[Communicated to the Council and the Members of the League.]

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LEAGUE OF NATIONS

CONDITIONS OF VOTING REQUESTS FOR ADVISORY OPINIONS FROM THE PERMANENT COURT OF INTERNATIONAL JUSTICE

OBSERVATIONS RECEIVED FROM GOVERNMENTS AND FROM THE INTERNATIONAL LABOUR OFFICE

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NOTE BY THE SECRETARY-GENERAL.

In pursuance of the report adopted by the Council on January 23rd, 1936 (see Annex), the Secretary-General requested the Members of the League to communicate to him by November 1st any observations they might wish to make on the question " in what circumstances and subject to what conditions an advisory opinion may be requested under Article 14 of the Covenant " (*i.e.*, an advisory opinion of the Permanent Court).

The replies which have been received are reproduced in the present document, which the Secretary-General has the honour to submit to the Council and circulate to the Members of the League.

The Director of the International Labour Office has requested the Secretary-General to communicate to the Council the memorandum reproduced below. The subject there discussed was in 1929 brought to the attention of the Committee of Jurists on the Statute of the Permanent Court of International Justice in a memorandum which that Committee decided to communicate to the Council, but it was not discussed by the Council.[1]

[1] The document distributed to the Council (document C.146.1929.V), now out of print, consisted of the memorandum of the International Labour Office and a letter from the Chairman of the Committee of Jurists to the Director of the International Labour Office (for these documents and for the discussion in the Committee of Jurists, which considered itself incompetent, see Minutes of the Committee of Jurists, pages 75 and 76 and Annexes 5 and 13).

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GOVERNMENT OBSERVATIONS.

Australia.

Telegram of November 3rd, 1936.

Commonwealth Government of Australia is in favour of necessity for unanimity by Council or Assembly under Article 14 of Covenant pertaining to requests for advisory opinions in all cases where the question relates to a substantive dispute or to the validity of material legal contentions. If the question is definitely one of procedure then the Commonwealth Government feels that a simple majority should be sufficient.

Belgium.

[*Translation.*] November 3rd, 1936.

The Government considers that the adverse vote of a minority of its members cannot prevent the Council's asking the Court for an advisory opinion.

In the light of a most valuable principle, to which the Secretariat has drawn the attention of Member States, it can, in the first place, be allowed that the opposition of one or both the parties need not prevent the Council from validly deciding to seek the opinion of the Court. Nor is there any reason why the opposition of any other Member of the Council should be allowed to prevent the Council's proceeding with its request.

It has been suggested that the procedure might be varied according as to whether the opinion would, or would not, deal directly with the substance of the dispute, whether it would, or would not, prejudge the substance of the dispute or, lastly, whether it would, or would not, be dealing with a specific case. These distinctions are certainly worthy of consideration; but apart from the fact that they would frequently be difficult to apply in practice, their adoption would necessitate the amendment of the Covenant, whereas the solution advocated above would only require agreement on a certain — logical and reasonable — interpretation of the present provisions of the Covenant. A request for an advisory opinion may, indeed, be regarded as a question of procedure, not requiring unanimity but merely a majority, irrespective of whether the opinion deals with a question of form or a question of substance. This view would appear to be all the more justified as the request for an advisory opinion is merely one of the Council's means of having light thrown on problems referred to it, and such opinions are not in themselves binding.

United Kingdom.

October 23rd, 1936.

In the resolution adopted by the Assembly in 1928, the question at issue was put as follows : " Whether the Council or the Assembly may, by a simple majority, ask for an advisory opinion within the meaning of Article 14 of the Covenant ". A study of the discussions which have taken place on this point in various organs of the League and of the opinions expressed by text-book writers seems to show that if the question is put in this way, so that the answer must be a simple " Yes " or " No ", applicable to all cases, there is a wide divergence of views both between Members of the League and between the jurists who have written on the subject, and it does not seem likely that further study of the question would result in unanimity.

In these circumstances, His Majesty's Government in the United Kingdom are disposed to think that the question is not really one to which a simple affirmative or negative answer, applicable in all circumstances, can be given, and they note that in the resolution adopted by the Assembly of 1935 the question is put in a different form : " In what circumstances and subject to what conditions an advisory opinion may be requested under Article 14 of the Covenant ".

