guarantee the European Statute until the conclusion of a peace treaty and will ask the British and American governments to do the same.

If we consider the London and Paris Agreements as a whole, we may say that they constitute the best possible substitute solution and will, if ratified and executed, contribute to strengthening the security structure of the free world. But, as was indicated by earlier developments, the idea of a union of free Europe is, unfortunately, in retreat. This is shown by the death of the EDC Treaty, the new French nationalism, the resignation of Jean Monnet, Chairman of the High Authority of the European Coal and Steel Community, and the elimination of all "supra-national" features in the new agreements. To that comes the weakness of the basic Saar Accord, on the ratification of which the coming into force of the whole treaty arrangement depends. Perhaps the hope expressed by the American Secretary of State[18] that "now we have both the Saar and Trieste problems settled" and that they "are no longer there to be unsettling of the whole situation," is over-optimistic. It should also not be overlooked that Italian Trieste was returned to Italy, whereas the intent of the Saar Accord is to separate permanently the one hundred percent German Saar from Germany. The Saar Accord is, of course, heavily attacked in West Germany; even the Chancellor of West Germany, who remains optimistic,[19] had to concede "a profound divergence of views" between France and West Germany. For the latter the Saar Accord is a temporary agreement which leaves German sovereignty over the Saar intact; for France the Accord is final, as expressed by Gilbert Grandval, French Ambassador to the Saar. The London and Paris Agreements are again provisional only, as the many references to a German peace treaty, the settlement of Germany's frontiers and the problem of reunification of Germany show. The whole treaty arrangement also presupposes a real conciliation between France and Germany, a permanent and sincere co-operation, and for that the present situation offers no guarantee. But the first necessity now is the ratification, the second, the execution of the London and Paris Agreements, the building up of a strong, reliable and yet not militaristic German Army.

JOSEF L. KUNZ

THE MONETARY GOLD DECISION IN PERSPECTIVE

The somewhat involved decision of the International Court of Justice in the Case of the Monetary Gold Removed from Rome in 1943,[1] which copes with such a novelty to the judicial process as an attack on jurisdiction by a plaintiff, also brings to a curious resting point one phase of a post-World War II experiment in international legal remedies: restitution *in specie*.

[18] In his televised report to the President and the Cabinet at the White House on Oct. 25, 1954. Department of State Publication 5659, p. 7.

[19] See Konrad Adenauer, "Germany, the New Partner," in Foreign Affairs, Vol. 33 (1955), pp. 177–183.

[1] I.C.J. Reports, 1954, p. 19; digested in this JOURNAL, Vol. 48 (1954), p. 649.

The principle of specific restitution of illegally taken property is not, of course, an innovation of the World War II period. It seems fair to say, however, that the settlements proposed for that war made greater use of the remedy than ever before. The restitution of monetary gold was a particularized aspect of a broader remedy based upon the principle of the return of objects illegally taken [2] by the Axis occupiers. Both the general remedy and its specialized version for monetary gold were developed out of very great deference for the teachings of John Maynard Keynes about the unwisdom, indeed the immorality, of the reparation charges against Germany following World War I.[3] A principal, and posthumous, effort in rejoinder to Keynes [4] was not available when the planning was done. Most likely it would have made no difference. The basic idea of restitution was to undo injustice and to restore war-disrupted order as an alternative to a large reparation bill against Germany.[5]

In the case of monetary gold the general anti-reparations policy referred to was paralleled by two others: one a wartime economic warfare measure and the other a viewpoint on liberated areas' monetary policy. The economic warfare measure was expressed in the United Nations Gold Declaration of February 22, 1944, which was designed to make it as difficult as possible for Germany to use in her aggression gold she had looted from occupied countries, Allied research having indicated that by that time Germany had well exhausted the gold with which she entered the war. The Gold Declaration built upon an earlier Allied Declaration on Axis Acts of Dispossession, January 5, 1943,[6] which itself is the most authoritative pre-peace treaty statement of the general restitution principle.

