favoured nation treatment over tariffs on imports and exports. It further offered certain protections for Belgian nationals operating within China, and *vice versa*. When China, under pressure from the Nationalist movement, asked that Belgium consider the renegotiation of the agreement, Belgium conceded to the request; a breakdown in the negotiations, however, led China to terminate the agreement by way of a presidential decree on 6.11.1926, with retrospective operation from 27.10.1926.<sup>210</sup> Belgium, for its part, considered the termination unlawful and continued to extend reciprocal protection to Chinese nationals within its territory.

China's refusal to refer the matter to the Permanent Court by way of a joint *compromis* prompted Belgium to make a unilateral application to the Court on 25.11.1926 under the optional clause jurisdiction of Article 36 (2) of the Statute. In this, it asked the Court to "give judgment [...] to the effect that the Government of the Chinese Republic is not entitled unilaterally to denounce the Treaty" and furthermore "[t]o indicate, pending judgment, any provisional measures to be taken for the preservation of rights which may subsequently be recognized as belonging to Belgium or her nationals".<sup>211</sup>

Submitted as it was in the winter of 1926/1927, the application arrived whilst the Court was in recess, requiring President *Huber* to act independently on the request for provisional measures under Article 57 of the 1922 Rules. He was not, however, deprived entirely of counsel, and was in informal correspondence with Judge *Loder* of the Netherlands, President of the Court from 1922–1924, and Vice-President *Weiss* of France.<sup>212</sup> On 20.12.1926, the Registrar informed the Belgian delegation that, on the basis

<sup>208</sup> Generally *E. Dumbauld* (note 7), 147 et seq.; *J. Sztucki* (note 144), 35 et seq.; *J. B. Elkind* (note 153), 88 et seq.; *J. H. W. Verzijl*, *The Jurisprudence of the World Court*, Vol. 1, 1965, 295 et seq.

<sup>209</sup> 2.11.1865, 131 C.T.S. 373.

<sup>210</sup> *Sino-Belgian Treaty (Documents)*, PCIJ Ser. C, No. 16-I (1927), 75. On the process of negotiation and termination in general, see generally *L. H. Woolsey*, *China's Denunciation of Unequal Treaties*, *AJIL* 2 (1927), 289 et seq.

<sup>211</sup> *Sino-Belgian Treaty* (note 1), 5.

<sup>212</sup> Revealed during the Court's deliberations during the 1931 reform of its Rules: Modification of the Rules (note 181), 182 (*Anzilotti*).

of the documents filed with the Court at that point, the President was not minded to offer interim relief.<sup>213</sup>

In response, on 3.1.1927, Belgium submitted a memorandum to the Court providing further evidence for its claims.<sup>214</sup> This, in part, argued that even if revenues and tariffs wrongly collected by the Chinese government and the wrongful treatment of Belgian nationals could be compensated through damages, this would involve a long and complicated procedure. Moreover, it was said, the damage caused with respect to consular, judicial and criminal matters would be irreparable. It therefore requested measures effectively replicating the provisions of the abandoned Treaty whenever China's denunciation of the agreement resulted in the loss of most favoured nation status for its nationals in China.<sup>215</sup> The President was persuaded by the Belgian supplement, and indicated provisional measures in his Order of 8.1.1927. No formal hearings were held, and China was *ex parte* – although it was kept apprised of events through the Registry.<sup>216</sup>

The Order given was brief, but striking in its modernity. Having set out the procedural history, the President stated that “the object of the measures of interim protection contemplated by the Statute of the Court is to preserve the respective rights of the parties pending the decision of the Court; [...] in the present case, the rights in question are those reserved to Belgium and to Belgian nationals in China, by the Treaty of November 2<sup>nd</sup>, 1865”.<sup>217</sup> The Order then established provisional jurisdiction over the merits, noting that both parties had made optional clause declarations under Article 36 (2) of the Statute.<sup>218</sup> It further noted that the breach of certain rights under the Treaty would result in harm which “could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form”.<sup>219</sup> Finally, the Order stated that provisional measures were awarded without prejudice to the final decision of the Court on both jurisdiction and the merits.<sup>220</sup>

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<sup>213</sup> *Sino-Belgian Treaty (Documents)* (note 210), 305.

<sup>214</sup> *Sino-Belgian Treaty (Documents)* (note 210), 17.

<sup>215</sup> *Sino-Belgian Treaty (Documents)* (note 210), 23 et seq.

<sup>216</sup> Modification of the Rules (note 181), 182 (*Hammar skjöld*, Registrar). The Registry did receive several “purely private” communications from the Chinese envoy to The Hague regarding the dispute. In relation to the award of interim measures, it was simply pronounced that “during the course of negotiations for the conclusion of a new treaty with Belgium, the Chinese government cannot do anything about the Court's Order” of 8.1.1927. *Sino-Belgian Treaty (Documents)* (note 210), 322. Further *J. Sztucki* (note 144), 36.

<sup>217</sup> *Sino-Belgian Treaty* (note 1), 6 et seq.

<sup>218</sup> *Sino-Belgian Treaty* (note 1), 7.

<sup>219</sup> *Sino-Belgian Treaty* (note 1), 7.

<sup>220</sup> *Sino-Belgian Treaty* (note 1), 7.

As to the substance of the measures, the President indicated that certain protections should be extended *vis-à-vis* Belgian nationals, property and shipping and judicial safeguards.<sup>221</sup> With respect to nationals, China was asked to guarantee consular protections under Article 10 of the Treaty; to protect Belgian missionaries who had proceeded into the interior of China and Belgian nationals more generally from insult or violence in accordance with Articles 15 and 17; and to guarantee that Belgian nationals would only be arrested through a consul, and subjected only to those forms of physical punishment that would be accepted under Belgian law in accordance with Article 19. As regards property and shipping, it was requested that China provide protection from sequestration and seizure otherwise than in accordance with international law, and to protect Belgian property from non-accidental damage in accordance with Article 14 of the Treaty. Finally, regarding judicial safeguards, it was requested that China ensure that any matter in which a Belgian national was a party proceed in a “modern” court in accordance with principles of procedural justice.

The second element of the operative part of the Order is curious. On the one hand, the President clearly considered relevant the fact that, with respect to some injuries, an indemnity would not provide adequate compensation, and ordered relief on this basis. On the other hand, the protections indicated in relation to property and shipping are worded sufficiently broadly to include *all* forms of seizure and sequestration, even those remediable through damages. This discrepancy was relied on by *Lauterpacht* in arguing that the Court had “clearly rejected” the proposition that interim relief would only be available where damages were insufficient.<sup>222</sup> This reading of the Court’s jurisprudence – admittedly open to *Lauterpacht* based on the practice available at the time – has not come to pass. As such, it is better to view the Order in the present instance as deriving from the President’s desire to ensure the effectiveness of the measures ordered: it might be argued that, given the scale of Belgian investments in China, it would have been impossible to distinguish – both from the President’s perspective and that of the Chinese government – which wrongful seizures could be compensated through damages, and which could not, necessitating a blanket order.

