EDITORIAL COMMENT

THE CUSTOMS UNION ADVISORY OPINION

By a vote of eight[1] judges to seven,[2] the Permanent Court of International Justice has advised the Council of the League of Nations that the reciprocal customs arrangement which Austria and Germany, by an agreement signed at Vienna, March 19, 1931, proposed to establish between them, is incompatible with the Geneva Protocol of October 4, 1922, concluded between Austria, on the one hand, and a group of guaranteeing Powers, on the other, when Austria was granted the so-called League of Nations loan. Seven of the majority judges also took the position that the proposed arrangement would violate Article 88 of the Treaty of St. Germain; but Judge de Bustamante, who was one of the majority, impliedly differed with his associates on this point. The seven judges constituting the minority held that the Vienna agreement and the proposed customs arrangement did not violate either the Geneva Protocol or the Treaty of St. Germain. Judge Anzilotti, one of the majority of eight, wrote a separate opinion, longer than either the majority or the minority opinion, in which he rested the case for incompatibility upon the second clause of Article 88 of the Treaty of St. Germain, though he considered the Geneva Protocol also violated. Before the court's opinion was formally announced, accurate statements of its purport appeared in the press, and Austria and Germany were induced to renounce their plan. The formal publication of the opinion furnished, however, an official sanction for what had been done.

By the Vienna agreement, Austria and Germany proposed to enter into an arrangement to assimilate their customs tariffs and to establish reciprocal free trade between themselves. They engaged to maintain their "independence" and separate customs services. The arrangement was to be reciprocal, there was to be no fusion of their customs administrations and no common fund. They agreed to consult each other, so that treaties which each sought to conclude with other nations would not be inconsistent with their customs arrangement. An arbitral tribunal was to be established to settle controversies arising out of the administration of the plan, the arrangement could be denounced by either party within three years (and earlier under circumstances), and it was to be open to adhesion by any other country.

[1] Guerrero (Salvador), Rostworowski (Poland), Fromageot (France), Altamira (Spain), Urrutia (Colombia), Negulesco (Roumania), Bustamante (Cuba), and Anzilotti (Italy) concurring specially.

[2] Adatci (Japan), Kellogg (United States), Rolin-Jaequemyns (Belgium), Hurst (Great Britain), Schücking (Germany), Van Eysinga (Holland), Wang (China).

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The question submitted by the Council to the court was:

> Would a régime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19, 1931, the text of which is annexed to the present request, be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol No. 1 signed at Geneva on October 4, 1922?

Article 88 of the Treaty of St. Germain reads:

> The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power.

The relevant articles of the Geneva Protocol of 1922 read:

> The Government of the Federal Republic of Austria,
> Of the other part,
> Undertakes, in accordance with the terms of Article 88 of the Treaty of Saint-Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence.
>
> This undertaking shall not prevent Austria from maintaining, subject to the provisions of the Treaty of Saint-Germain, her freedom in the matter of customs tariffs and commercial or financial agreements, and, in general, in all matters relating to her economic régime or her commercial relations, provided always that she shall not violate her economic independence by granting to any State a special régime or exclusive advantages calculated to threaten this independence.

The whole issue, as framed both by majority and minority, turned on the question whether the proposed customs arrangement alienated or endangered Austria's independence. The majority stated that "the only question the Court has to settle is whether, from the point of view of law, Austria could, without the consent of the Council, conclude with Germany the customs union contemplated in the Vienna Protocol."

The majority opinion begins by the following paragraph:

> Austria, owing to her geographical position in central Europe and by reason of the profound political changes resulting from the late war, is a sensitive point in the European system. Her existence, as determined by the Treaties of Peace which were concluded when the war came to an end, is an essential feature of the present political settlement which has stabilized in Europe the consequences of the break-up of the Austro-Hungarian monarchy.

After defining "independence" as the equivalent of separate existence with separate organs of government, and admitting that Austrian independence was neither alienated nor endangered as a matter of law, the majority nevertheless concluded that the proposed treaty constituted a

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"special régime" calculated to afford Germany "advantages" which are "withheld from third Powers," and that "from the economic standpoint adopted by the Geneva Protocol of 1922, it is difficult to maintain that this régime is not calculated to threaten economic independence." Although the majority also state that "independence" is "one and indivisible" and do not undertake anywhere to define what the concept "economic independence" might mean, they nevertheless assert, without argument, that, while no single article of the proposed treaty could be deemed to threaten Austrian independence, yet, taking the arrangement "as a whole," and possibly in application of General Smuts' theory of "holism," it was "calculated to threaten" Austria's independence. Why this is so, the majority do not explain, though Judge Anzilotti, in his concurring opinion, frankly declares that it "might" lead some day to a political union, toward which goal a strong political movement in both countries had long been apparent.