After United States Forces found substantial quantites of monetary gold in a salt mine near Merkers, Germany, attention also began to be paid to certain postwar implications of this discovery. Although some of the gold was possibly identifiable, a good deal of it certainly was not; and, moreover, the extent to which the Germans had dipped into one cache of looted gold rather than another appeared to be haphazard. Within the Depart-

[2] A taking by force or duress was dealt with as illegal. Identification of the property was required. Return was made to the government of the country from which the removal took place.

[3] Keynes, Economic Consequences of the Peace (1920), esp. pp. 53–55, 226–251.

[4] Mantoux, The Carthaginian Peace *or* The Economic Consequences of Mr. Keynes (Pub. 1946, after the brilliant young French economist author was killed in one of the last engagements of World War II in Europe).

[5] The United States, Britain and France resisted reparations claims against Italy on the ground of her incapacity to pay. In the case of Germany, reparations were limited to amounts far smaller than the total of war claims against Germany, being restricted to the taking of German external assets and the removal of certain plant equipment from Germany estimated to be in excess of that country's peacetime needs. In contrast, the Soviet Union sought large reparations from Italy, and it was on the Soviet claim for reparations of $10,000,000,000 in current manufactures from Germany that the quadripartite control of Germany foundered. See Clay, Decision in Germany (1950), Ch. 7. The full history of the impact of changing circumstances and conditions on German and Japanese reparation policy remains to be written.

[6] Editorial, this JOURNAL, Vol. 37 (1943), p. 282.

ment of State, in connection with the preparation of instructions for the American Delegation to the Paris Conference on Reparations, the position developed that the restitution of looted monetary gold should not follow an accidental pattern established by the Germans but, rather, that the gold should be returned in such a way as to maximize its contribution to the restoration of monetary stability in the ravaged countries. These proposals encountered opposition in the Treasury Department, the view there being expressed that the gold should be claimed by the United States as war booty.[7] However, the United States Delegation was finally instructed to seek in the Paris Reparation Agreement the adoption of a "gold pool" principle, whereby the looted gold would be returned to the various countries which lost gold to Germany in the proportion of their losses to total losses.[8]

Part III of the Paris Agreement on Reparation[9] put the "gold pool" into legal effect. Albania was a party to the agreement. The agreement provided for eventual participation by Italy and Austria, and they were later allowed to participate. By Part III of the Paris Agreement also, the United States, the United Kingdom and France, as the Occupying Powers concerned, were put in charge of the gold restitution operation. To accomplish this purpose the three Powers established the Tripartite Commission on Restitution of Monetary Gold,[10] an organization separate from, but staffed at the top by the same persons appointed by these countries as their delegates to the Inter-Allied Reparation Agency.[11] The Tripartite Gold Commission, its coffers swelled by some gold recoveries from neutral countries,[12] went about its work over several years, receiving claims and making awards. The Bank of England became its custodian pending restitution deliveries, and a private claim for the return of seized

[7] A viewpoint which, aside from its economic shortsightedness, also had the disadvantage of supporting by emulation Soviet seizures of industrial property in Manchuria and in Southeastern Europe as "war trophies."

[8] A sidelight of sorts is cast on the lawyer's rôle in the making of foreign policy through international agreements by the recollection that the American gold pool [sometimes less elegantly called "pot"] had to be explained to the British in terms of the maritime insurance concept of the "general average" and to the continentals [thanks to a suggestion from one of the most scholarly among them] by reference to the *Lex Rhodia de Jactu,* preserved in the Pandects, Dig. 14.2.1; *cf.* 3 Kent, Comm. 232, 233.

[9] T.I.A.S. No. 1655, in force Jan. 24, 1946; this JOURNAL, Supp., Vol. 40 (1946), p. 117; described in Howard, The Paris Agreement on Reparations from Germany, Dept. of State Bulletin, Vol. 14 (1946), p. 1023 *et seq.*, esp. p. 1027.

[10] See *ibid.*, Vol. 15 (1946), p. 563, reporting the establishment of the Commission, Sept. 27, 1946.

[11] Established by Part II of the Paris Agreement on Reparation to apply the principles of dividing German assets available to the Western countries for reparation. See Howard, The Inter-Allied Reparation Agency, Dept. of State Bulletin, Vol. 14 (1946), p. 1063.