It is worth pausing here and considering from where the President might have been drawing these principles. Tentatively, it appears he was relying on

<sup>221</sup> *Sino-Belgian Treaty* (note 1), 7 et seq.

<sup>222</sup> *H. Lauterpacht*, *The Development of International Law by the International Court*, 1958, 252. This analysis was not proffered in *Lauterpacht*’s earlier version of the same text, *The Development of International Law by the Permanent Court of International Justice*, 1934.



notions familiar to the civil law tradition of interim relief. The terms of the Order bear a passing resemblance to the 19<sup>th</sup> century codes of civil procedure from jurisdictions such as Germany and Switzerland,<sup>223</sup> whilst omitting considerations central to the common law notion of the interlocutory injunction, most notably the need to prove a *prima facie* case on the merits and the balance of convenience. In addition, civil law notions of interim relief had already been adapted for municipal use through the procedure of the mixed arbitral tribunals. Finally, it is worth noting, though the point is circumstantial, that the individuals with whom *Huber* conferred – Judge *Loder* and Vice-President *Weiss* – were both civil lawyers, and *Loder* in particular was familiar with the procedural workings of the mixed arbitral tribunals as the President of the Anglo-Austrian, Anglo-Bulgarian and Anglo-Hungarian entities.

The Order of 8.1.1927 was short-lived. On 3.2.1927, the Belgian delegation notified the Court that it had reached an agreement with China on a provisional regime with respect to Belgian nationals that effectively reinstated the Treaty. Pursuant to this, Belgium further noted that the removal of the Order would be agreeable to China, and thus assist a negotiated settlement.<sup>224</sup> Accordingly, on 15.2.1927, the President issued another Order providing that: (1) due to the provisional regime, the circumstances justifying the original Order no longer applied;<sup>225</sup> and (2) there was no other situation which demanded the maintenance of protective action. As a consequence, the original Order ceased to be operative, although it was not formally revoked.

The Order of 15.2.1927, however, was at pains to point out that interim relief was only lifted for “purely legal reasons” and furthermore, that measures of protection “cannot be dependent [...] upon the position of negotiations that may be in progress between the parties”.<sup>226</sup> This statement is rather vague, but might be taken as an allusion to the Court’s – and President’s – power to award interim measures *proprio motu* without placing a premium on the position of the parties, although their attitudes were clearly to be taken into account on some level.

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<sup>223</sup> The French CPC and its procedure of *en référé* exhibited less procedural articulation than the terms of the Order in the *Sino-Belgian Treaty* case, and in any event seems to have been largely party-driven, see above Chapter II.

<sup>224</sup> *Sino-Belgian Treaty (Documents)* (note 210), 324.

<sup>225</sup> It was also noted that the same effect would be achieved if Belgium renounced the disputed rights voluntarily: *Sino-Belgian Treaty* (note 1), 11.

<sup>226</sup> *Sino-Belgian Treaty* (note 1), 11.

The Order of 8.1.1927 ceased to operate on 25.5.1929 when the matter was removed from the Court's docket at Belgium's request following successful negotiations.<sup>227</sup>

### b) *Factory at Chorzów (Indemnities)*

The second case in which the Court was required to consider the operation of Article 41 was part of the celebrated series of cases concerning Germany and Poland in the context of Polish Upper Silesia.<sup>228</sup> The relevant phase of proceedings followed the ruling by the Court in *Certain German Interests in Polish Upper Silesia*<sup>229</sup> that Polish expropriation of industrial properties at Chorzów constituted a violation of the Convention Concerning Upper Silesia.<sup>230</sup> Germany and Poland then began negotiations with a view to determining the amount of compensation payable. On 8.2.1927, Germany, citing a breakdown of negotiations, made a new application to the Court requesting a determination that Poland was under an obligation to provide compensation in the amount of 76 million Reichsmark to certain Germany companies.<sup>231</sup> On 26.7.1927 the Court affirmed its jurisdiction.<sup>232</sup>

On 14.10.1927, prior to the submission of written proceedings, Germany lodged a request for provisional measures with the Court requesting the payment by Poland of 30 million Reichsmark within one month.<sup>233</sup> The logic of the German position was that, following its determination in *Polish Upper Silesia*, Polish liability had been fixed at "a certain minimum", leading to the conclusion that in the case at bar, only the upper amount of the award was in question.<sup>234</sup> Moreover, it was said, the German companies af-

<sup>227</sup> PCIJ Ser. A, No. 18 (1929).

<sup>228</sup> Generally *E. Dumbauld* (note 7), 153 et seq.; *J. Sztucki* (note 144), 36 et seq.; *J. B. Elkind* (note 153), 90 et seq.; *J. H. W. Verzijl* (note 208), 297. Other cases in the series – which were part of wider German efforts to discredit the Polish treatment of minorities – include the *Prince von Pless* and *Polish Agrarian Reform* cases, to be discussed presently. Further *G. Alfredsson*, "German Minorities in Poland, Cases Concerning the", in: R. Wolfrum, MPEPIL, 2010.

<sup>229</sup> *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Ser. A, No. 7 (1926), 81.

<sup>230</sup> 15.5.1922, 9 L.N.T.S. 466.

<sup>231</sup> PCIJ Ser. C, No. 13-I (1927), 107 et seq.

<sup>232</sup> PCIJ Ser. A, No. 9 (1927), 33.

<sup>233</sup> The sum was apparently derived from that which "the two Governments had all but agreed in January this year" plus "the value of patents, licenses, etc. wrongfully used by the Polish Government up to the present time", *Factory at Chorzów (Indemnities)* (note 5), 7 et seq.