The view which His Majesty's Government in the United Kingdom are at present disposed to adopt is that the question whether unanimity is necessary for a decision to ask for an advisory opinion, or whether it is to be regarded as a matter of procedure for which a simple majority suffices, depends upon the circumstances of the case and the nature of the question which it is proposed to put to the Court. It is not difficult to imagine circumstances (particularly when the Council or the Assembly is not dealing with a dispute) where a decision to ask for an advisory opinion may properly be regarded as a matter of procedure within the meaning of Article 5 (2) of the Covenant. On the other hand, where the Council or the Assembly is dealing with a dispute, and the question which it is proposed to put to the Court relates to the substance of the dispute (or to the validity of material legal contentions advanced by one party or the other), so that the effect of the opinion would be substantially equivalent to deciding the dispute between the parties, His Majesty's Government consider that the absolute unanimity prescribed in Article 5 (1) is necessary. The Covenant imposes on the Members of the League no obligation to submit any particular dispute to judicial settlement (except in so far as such an obligation may result from Article 12 in the case of a dispute likely to lead to a rupture), and such an obligation can only result from commitments which a State

has voluntarily accepted, either by signing the Optional Clause or in some other manner. In the case of a dispute to which no such commitment is applicable, it appears to His Majesty's Government impossible to interpret the last sentence of Article 14 of the Covenant in such a way as to enable a Member of the League to be forced against its will to submit the dispute to the Permanent Court. His Majesty's Government in the United Kingdom are not impressed by the argument which in this connection is based upon the distinction between a decision of the Permanent Court and an advisory opinion. There has never been a case yet in which the Council has not acted upon an advisory opinion which it has requested, and if the opinion is not to be acted upon, to obtain it would serve no useful purpose, while a failure by the Council to act upon it might well be regarded as lacking in respect to the Court. Moreover, the practice and procedure of the Court in dealing with advisory opinions have now been largely assimilated to that applicable in contentious cases. For these reasons, and in view of the authority which attaches to an opinion by the Permanent Court, His Majesty's Government find it impossible in the present connection to draw any practical distinction between the effect of a judgment and that of an advisory opinion. In these circumstances, His Majesty's Government consider that, where the matter which it is proposed to refer to the Court relates to the substance of a dispute, it is impossible to regard the matter as one of procedure, and that to hold that in such a case an advisory opinion can be asked for by a simple majority would be inconsistent with the principles adopted by the League in dealing with the judicial settlement of disputes.

His Majesty's Government in the United Kingdom do not propose in this memorandum to discuss the question whether, in certain circumstances, " limited unanimity " — *i.e.*, excluding the representatives of the interested parties — may suffice. They are, however, not at present convinced that cases exist where a rule other than absolute unanimity or a simple majority is applicable, at any rate in the absence of a definite treaty provision to that effect.

His Majesty's Government are therefore disposed to think that the question under discussion is not one to which an answer of universal application can be given, but must be determined according to the circumstances of each particular case, the general principle being that a simple majority suffices where the question is really one of procedure, but that unanimity is required where something more than procedure is involved, particularly where the question which it is proposed to put to the Court relates to the substance of a dispute. If this be the correct principle, it would obviously be impossible to lay down any hard and fast criterion for deciding into which category a particular case falls, and there would no doubt be border-line cases, but on the basis of this principle a jurisprudence could probably be developed which should enable most cases, at any rate, to be decided without serious difficulty.

China.

[*Translation.*] November 26th, 1936.

The Chinese Government, having studied this question, pronounces definitely in favour of a majority vote in the Assembly or the Council for requests for advisory opinions from the Permanent Court of International Justice.

The Chinese Government does not think it necessary to recapitulate all the arguments that have already been advanced in support of this view. It would merely point out that its attitude, dictated by the desire to found international relations on a basis of law, is in strict conformity with the attitude adopted by China in her relations with other States. A faithful supporter of the Covenant, the Chinese Government is prepared to agree to anything that may facilitate the development of the law, the prescriptions of which all the Members of the League have undertaken to observe " as the actual rule of conduct among Governments".

Furthermore, in the Chinese Government's view, a request for an advisory opinion from the Court is a matter of procedure, and should therefore be decided by a majority vote in the Assembly or the Council, as provided in Article 5, paragraph 2, of the Covenant.

Denmark.