In the light of the conclusions of the majority, the following paragraphs from the majority opinion, to which the minority do not fail to call attention, are striking:

> It can scarcely be denied that the establishment of this régime does not in itself constitute an act alienating Austria's independence, for Austria does not thereby cease, within her own frontiers, to be a separate State, with its own government and administration; and, in view, if not of the reciprocity in law, though perhaps not in fact, implied by the projected treaty, at all events of the possibility of denouncing the treaty, it may be said that legally Austria retains the possibility of exercising her independence.
>
> It may even be maintained, if regard be had to the terms of Article 88 of the Treaty of Peace, that since Austria's independence is not strictly speaking endangered, within the meaning of that article, there would not be, from the point of view of law, any inconsistency with that article.

To the minority, these two paragraphs practically answer the question submitted by the Council and contradict the majority's own conclusion that the arrangement was incompatible with the Geneva Protocol. The minority object to jumping at such a conclusion without reasoning or argument. They maintain that it is a legal and not a political question which was submitted, and that nothing before the court justifies them in finding that an open customs union such as that contemplated could or even might lead to political absorption of one country by the other, a conclusion not sustained by most of the precedents, and in this case a matter of pure political speculation; that Austria had been intentionally left alive and was not to be deprived of the means of existence, as was evident from that part of the Geneva Protocol which enabled Austria to maintain "her freedom in the matter of customs tariffs and commercial or financial agreements, and, in general, in all matters relating to her economic régime or her commercial relations"; that by the words "economic independence" in the protocol no further restrictions upon Austria's independence were intended, were made, or were

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necessary than are already included within the Treaty of St. Germain; that if no single article of the Vienna agreement could be deemed incompatible with Austria's prior engagements, it was difficult to see how the plan "as a whole" could be inconsistent therewith; that the purpose of all the treaties was to maintain the continued existence of Austria as a separate state, and this purpose was in no way impaired by the proposed customs plan, which was designed, indeed, to prevent the collapse of Austria; that the plan granted no special or exclusive advantages which could imperil Austria's independence, even disregarding the important fact that the proposed arrangement was open to general adherence; that if the *establishment* of the contemplated customs reciprocity does not threaten Austria's independence, as the majority admitted, it was not the function of the court to suggest that the "*consequences* resulting from its establishment" could endanger the future existence of Austria as a separate state; that neither Germany nor Austria foresaw a loss of its independence "as a consequence" of the proposed plan; that one cannot attack the customs plan "as a whole" but only in its concrete provisions, for no two are alike, and inasmuch as this proposed plan in its details admittedly does not impair the independence of either state, it is hard to see how its consequences "so far as can reasonably be foreseen," quoting from the majority opinion, could "threaten" the independence of Austria; that if all the military, financial, and economic restrictions imposed upon Austria by the Treaty of St. Germain did not threaten her independence, *a fortiori* a reciprocal customs arrangement voluntarily entered upon could not do so.

Judge Anzilotti, in his concurring opinion, is extremely frank. He admits that it is largely a political question which is being decided: "Everything depends on considerations which are for the most part, if not entirely, of a political or economic kind." He admits that the court could refuse to render an opinion, but that if it gave one it would have to include both the legal and the political questions. He finds the root of Austria's disability to enter the arrangement in her engagement, in the second sentence of Article 88, "to abstain from any act which might directly or indirectly or by any means whatever compromise her independence," and frankly states that the fear of a political union with Germany was always in the minds of the treaty makers (a fact of which he takes judicial notice), and that, while the same customs union with Czechoslovakia would not be within the restrictions of the treaty or of the Geneva Protocol, a customs union with Germany is; that Austria's independence was posited, not for the benefit of Austria, but in the interests of the other states of Europe, so that it is, we may infer, a penalty on Austria; that Austria was forbidden not only to "alienate" her independence but to do anything which could "place independence in danger" or "expose that independence to danger"; that even though independence was "formally intact" that might not be enough, for the proposed plan was "susceptible of exposing it to danger"; that while the plan did not