<sup>234</sup> *Factory at Chorzów (Indemnities)* (note 5), 4.

fectured by Poland's behaviour had recently been presented with "a very favourable opportunity [that] had arisen which would have permitted the Companies in question to re-establish the economically sound position which they had lost" that was allegedly in danger of evaporation, causing thereby further irreparable damage to the companies' interests.<sup>235</sup> Accordingly, it was said:

"In these circumstances, seeing that the principle of compensation is recognized, and that only the maximum sum to be paid by the Polish Government is still in doubt, and seeing that unless payment be immediate, the amount of the damage and that of the compensation would considerably increase, and seeing that the prejudice caused by further delay would be irreparable, the German Government consider that an interim measure of protection whereby the Court would indicate to the respondent Government the sum to be paid immediately, as a provisional measure and pending final judgment, is essential for the protection of the rights of the Parties, whilst the affair is *sub judice*."<sup>236</sup>

In light of the preceding discussion on the origin of interim relief in the context of Article 41, the German litigation strategy is clear. First, German civil procedure considered provisional satisfaction with respect to an undetermined money claim as a valid basis for interim relief.<sup>237</sup> Second, Germany would doubtlessly have been aware that the Polish-German Tribunal had held three years earlier that it possessed the power to grant interim payment as a protective measure.<sup>238</sup> Third, Germany noted that the wording of Article 41 had been amended so as to include not only acts, but also omissions – here, a failure by Poland to pay the amount requested.<sup>239</sup> The strengths of this strategy notwithstanding, the Court unanimously rejected the request by way of an Order of 21.11.1927, without requesting submissions from Poland and without consulting with either of the *ad hoc* judges.<sup>240</sup> The Court's reasoning was perfunctory, noting only that "the request of the German government cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the [German] claim".<sup>241</sup>

The case was concluded when the Court eventually determined that the Polish government was under an obligation to compensate the affected

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<sup>235</sup> *Factory at Chorzów (Indemnities)* (note 5), 4 et seq.

<sup>236</sup> *Factory at Chorzów (Indemnities)* (note 5), 6.

<sup>237</sup> See above Chapter II.

<sup>238</sup> *Ellermann v. Poland*, (1924), 5 TAM 457, 459.

<sup>239</sup> *Factory at Chorzów (Indemnities)* (note 5), 6 et seq.

<sup>240</sup> *Factory at Chorzów (Indemnities)* (note 5), 10.

<sup>241</sup> *Factory at Chorzów (Indemnities)* (note 5), 10.

companies.<sup>242</sup> Following the agreement of an amount between the parties – forestalling the work of the Committee of Experts appointed by the President of the Court – Germany requested that the matter be withdrawn. It was removed from the list by the Order of 25.5.1929.<sup>243</sup>

### c) *Legal Status of South-Eastern Greenland*

The *South-Eastern Greenland* case<sup>244</sup> produced what was arguably the most sophisticated of the Permanent Court's pronouncements on provisional measures, in the context of a territorial dispute between Denmark and Norway. The case proceeded on the basis of two successive occupations by Norway – in July 1931 and July 1932 respectively – of the eastern and south-eastern coasts of Greenland. The first such occupation was met on 11.7.1931 by an application to the Court by Denmark requesting a declaration that the Norwegian action was unlawful: this led to the parallel proceeding of *Legal Status of Eastern Greenland*.<sup>245</sup> The second – in reality an assertion of sovereignty by royal decree – was prompted by the dispatch of a Danish expedition to the region and resulted in unilateral applications to the Court by both parties under the optional clause. Denmark again asked the Court to declare the Norwegian occupation illegal,<sup>246</sup> whilst Norway asked for a declaration that the contested territory was subject to its sovereignty.<sup>247</sup> The Norwegian application, furthermore, asked the Court “to order the Danish Government, as an interim measure of protection, to abstain from any coercive measure directed against Norwegian nationals in the said territory”.<sup>248</sup> The jurisdiction of the Court was uncontested. The Court consolidated the proceedings on 2.8.1932.<sup>249</sup>

The application for interim relief was framed in terms of the preservation of the *status quo* and the non-escalation of the dispute. As described by the Court in its Order of 3.8.1932, the catalyst was the expedition, which Denmark had equipped with police powers over both Danish and Norwegian nationals. The Danish press, moreover, had indicated that acts of violence

<sup>242</sup> PCIJ Ser. A, No. 17 (1928), 63.

<sup>243</sup> PCIJ Ser. A, No. 19 (1929), 13.

<sup>244</sup> Generally *E. Dumbauld*, *Relief Pendente Lite* in the Permanent Court of International Justice, AJIL 29 (1945), 391 et seq.; *J. Sztucki* (note 144), 37 et seq.; *J. B. Elkind* (note 153), 92 et seq.; *J. H. W. Verzijl* (note 208), 297 et seq.

<sup>245</sup> *Eastern Greenland (Documents)*, PCIJ Ser. C, No. 62 (1931), 9 et seq.

<sup>246</sup> *South-Eastern Greenland (Documents)*, PCIJ Ser. C, No. 69 (1932), 10.

<sup>247</sup> *South-Eastern Greenland (Documents)* (note 246), 12.

<sup>248</sup> *South-Eastern Greenland (Documents)* (note 246), 10.

<sup>249</sup> *South-Eastern Greenland* (note 5), 271.

against any Norwegian nationals who the expedition came across were likely.<sup>250</sup> Norway, for its part, had conferred similar police powers on one of its own expeditions to the region.<sup>251</sup> As a result, Norway asserted that frequent contact between Norwegian and Danish nationals in the region was likely, and that violence would result. Denmark disputed this, pointing out that the odds of two small expeditions crossing paths in so vast an area were slim.<sup>252</sup>

The Court's Order of 3.8.1932 is notable for a number of reasons. First, it was the first decision of the Court to be handed down under Rule 57 as it appeared in the 1931 Rules, which involved several interesting procedural considerations.<sup>253</sup> Notably, the Court continued its earlier practice of issuing its decision in the form of an order rather than a judgment, although the latter form was available.<sup>254</sup> In addition, the Court agreed to a Norwegian request that *ad hoc* judges be permitted to participate in the deliberations, a pattern which persists to this day and which was incorporated in Article 61 (9) of the 1936 Rules.<sup>255</sup> Second, the Order demonstrates far greater complexity than those issued in the Court's earlier cases and is similar in this respect to the modern practice.

In the substance of the Order, the Court first addressed the further interpretation of Article 41 of the Statute, noting that there was no need for it to decide whether it had the power to indicate provisional measures where there was no controversy pending before it other than the application for interim relief itself. This holding was premised on the finding that the dispute between Norway and Denmark clearly constituted a live and substantive issue on the merits.<sup>256</sup> The Court also made clear that it was qualified to indicate relief *proprio motu*,<sup>257</sup> and its conclusion on this point led to the eventual codification of this power in Article 61 (6) of the 1936 Rules. Finally, it noted that it did not need to resolve the question of whether relief could be ordered solely to prevent the non-aggravation of the dispute as

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<sup>250</sup> *South-Eastern Greenland* (note 5), 278.

<sup>251</sup> *South-Eastern Greenland* (note 5), 283.