[12] The Paris Agreement, Part III-G envisaged the possibility that the Allied Powers might get back from certain neutral countries gold they had received from Germany. There were such recoveries.

gold was successfully met by the Bank's plea of sovereign immunity on behalf of the Tripartite Powers.[13]

During the whole period, however, a contention regarding certain gold seized by the Germans at Rome and claimed by Albania to have been illegally dealt with by Italy and by Italy to have been Italian, remained unsolved. In May, 1951, the three governments, the Tripartite Commission not having been able to reach a conclusion, announced an agreement between themselves, but without Italy or Albania, out of which "settlement" the present unsettlement arose.[14] The agreement was to submit to an arbitrator the question whether the gold looted at Rome was originally the property of Italy or of Albania when carted away by the retreating Germans. To this extent the agreement merely involved the selection of a method of determination in lieu of the Tripartite Commission, whose initial decision was declared withdrawn.

A new and decidedly novel element was, however, then injected into the agreement: If the arbitrator should decide that under Part III of the Paris Agreement on Reparation the looted gold had at the time of its looting been the property of Albania, a further series of questions would then arise. These involved the competing claims of the United Kingdom and of Italy to the gold, assuming it to be the property of Albania. The British claim was based on the unsatisfied judgment of the International Court of Justice in the *Corfu Channel Case*; that of Italy upon the alleged confiscation by Albania of the assets of the National Bank of Albania, largely owned by the Italian Government.[15] The three governments announced their agreement as follows: If the arbitrator should find that the proper "gold pool" claim was that of Albania, then the United Kingdom should have the gold, unless within 90 days after the arbitral award in favor of Albania on the restitution claim (a) Albania should contest the transfer to Britain before the International Court of Justice or (b) Italy should contest before that Court (i) the arbitral award to Albania under the "gold pool" right or (ii) the granting of priority to the British claim as between the two derivative contenders for the gold.

The arbitrator found that the valid gold pool claim under the Paris Agreement[16] was Albania's. Thereafter there came the acceptance by Italy of reference to the International Court of Justice, Albania having taken no notice of the opportunities furnished her for resort to that tribunal by the agreement of the three Powers.

Thus the stage was set for the unorthodox: Italy took formal steps to come within the time limitation fixed in an agreement to which she was

[13] Dollfus Meig et Cie., S. A. *v.* Bank of England, [1950] 1 All E. R. 747; *ibid.*, [1950] 2 All E. R. 605; digested in this JOURNAL, Vol. 44 (1950), p. 592; Vol. 45 (1951), p. 383.

[14] Quoted in full in Dept. of State Bulletin, Vol. 24 (1951), pp. 785, 786–787.

[15] However, the nature of the Italian claim seemed to raise once again the basic question left to the arbitrator; compare the announcement with the signed agreement, cited above, note 14.

[16] This writer has not been able to find an original source for the arbitral award, reported to have been made Feb. 20, 1953.

not a party. But, having been made a plaintiff against her will, she thereafter objected to the competence of the Court. This led to a British gambit: Italy, in view of her objection to competence, had not really turned to the Court within the time limit fixed by the Tripartite Agreement. The objective, obviously, of the British move was to leave the field entirely open for Her Majesty's Government to take over the Albania gold in satisfaction of its Corfu Channel claim, neatly eliminating both rival claimants. In all this legal jockeying the United States and France apparently took no part.

The decision of the Court may on its face seem another nicely reasoned piece of ineffectualness. The background of the case has been developed in this editorial to suggest: (1) that, in fact, the Court did, under unfavorable circumstances, accomplish a sort of equitable justice, and (2) that blame for the frustration the decision creates must lie elsewhere.

In a very real sense Britain, France and the United States were international fiduciaries of the looted monetary gold. It is somewhat disturbing to find these fiduciaries disposed in the twilight of their trust to enforce their own non-trustee claims against the trust assets, not against merely the "bad hat" cestui (Albania), but the other (Italy) as well.