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now impair Austria's independence, it might endanger it in the future; that whether it is or would be so endangered is a question of fact, political in character, which, however, the court may answer, as Judge Anzilotti undertakes to do; that "it may be asked whether there is not some contradiction in requiring that a state should exist and at the same time putting it in a position which makes its existence extremely difficult." And while Judge Anzilotti admits the contradiction, he nevertheless felt that it was the intention of the treaty makers to prevent "economic solidarity" between Germany and Austria, that "while economic union does not necessarily lead to political union . . . its influence is very decidedly in that direction," and that "a system of free trade between the two countries" would be likely "to turn the scales in favor of" a wider union. Judge Anzilotti adds, philosophically, "Man's will, however, has only a limited influence over social forces like those which are urging Austria towards fusion with Germany, and in all probability the consequences of the union would ensue despite the precautions taken in the Protocol."

What can one make of all this? Fifteen judges apparently agree that the specific plan before them for consideration constituted no impairment of Austria's independence, but eight think that it might eventually lead to some such result. Thus a great court, it is respectfully submitted, converts a legal question into a political question and decides it on considerations involving exclusively political speculation, implying, in addition, an assumption that two nations will flagrantly violate their solemn obligations to respect Austria's independence. The prohibition of Austria's initiative in entering upon a customs union with Germany, apparently regardless of its character, would seem, indeed, to be the principal violation of Austria's independence herein involved, independence which all the signatories of the peace treaties agreed to respect. The admission that a similar customs union with Czechoslovakia would constitute no threat or danger to Austria's independence, an opinion in which the formal majority would presumably have joined Judge Anzilotti, indicates how exclusively political the opinion is.

The Council of the League has thus used the court and the court has avowedly permitted itself to be used to achieve a political goal. The opinion may be ventured that the court might appropriately have declined to decide the case or might have decided only that part relating to present incompatibility or compatibility as a matter of law, leaving it to the Council to determine whether on political considerations they would forbid the plan. For nine years prior to the recent election of judges the court struggled to maintain its judicial independence, subjected on several occasions to temptations by the Council, which, indeed, censured the court for its refusal to render an advisory opinion in the Eastern Carelia Case. A majority of the court also stood out against the proposal, for which there was internal support, that it should even give secret opinions. After the Mosul Case, in which Turkey had no judge, the court adopted a rule which provided

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that even in advisory opinions interested states not represented on the court might appoint a judge *ad hoc*. The action of the court, with its new personnel, in confessedly permitting itself to be used as a political instrument, has created a danger which cannot be minimized. The court has behind it only public opinion and public confidence, not a sovereign state. The weakening of its judicial character threatens its very life. Nor is it helpful to suggest that the United States Supreme Court has made political decisions. It is a function of the Supreme Court to decide questions of constitutional law, and these questions often are of a political nature, in the sense that one's opinion upon them is necessarily governed by principles of constitutional interpretation on which political parties more or less divide. The Supreme Court has often refused to decide political questions as such. In the Customs Union Case the legal issue, on the record before the court, was, as both majority and minority admitted, clear and simple; but the court split because the majority avowedly assumed, on the Council's request, to pass upon a political question on speculative forecasts of possible political consequences. Under the court as formerly constituted, the exercise of the advisory function, kept within legal bounds, often played a useful part. Under the practice now introduced, however, the advisory function may well have proved to be an unfortunate experiment, and it is still not too late to consider the advisability of transferring that function, which is not in any event strictly judicial, to a body of competent jurists, sitting at Geneva, who will advise the League of Nations on such questions as it may see fit to submit.

There is another matter which deserves consideration. It will be recalled that Italy, France, and Germany have elected judges on the court. Austria requested the privilege of appointing a national judge *ad hoc*, on the ground that she was involved in the Treaty of St. Germain and the Geneva Protocol of 1922, and not Germany, and that she, therefore, had no common cause (*cause commune*) with Germany. Thereupon Czechoslovakia also asked for a judge. The majority of the court denied both requests. The argument of the Austrian Agent differed considerably from that of the German Agent, and, in fact, as five of the judges pointed out in a dissenting opinion on Austria's application for a separate judge, Austria was "a party to the dispute," whereas Germany was not. And yet the one country whose powers and fate were under consideration had no representation on the court. The position of Austria and Czechoslovakia was not at all analogous. When it is recalled that the final decision of the court on the principal question was one of eight judges against seven and that the Italian and the French judge were among the eight, it is apparent how vital was the decision to exclude an Austrian judge from the bench.

To a person interested in European welfare, the very fact that the legality or propriety of such a customs arrangement could be placed in issue, is a symbol of European political conditions.

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