<sup>252</sup> *South-Eastern Greenland* (note 5), 283.

<sup>253</sup> *E. Dumbauld* (note 244), 392.

<sup>254</sup> The Court attributed this to a desire to maintain a distinction between provisional measures and final decisions. A further factor was the fact that provisional measures could be awarded *proprio motu*, whereas judgments clearly could not. *Ninth Report of the Permanent Court of International Justice*, PCIJ Ser. E, No. 9 (1932-1933), 171.

<sup>255</sup> *South-Eastern Greenland* (note 5), 280. Further PCIJ Report 9 (note 254), 162.

<sup>256</sup> *South-Eastern Greenland* (note 5), 284.

<sup>257</sup> *South-Eastern Greenland* (note 5), 284.

opposed to the protection of specific rights, as in the present case an analysis of both strands of relief yielded the same result.<sup>258</sup>

In relation to Norway's specific request, the Court declined to award interim relief on the basis that no protection was required. In the first place, the incidents that Norway sought to prevent (i.e. violence against its nationals in the disputed area) could not on any reasoning affect the existence of or value of the sovereign rights claimed in South-Eastern Greenland.<sup>259</sup> Such incidents, moreover, could not adversely affect any rights that the Court might finally recognize as belonging to Norway.<sup>260</sup> In the second place, each party had made declarations to the effect that they intended to refrain from acts of violence against citizens of the other so long as they were not first provoked,<sup>261</sup> rendering it highly unlikely that the events to be prevented (and any consequential escalation of the dispute) would have actually occurred.

Having denied the Norwegian request, the Court turned its attention to the question of whether relief was nonetheless appropriate *proprio motu*. Its reasoning in this respect was similar to that deployed with respect to the Norwegian application: (1) both parties had stated that they did not intend to provoke violence; (2) provisional measures could not preserve or otherwise affect the rights which were the subject of the litigation and even if they could, the damage caused by a failure to indicate would not be irreparable; and (3) in any event, the parties were already under an obligation to abstain from measures likely to "aggravate or extend the dispute" by virtue of the 1928 General Act for the Pacific Settlement of International Disputes.<sup>262</sup>

Notwithstanding its dismissal of the request, the Court stated explicitly that it "reserv[ed] its right subsequently to consider whether circumstances had arisen requiring the indication of provisional measures".<sup>263</sup> The matter was finally disposed of by the Court's decision in *Eastern Greenland*, in which Danish sovereignty over the contested territory was confirmed.<sup>264</sup> As a consequence, the litigation in *South-Eastern Greenland* was deprived of its object and both governments withdrew their applications. The case was formally removed from the list on 11.5.1933.<sup>265</sup>

<sup>258</sup> *South-Eastern Greenland* (note 5), 284.

<sup>259</sup> *South-Eastern Greenland* (note 5), 285.

<sup>260</sup> *South-Eastern Greenland* (note 5), 287.

<sup>261</sup> *South-Eastern Greenland* (note 5), 285 et seq.

<sup>262</sup> *South-Eastern Greenland* (note 5), 288 et seq.

<sup>263</sup> *South-Eastern Greenland* (note 5), 289.

<sup>264</sup> PCIJ Ser. A/B, No. 53 (1933), 75.

<sup>265</sup> PCIJ Ser. A/B, No. 55 (1933), 157 et seq.

#### d) The *Prince von Pless* Case

The next consideration by the Court of Article 41 of its Statute occurred in the *Prince von Pless* case,<sup>266</sup> which was at its core a taxation dispute between Poland and a Polish national of German ethnic origin. The Prince operated several mines in Upper Silesia, and lodged several complaints with the League of Nations regarding the actions of Polish taxation authorities. This dispute eventually led to Germany's application to the Court of 18.5.1932, which requested judgment to the effect "that the attitude of the Polish government and authorities towards the Pless Administration [...] is in conflict with Articles 67 and 68 of the Geneva Convention [of 1922]" and that acts committed pursuant to that attitude under Article 65 of the same.<sup>267</sup> Germany's claim was lodged in its capacity as a member of the Council of the League of Nations under Article 72 (3) of the 1922 Convention. On 4.2.1933, the Court ordered that Poland's preliminary objections be joined to the merits.<sup>268</sup>

The question of interim relief was raised following the issue by the Polish taxation office on 20.4.1933 of two orders requesting that the Prince pay some 1.8 million Zlotys within 15 days on account of income tax unpaid between 1927 and 1930. Simultaneously, the tax office decreed the attachment of the Prince's claim against the Polish State Railways, an amount nearly equalling the debt allegedly outstanding. This prompted Germany to lodge a request for provisional measures with the Court on 2.5.1933, where-in the Court was requested:

"[T]o indicate to the Polish Government, as an interim measure of protection, pending the delivery of judgment [...] that it should abstain from any measure of constraint in respect of the property of the Prince von Pless on account of income tax."<sup>269</sup>

With the revision of the Rules in 1931, Article 57 no longer gave the President the power to order interim relief unilaterally pending the convening of the Court as a whole. As a result, and with the taxation orders soon to take effect, President *Adachi* wrote to the Polish government in a bid to

<sup>266</sup> Generally *J. Sztucki* (note 144), 38 et seq.; *J. B. Elkind* (note 153), 93 et seq.; *E. Dum-bauld* (note 244), 394 et seq.

<sup>267</sup> *Prince von Pless (Documents)*, PCIJ Ser. C, No. 70 (1932), 201.

<sup>268</sup> PCIJ Ser. A/B, No. 52 (1933), 16.

<sup>269</sup> It was also suggested that "measures of constraint would irremediably prejudice the rights and interests forming the subject of the dispute". *Prince von Pless (Documents)* (note 267), 202 et seq.

have the time limit extended,<sup>270</sup> and then on 5.5.1933 convened an emergency session of the Court for 10.5.1933, setting aside the following day for both parties to give their views on the application. Although no harm appeared to result from this course of action, the perception of a “near-miss” when the Court was out of session may have prompted the return of the President’s unilateral power to order provisional measures on a limited basis in Article 61 (3) of the 1936 Rules.