Interesting questions of law remain open regarding the capacity under international law of Britain and the other two Tripartite Commission Powers effectively to agree that Albania's gold should, by their decision and without the initiation by Britain of any Court or Security Council [17] action to enforce the prior judgment, be sequestered for its satisfaction. Certainly any likelihood at Paris in 1946 of any such self-help principle would have prevented agreement on Part III of the Paris Agreement on Reparation. It is from that Agreement and not from any claims based on the conquest of Germany that the three Occupying Powers seem to derive their authority. The fact that blocked gold deposits have been a factor in the negotiation of certain other claims settlements [18] probably give us no legal precedent in any case, and certainly not for the instant situation.

When the position of Italy under the 1951 Tripartite Agreement is considered, moreover, not even the plea of lending effectiveness to the rule of law by aiding the enforcement of the judgments of the International Court appears to justify the agreement of the three Powers. Italy was envisaged as an eventual beneficiary of the gold pool under the Paris Agreement of 1946; subsequently she had her restitution claims against Germany safeguarded from waiver in the Peace Treaty.[19] Eventually she became a participant in the gold pool. By their own action the three made themselves fiduciaries for Italy.

The effect of the Court's decision was to reject the British stratagem which would have opened the way for Britain to win against Italy either way the Albanian claim might be decided. It was necessary for the Court to develop the principle that under certain circumstances there is nothing

[17] Under Charter, Art. 94.

[18] As the U. S.-Yugoslav Nationalization Claims Settlement of July 19, 1948.

[19] Treaty of Peace with Italy, T.I.A.S. No. 1648, Art. 77; this JOURNAL, Supp., Vol. 42 (1948), p. 75.

wrong, under Article 62 of the Rules of the Court, with a plaintiff's raising a legal issue of jurisdiction after having accepted jurisdiction. Some of the differentiations are thin, the reasoning embraces legal metaphysics;[20] but, sirs, what would you have under the circumstances?

Then the Court gives a gentle lesson in elemental due process; since Italy's claim turns on whether Albania has committed a legal wrong against Italy under international law, there is actually a dispute between Albania and Italy. Such a dispute could not be decided without the appearance of Albania.

The episode, on the whole, does not appear to be a happy one, mainly because the Court was cavalierly tossed a "hot potato" that diplomacy and international quasi-administrative law and international arbitration did not handle. The potato appears to have been tossed mainly to get rid of it, and the Court apparently has no choice but to field such tosses under Article 36.1 of its Statute. It is regrettable that it is so often assumed that the Court can settle anything—if only the parties will go to it. Such a proposition is surely not held for domestic courts; it is obviously not even remotely true internationally in today's world—certainly not true so long as the Court has no authority to command relevant sovereign parties to appear unless they have themselves consented to appear.

The Tripartite Gold Commission [or the governments behind it] should have found the facts and made the restitution award, for or against Albania, for or against Italy. That was what it was set up by international agreement in 1946 to do. The entirely distinct British claim against Albania should have been rigorously insulated from the restitution operation. The countries behind the Commission have failed to do their bit for the development of the international administrative law some have thought they have seen coming.[21] They have unilaterally modified an international agreement under which they voluntarily assumed fiduciary obligations. They put the Court in a very difficult position and it is no thanks to them that it managed to do elemental justice at the price of not solving an international problem.

It would be interesting to know what finally happened to the gold.

COVEY T. OLIVER

THE INTERNATIONAL LAW COMMISSION'S 1954 REPORT ON THE REGIME OF THE TERRITORIAL SEA

The International Law Commission decided in 1951 to initiate work on the "Régime of Territorial Waters." This action was taken pursuant to a resolution of the General Assembly at its Fourth Session on December 6, 1949. The initiative was taken by Iceland whose proposal was adopted by a slim margin.[1] Mr. J. P. A. François of The Netherlands was ap-

[20] Literally, as in American tax cases: What is real? What is sham? Refer to the report of the case, in this JOURNAL (cited above, note 1), pp. 652–653.

[21] *Cf.* Rubin, "The Judicial Review Problem in the ITO," 63 Harvard Law Review (1949) 78.

[1] Liang, "Notes on Legal Questions Concerning the United Nations," this JOURNAL, Vol. 44 (1950), p. 533.