On 8.5.1933, Poland informed the Registrar that the attachment order was erroneously issued and had been annulled, and that furthermore the Prince’s taxes would not be collected until the Court had resolved the dispute. Accordingly, it was requested that the Court cancel the hearings.<sup>271</sup> Germany agreed with this approach.<sup>272</sup> As a consequence, the Court issued a brief order declaring that “the request for the indication of interim measures of protection [...] has ceased to have any object”.<sup>273</sup> With the merits pending, Germany withdrew from the League of Nations, and thus informed the Court on 27.10.1933 that it did not intend to pursue the matter. The Court declared the proceedings terminated on 2.12.1933.<sup>274</sup>

#### e) The *Polish Agrarian Reform Case*

The *Polish Agrarian Reform case*<sup>275</sup> prompted another relatively sophisticated consideration of provisional measures by the Court. The case occurred in the same context as that of the *Prince von Pless* case, the alleged exploitation of ethnic Germans by Poland in a manner contrary to Articles 7 and 8 of the Minorities Treaty.<sup>276</sup> Significantly, Article 12 of the Treaty provided that any Member of the Council of the League of Nations could refer to the Court any difference of opinion with Poland regarding the interpretation or application of the provisions of the Treaty regarding the protection of minorities. It was again in its capacity as a Council member that Germany brought its application.

On this occasion, the offending act was agricultural reform in the voivodships of Posnania and Pomereilia, which Germany claimed was carried

<sup>270</sup> *Prince von Pless (Documents)* (note 267), 430.

<sup>271</sup> *Prince von Pless (Documents)* (note 267), 431 et seq.

<sup>272</sup> *Prince von Pless (Documents)* (note 267), 432.

<sup>273</sup> *Prince von Pless* (note 5), 154.

<sup>274</sup> PCIJ Ser. A/B, No. 59 (1933), 194 et seq.

<sup>275</sup> Generally *J. Sztucki* (note 144), 40; *J. B. Elkind* (note 153), 94 et seq.; *E. Dumbauld* (note 244), 395 et seq.

<sup>276</sup> Minorities Treaty between the Principal Allied and Associated Powers and Poland, 28.6.1919, 25 C.T.S. 413.



out in a manner that discriminated against Polish nationals of German origin. In its application filed on 3.7.1933, the Court was asked “to declare that violations of the Treaty of June 28<sup>th</sup>, 1919, have been committed to the detriment of Polish nationals of German race and to order reparations to be made”.<sup>277</sup> Germany also requested that interim measures be awarded to preserve the *status quo*, noting generally the increasing disparity between the minority and majority regarding compulsory participation in the agrarian reform and further listing three recent compulsory actions against members of the German minority.<sup>278</sup>

On 29.7.1933, the Court issued a lengthy Order denying interim relief. Significantly, this was the first time that dissenting opinions were appended to such an Order, establishing a precedent for the future practice of the International Court.<sup>279</sup> The rejection was premised on the argument that the interim measures asked for would result in a general suspension of the Polish agrarian reforms, “and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim”,<sup>280</sup> establishing that the power to order provisional measures was inherently limited to protection of the rights which were subject to the actual claim. Put another way, although a formally separate proceeding from the point of view of the Court’s procedure, a request for provisional measures remained predicated on a request for final relief – the stream could not rise higher than its source.<sup>281</sup> The conclusion, however, was a curious one, as the Court also refused to offer a more limited form of relief *proprio motu*, e.g. directed towards the three specific examples of expropriation mentioned in the German application.<sup>282</sup> The Court offered no explanation for this, but the dissent of Judge *Anzilotti* indicated that notwithstanding

<sup>277</sup> *Polish Agrarian Reform (Documents)*, PCIJ Ser. C, No. 71 (1933), 11.

<sup>278</sup> *Polish Agrarian Reform (Documents)* (note 277), 13 et seq.

<sup>279</sup> Notwithstanding the modern practice, this does not appear to have been a universal right of the judges under the Statute or Rules of the Permanent Court: the practice had developed whereby dissents could be appended to orders concerning important questions of law, but this was subject to the consent of the Court as a whole. In *Electricity Company of Sofia and Bulgaria*, a member of the Court wished to attach a dissenting opinion to an order setting the date for commencement of oral proceedings. The body of the Court refused to authorize this: *Sixteenth Report of the Permanent Court of International Justice*, PCIJ Ser. E, No. 16 (1939-1945), 198 et seq.

<sup>280</sup> *Polish Agrarian Reform* (note 5), 178.

<sup>281</sup> To adopt *mutatis mutandis* an analogy employed by another author in relation to the *Sino-Belgian Treaty* case, the aegis of the Court “is always commensurate with the rights it is designed to protect, like the trees of Troy which by command of the gods never grew higher than the walls of the city”, *E. Dumbauld* (note 7), 153. See also *Australian Communist Party v. Commonwealth*, (1951) 83 CLR 1, 258 (*Fullager*).

<sup>282</sup> *Polish Agrarian Reform* (note 5), 178 et seq.

the allusion of the German government to specific cases, these were not identified with particularity in the pleadings, leaving the Court unable to craft a more specific form of relief.<sup>283</sup>

Three dissenting opinions were attached to the Order. The first, by Baron *Rolin-Jaequemyns*, did not answer the central contention of the majority, but instead noted that “the indication of such “interim measures” would considerably facilitate the *reparation* – so far as may be necessary – of those rights in the form of their preservation, rather than by compensation for their loss”.<sup>284</sup> This position would appear to ignore the principle already established in the Court’s jurisprudence that relief could not be awarded to prevent damage that could be remedied through monetary compensation.

The second dissent was appended by Judge *Anzilotti*, who declared that he found it “difficult to imagine any request for the indication of interim measures more just, more opportune or more appropriate than the one we are considering”.<sup>285</sup> Whilst Judge *Anzilotti* agreed with the Court that the German pleading was inadequate on both a general and specific level, he took a different view of the German application for final relief, interpreting it as a request for a declaration that the *whole body* of the Polish legislation directed towards agrarian reform was applied in a manner inconsistent with Poland’s obligations under the Minorities Treaties. On such an interpretation, the Court could have awarded relief whereby the application of the reform legislation to the German minority was suspended in its entirety pending the resolution of the dispute – in other words, by identifying a still higher source for the stream, allowing the further elevation of the descend-ent watercourse.<sup>286</sup> Had the majority adopted such an approach, it would have been entirely consistent with its earlier practice. Ultimately, however, Judge *Anzilotti* felt that a party should be responsible for the wording of its own pleadings, and supported the majority opinion on that basis, but further noted that such a denial of relief should be without prejudice to an amended German application,<sup>287</sup> which appears to have been the inspiration for Article 61 (5) of the 1936 Rules.

A third dissent was registered jointly by Judges *Schücking* and *van Eysinga*, who considered the subject of the dispute to be the same as that which had been subject to a lengthy investigation by the League, which had provided detailed evidence through the Nagaoka Committee on Polish ex-

<sup>283</sup> *Polish Agrarian Reform* (note 5), 182.

<sup>284</sup> *Polish Agrarian Reform* (note 5), 180.

<sup>285</sup> *Polish Agrarian Reform* (note 5), 181.

<sup>286</sup> *Polish Agrarian Reform* (note 5), 182.

<sup>287</sup> *Polish Agrarian Reform* (note 5), 182.

propriation.<sup>288</sup> They concurred with Baron *Rolin-Jaequemyns* that provisional measures could be awarded in order to facilitate reparation through preservation, rather than through compensation – although again this was contrary to the Court’s earlier practice. They were further in favour of the award of relief *proprio motu*.<sup>289</sup> The most significant point of the dissent, however, from the perspective of post-1946 practice, was the dissent’s response to the Polish assertion that interim relief was not possible where the claim was founded on Article 12 of the Minorities Treaty, in other words, where a state could claim standing without any direct involvement in the dispute, and thus without any actual injury whatsoever – much less one that could be deemed “irreparable”. This argument was not addressed by the minority, and the dissenters did not proceed beyond simply disagreeing with the point, but it raises interesting parallels with the modern interaction of provisional measures with obligations *erga omnes*.<sup>290</sup>

The case was eventually terminated for the same reasons as that of the *Prince von Pless*, and removed from the list on 2.12.1933.<sup>291</sup>

#### f) *Electricity Company of Sofia and Bulgaria*

The final case heard by the Court, and the only decision on provisional measures under the 1936 Rules, was *Electricity Company of Sofia and Bulgaria*.<sup>292</sup> The dispute, between Belgium and Bulgaria, had its roots in the First World War. In short, the company was a Belgian entity expropriated by Bulgaria during that conflict, which had been the subject of two awards of the Belgian-Bulgarian mixed arbitral tribunal providing for reparation.<sup>293</sup> The Belgian application of 26.1.1938 alleged that certain actions of the Bulgarian government in the context of a rate controversy had deprived the company of the benefits of those awards, whilst alleging further breaches of the Treaty of Neuilly. As such, the Court was asked to “declare that [...] Bulgaria has failed in its international obligations [...] and to order the re-

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<sup>288</sup> *Polish Agrarian Reform* (note 5), 185 et seq.

<sup>289</sup> *Polish Agrarian Reform* (note 5), 187.

<sup>290</sup> *Polish Agrarian Reform* (note 5), 187 et seq.

<sup>291</sup> PCIJ Ser. A/B, No. 60 (1933), 201 et seq.

<sup>292</sup> Generally *J. Sztucki* (note 144), 40 et seq.; *J. B. Elkind* (note 153), 97 et seq.; *E. Dumbauld* (note 244), 399 et seq.

<sup>293</sup> See *Electricity Company of Sofia and Bulgaria v. Bulgaria and the Municipality of Sofia*, (1923), 3 TAM 308; *Electricity Company of Sofia and Bulgaria v. The Municipality of Sofia and Bulgaria*, (1925), 5 TAM 759.

quisite reparation in respect of the above-mentioned acts to be made”.<sup>294</sup> Jurisdiction was founded on the optional clause and on the 1931 Treaty of Conciliation, Arbitration and Judicial Settlement<sup>295</sup> between the parties.

The Belgian application was followed by two requests for interim measures. The first was made on 2.7.1938, where Belgium requested that compulsory execution against the company by virtue of proceedings against it in the Bulgarian courts be postponed until after judgment.<sup>296</sup> The request was withdrawn following the granting of assurances by Bulgaria in a telegram of 28.7.1938.<sup>297</sup> Significantly, the Bulgarian response also contested the substantive jurisdiction of the Court<sup>298</sup> – had submissions actually been made, it would have been the first time that the Court considered the relationship between its jurisdiction over the merits and its jurisdiction to offer interim relief.

On 4.4.1939, the Court upheld its jurisdiction, rejecting two of the three preliminary objections raised by Belgium.<sup>299</sup> Prior to the hearing on the merits, however, the Municipality of Sofia launched an action in the Bulgarian courts for execution against the company. This prompted the second request for interim relief on 17.10.1939, in which Belgium requested that the Court “indicate as an interim measure of protection that the new proceedings in the Bulgarian Court [...] be suspended until the [Permanent Court] has delivered judgment on the merits”.<sup>300</sup> By this stage, however, events had overtaken the Court. Poland had already been invaded and occupied by Germany and the Soviet Union, and Europe was descending into war. When asked to furnish the Court with observations on the Belgian request, the Bulgarian delegation stated (whilst maintaining that the request should not be granted) via telegram that it was impossible for them to confer with foreign counsel and thus prepare a defence. Moreover, due to the international situation, the Bulgarian government had forbidden both the delegation and the Bulgarian *ad hoc* judge from travelling to The Hague.<sup>301</sup> As a consequence, Bulgaria was unrepresented when the Court met to consider the question of interim relief on 2.12.1939, which resulted in its Order of 5.12.1939. By this stage, the situation had deteriorated further still, and the

<sup>294</sup> *Electricity Company of Sofia and Bulgaria (Documents)*, PCIJ Ser. C, No. 88 (1938), 14.

<sup>295</sup> 23.6.1931, 137 L.N.T.S. 191.

<sup>296</sup> *Electricity Company of Sofia and Bulgaria (Documents)* (note 294), 17.

<sup>297</sup> *Electricity Company of Sofia and Bulgaria (Documents)* (note 294), 463 et seq.

<sup>298</sup> *Electricity Company of Sofia and Bulgaria (Documents)* (note 294), 459.

<sup>299</sup> PCIJ Ser. A/B, No. 77 (1939), 84.

<sup>300</sup> *Electricity Company of Sofia and Bulgaria* (note 5), 196.

<sup>301</sup> *Electricity Company of Sofia and Bulgaria* (note 5), 197.

Court appears to have been well aware of the events that were likely to (and in fact did) follow.<sup>302</sup>

The exigent circumstances surrounding *Electricity Company of Sofia and Bulgaria* appear to have prompted an unusually broad order on the part of the Court. Referring to Article 41 of its Statute and Article 61 (4) of the 1936 Rules, the Court held that these provisions applied the

“principle universally accepted by international tribunals [...] to the effect that the parties to a case must abstain from any measures capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate and extend the dispute.”<sup>303</sup>

This pronouncement is intriguing. In the first place, it is strongly referable to the experience of the Central American Court of Justice. In the second, it appears to contradict the narrower view of the Court in cases such as *South-Eastern Greenland* and *Polish Agrarian Reform*, in which the only power acknowledged by the Court was the power to protect the specific rights inherent in the dispute.<sup>304</sup> In those cases, however, it can be argued that no risk of escalation was immediately apparent, forestalling the need for broader additional measures. Although it is true that, taken in isolation, no risk of escalation was manifest in the facts as presented in the Belgian application, the Court apparently felt that given the international situation the matter was incapable of resolution in a timely fashion and so elected to freeze the proceedings to the greatest extent possible.<sup>305</sup> Thus, the Court provided:

“Whereas, in this case, present conditions and the successive postponements and resulting delays and, finally, the actions as demandant above mentioned, justify in the view of the Court the indication of measures calculated to prevent, for the duration of the proceedings before the Court, the performance of acts likely to prejudice, for either of the Parties to the case or for the interests concerned, the respective rights which may result from the impending judgment [...]

The Court indicates as an interim measure, that pending the final judgment of the Court [...] the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute [...]<sup>306</sup>

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<sup>302</sup> See the statement given by President *Guerrero* at the opening of the Court's hearing on 4.5.1939. PCIJ Report 16 (note 279), 8.

<sup>303</sup> *Electricity Company of Sofia and Bulgaria* (note 5), 199.

<sup>304</sup> *E. Dumbauld* (note 244), 401.

<sup>305</sup> PCIJ Report 16 (note 279), 152.

<sup>306</sup> *Electricity Company of Sofia and Bulgaria* (note 5), 199.

On 26.2.1940, the Court indicated that the case was ready to proceed.<sup>307</sup> Before hearings could occur, however, Germany invaded the Netherlands and the Court's activities were brought to a halt.<sup>308</sup> The matter was never resumed.<sup>309</sup>

## V. Conclusions

### 1. Towards a Modern Law of Provisional Measures

This was the corpus of jurisprudence that was inherited by the International Court when it came to consider its first application for provisional measures in 1951.<sup>310</sup> The Court in *Anglo-Iranian Oil* clearly considered it necessary to take into account the decisions of the Permanent Court, as reflected most clearly in the dissenting opinion of Judges *Winiarski* and *Badawi Pasha*.<sup>311</sup> Moreover, the Court applied its 1946 rules, which adopted Article 61 of the 1936 Rules wholesale, with the exception of paragraph 9, which was omitted so as to allow the attendance of *ad hoc* judges in all cases involving provisional measures.<sup>312</sup> Thus was the codified practice of the Permanent Court to be translated into the procedure of its successor.

The results of the Permanent Court's endeavours *vis-à-vis* interim relief are occasionally described in mildly derogatory terms. The Court, after all, considered the issue on six occasions, and awarded provisional measures only twice.<sup>313</sup> But its jurisprudence nonetheless acts as a bridge between the 19<sup>th</sup> century international and municipal origins of provisional measures on the one hand, and the modern understanding of the topic on the other: the achievement of the Permanent Court was in merging these previously separate traditions.

<sup>307</sup> PCIJ Ser. A/B, No. 80 (1939), 9.

<sup>308</sup> PCIJ Report 16 (note 279), 152 et seq. The Court decamped to Geneva on 16.6.1940. Judge *van Eysinga* and certain other members of the Registry remained in The Hague to defend the Court's interests for the remainder of the war. PCIJ Report 16 (note 279), 10 et seq.

<sup>309</sup> On 3.9.1945, the Registrar inquired as to the further intentions of the parties. Belgium stated that it did not intend to pursue the case. Bulgaria, by now under Soviet occupation, never replied. PCIJ Report 16 (note 279), 146.

<sup>310</sup> *Anglo-Iranian Oil Company (UK v. Iran)*, Order of 5.7.1951, ICJ Reports 1951.

<sup>311</sup> *Anglo-Iranian Oil* (note 310), 96 et seq.

<sup>312</sup> Rules of Court, 6.5.1946, *ICJ Acts and Documents, No. 1* (2<sup>nd</sup> ed. 1947), 74. Further *Sb. Rosenne* (note 35), 68.

<sup>313</sup> See e.g. *S. Oda*, Provisional Measures, in: V. Lowe/M. Fitzmaurice, *Fifty Years of the International Court of Justice*, 1996, 541 et seq.

As noted, much of the procedural practice of the Court was reflected in the 1936 Rules, notably the capacity of the Court to order relief *proprio motu*. However, many of the substantive matters surrounding provisional measures were not so codified, and these remain the most controversial elements of the field today, due largely to their sensitivity to the facts. It is therefore worth examining exactly which elements of the modern practice were already in place when the Court was wound up in 1946, and which were absent or underdeveloped.

When considering which elements of the modern doctrine were present in 1946, the jurisprudence of the Permanent Court first demonstrates a clear understanding of the purpose of provisional measures. As Judge *Negulesco* remarked when considering the 1931 revision of the Rules, provisional measures “sometimes [...] were regarded as designed to preserve rights claimed in an action at law, sometimes their object was to re-establish or safeguard the *status quo*”.<sup>314</sup> This may be seen to reflect the dual municipal and international origins of provisional measures, with the latter emerging in an inter-state context through the experience of the Central American Court of Justice, and the latter through domestic law as mediated by the mixed arbitral tribunals.<sup>315</sup> Examples of both species of order may be seen, with provisional measures awarded in order to safeguard rights under litigation in the *Sino-Belgian Treaty* case, and to maintain the *status quo* in *Electricity Company of Sofia and Bulgaria*. The Court, however, saw its jurisdiction as limited to protecting those rights that were specifically the subject of the dispute, hence the rejection of measures in the *South-Eastern Greenland* and *Polish Agrarian Reform* cases.

Second, the Court adopted from the mixed arbitral tribunal the concept of imminent and irreparable harm as a prerequisite to the award of provisional measures. In the *Sino-Belgian Treaty* case, President *Huber's* award was predicated on the likelihood that inaction would result in harm that could not be compensated by monetary relief. The opposite may be taken as implied in the Court's rejection of the request for an “interim judgment” in the *Factory at Chorzów (Indemnities)* case – although a delay in relief could

<sup>314</sup> Modification of the Rules (note 181), 192.

<sup>315</sup> Although some taxonomies may attempt to identify additional rationales for the award of provisional measures, these may be taken as subsets of these two broad categories. *Thirlway*, for example, identifies some four rationales for provisional measures which are additional to the two identified. Of these, three can be seen as deriving from the need to protect the rights of the parties (prevention of irreparable prejudice, non-anticipation of the Court's decision, preservation of evidence) and one as deriving from the protection of the *status quo* (non-aggravation or extension of the dispute). *H. Thirlway*, *The Indication of Provisional Measures by the International Court of Justice*, in: R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, 1994, 1 et seq., 5 et seq.

have led to additional damage to the German minority, it would have been compensable through damages, and thus provisional measures of protection were inappropriate. In addition, the Court's conclusion in this case indicated that it did not conceive of provisional measures as a method by which the merits of the dispute could be resolved before they had been adjudicated fully.

The Court also alluded to factors which were not yet significant, but which would become so in the jurisprudence of the International Court and the modern tribunals. The first was the need for *prima facie* jurisdiction over the merits. This was hinted at – though not in any considered fashion – in the Order in the *Sino-Belgian Treaty* case, in which President *Huber* stated that his conclusions on jurisdiction were reached without prejudice to any conclusion on the subject that the Court as a whole might eventually reach. On the whole, however, the Court was never called upon to award provisional measures in a case in which an outright challenge to jurisdiction remained unresolved, unlike in the modern era of international dispute resolution, where such challenges are almost *de rigueur*. In the closest analogy to such a case, *Electricity Company of Sofia and Bulgaria*, Bulgaria's preliminary objections were denied and the Court's jurisdiction established prior to the award of interim relief. But that is not to say that an award of provisional measures on the basis of *prima facie* jurisdiction alone would have been unheard of at the time. As stated, the mixed arbitral tribunals had already established a precedent in this respect which would subsequently be noted in the *Anglo-Iranian Oil* case, even if the dissenters there claimed that “as joint organs of two States, [these tribunals] differ both as to their character and as to their procedure from [...] the International Court of Justice, and there is, consequently, nothing to be learned from their precedents”<sup>316</sup>.

A second point was that of an application for provisional measures where the claimant was not directly affected by the actions of the respondent, i.e. in the sense that its own interests were not prejudiced *per se*. Such situations are obviously of increasing importance where provisional measures are requested in order to protect the interests of the international community, i.e. in cases concerning the preservation of rights *erga omnes*. In both the *Prince von Pless* and *Polish Agrarian Reform* cases, Germany's actions were grounded in its ability to bring a claim against Poland as a concerned member of the League of Nations that had suffered no immediate injury. In the latter case, Poland's argument that this should prevent the award of interim relief was not addressed by the majority, and was rejected by the dissenting Judges *Schücking* and *van Eysinga* in only a perfunctory manner.

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<sup>316</sup> *Anglo-Iranian Oil* (note 310), 98 (Judges *Winiarski* and *Badawi Pasha*, diss.).



A final point in this respect is the conception of provisional measures as binding. The Court's internal conversations regarding the amendment of its Rules in 1931 indicate that at that stage the Court did not consider interim relief to impose any obligations on the parties, a conclusion based in part on a misreading of the antecedent language in the *Bryan* Treaties. Discussions surrounding the drafting and adoption of Article 41 of its Statute lead to a similar conclusion, as does the inclusion of the word "ought", as opposed to "must" in its language. In 1927, the Court's then-Registrar, *Åke Hammarskjöld*,<sup>317</sup> published an article emphatically denying the binding nature of provisional relief, and Judge *Hudson's* 1934 study of the Court's practice concluded that Article 41 measures "clearly lack[ed] the binding force attributed to a "decision" by Article 59".<sup>318</sup> *Dumbauld* is of the view that such measures could only be made binding on the intervention of an additional legal matrix rendering it so, such as the Locarno Treaties or the General Act for the Pacific Settlement of International Disputes.<sup>319</sup> But this view had its opponents: *Niemeyer*<sup>320</sup> argued vociferously that provisional measures were binding, basing his argument in part on the practice within municipal legal systems, and *Hudson* changed his view in the 1943 version of his study<sup>321</sup> before reverting to a studied agnosticism in 1952.<sup>322</sup> In any event, the Permanent Court was not required to rule on the question.

## 2. Two Premises

This paper has sought to establish two things. First, that the Permanent Court – and by extension, the International Court – did not establish a unique brand of interim relief; rather its jurisprudence was part of a wider tradition of provisional measures in international and municipal law. As to

<sup>317</sup> *Å. Hammarskjöld* (note 168). *Hammarskjöld's* argument, in effect, hinged on: (a) the fact that Art. 41 was in the section of the Statute dealing with "procedure"; (b) the text of Art. 41 required that provisional measures be "indicated" rather than "ordered"; (c) in the event of a breach of interim relief, the option was open to refer the matter to the League; and (d) the text held interim relief to be separate from interlocutory and definitive decisions.

<sup>318</sup> *M. O. Hudson*, *The Permanent Court of International Justice*, 1934, 415.

<sup>319</sup> *E. Dumbauld* (note 7), 168 et seq. The Court would have been unlikely to agree. In its subsequent decision in *South-Eastern Greenland*, the Court cited the intervention of the General Act as rendering Norway's request for provisional measures moot. *South-Eastern Greenland* (note 5), 288 et seq.

<sup>320</sup> *G. Niemeyer*, *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen*, 1932, 11 et seq. Further *J. B. Elkind* (note 153), 154 et seq.

<sup>321</sup> *M. O. Hudson* (note 153), 425 et seq.

<sup>322</sup> "The Court's own jurisprudence can hardly be said to have resolved this point with finality", *M. O. Hudson*, *The Thirtieth Year of the World Court*, *AJIL* 36 (1952), 1 et seq., 23.

the former, the wording of Article 41 of the Court's Statute was influenced by the experience of the Central American Court of Justice and its power to "fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *statu quo* pending a final decision", as mediated through the *Bryan* Treaties. This general power, however, proved unsuitable for use in cases requiring a more nuanced analysis, causing the Court to have recourse to additional concepts of interim relief, as translated through the mixed arbitral tribunals arising out of the Treaty of Versailles and its associated agreements. As to the latter, it may be tentatively inferred that international courts and tribunals in the early 20<sup>th</sup> century drew on the civilian model of provisional relief in preference to the common law tradition of the interlocutory injunction, but anything more than this is mere speculation. Although a close connection between domestic and international concepts of interim relief might be suggested, the evidence required for a more specific and emphatic assertion is at present lacking.

Second, the paper has sought to establish that the jurisprudence of the Permanent Court provided a foundation for the modern (i.e. post-1946) law of provisional measures that remains more or less undisturbed. In addition to setting down detailed procedural guidelines, the Court established as central several central substantive conditions for the award of provisional measures – especially as concerned the purpose of such relief, the protection of rights subject to litigation and the need for imminent, irreparable injury – and introduced several other areas of perpetual concern to the debate, some of which only recently appear to have been resolved – e.g. the binding character of the measures adopted. In short, in the Permanent Court, we see for the first time a recognizably modern law of provisional measures that draws upon both municipal and international experience. Although the rapid growth of international courts and tribunals that followed the Second World War elaborated its jurisprudence, perhaps in certain cases beyond recognition, it was here that provisional measures had their modern genesis.