[*Translation.*] August 20th, 1936.

The Danish Government considers that there can be no legitimate doubt that an advisory opinion may be asked from the Court by the Council or the Assembly by a resolution adopted by a simple majority. The Danish Government cannot recognise the justice of the chief argument put forward in support of the necessity of a unanimous resolution — namely, that in practice such an opinion is considered to possess an authority equal to that of a judgment strictly so-called, and that a simple majority of the Council or the Assembly can thus produce a final decision in a dispute involving a State which has not consented to a legal decision by the Court. The question of the authority to be attached in practice to the Court's advisory opinions must depend in each particular case on the contents of those opinions, and has nothing to do with the question of the necessity of unanimity or a majority in bringing the dispute before the Court.

The Danish Government considers that this is a case falling under Article 5, paragraph 2, of the Covenant.

Ecuador.

[*Translation.*] September 24th, 1936.

Article 14 of the Covenant of the League of Nations mentions as a function (compulsory and not optional) of the Permanent Court of International Justice that of giving an advisory opinion on any dispute or question referred to it by the Council or by the Assembly.

According to the system laid down in the Covenant (Article 5, paragraph 1), however, decisions at any meeting of the Assembly or of the Council require the agreement of all the Members of the League represented at the meeting. But this unanimity can only be necessary for questions of substance discussed and settled either by the Assembly or the Council in pursuit of the essential aims assigned to the organs of the League of Nations in the preamble to the Covenant.

A mere request for an opinion to the Permanent Court of International Justice may be a preliminary to the institution of proceedings before the same Court, the Assembly or the Council ; and in this sense it is not a question of substance requiring unanimity for decisions. We therefore consider paragraph 2 of the same Article 5 to be applicable to these cases, this paragraph laying down that all matters of procedure at meetings of the Assembly or of the Council shall be regulated by those bodies and may be decided by a majority of the Members of the League represented at the meeting.

Questions of procedure may, however, arise in connection with matters already under consideration by the Assembly or the Council which may require an opinion from the Permanent Court to clear up certain points. In such a case, a simple majority of votes is sufficient for submitting a request for an advisory opinion to the Court. But it is also possible that any Government Member of the League, which is represented on the Assembly or the Council, may desire, with a view to clearing up any point of international law or of the interpretation of treaties, or other similar matters, to propose to the Council or the Assembly the desirability of consulting the Court ; in such a case, those bodies may accept the proposal by a simple majority of votes and ask the Court for an opinion, this possibility being also provided for in Article 17, paragraph 1, of the Covenant.

Accordingly, in the Government of Ecuador's view, the system laid down in the Covenant and the provisions of Article 14, Article 5, paragraphs 1 and 2, and Article 17, paragraph 1, taken in conjunction with the fundamental aims mentioned in the preamble of the Covenant, are such as to make it quite clear that the Assembly and the Council are fully entitled to address requests for an advisory opinion to the Permanent Court of International Justice by a simple majority of votes.

Estonia.

[*Translation.*] September 7th, 1936.

The Ministry for Foreign Affairs has the honour to communicate the following observations concerning advisory opinions.

Advisory opinions are a means by which the Council or Assembly can consult the Court on any dispute or point of law.

So long as it is a question of obtaining advisory opinions to clear up points of law on matters arising in the conduct of ordinary League business which are not directly prejudicial to the interest of any Member, the Estonian Government can see no objection to such opinions being regarded as mere matters of procedure ; it is therefore in favour of enabling the Council and Assembly to request such opinions by a mere majority vote. Insistence on unanimity in such cases would make procedure unduly rigid and thus might hamper the organs of the League in their work.

The question takes on a different aspect when an advisory opinion is designed to assist the Council in settling a dispute submitted to it by the parties, or one of the parties, under a provision of the Covenant. An advisory opinion, in regard to which the Court deliberately follows the contentious procedure, is more or less equivalent to a judgment and places the Council in possession of the legal bases of any settlement of the dispute. Having regard to the very high authority which the Court enjoys, it must be recognised that, in practice, if not in law, its opinion is binding upon the Council. In this way, a request for an advisory opinion has the effect of substituting legal proceedings before the Court for conciliation proceedings before the Council. Being firmly attached to the principle of compulsory arbitration, the Estonian Government would not object to this, but would prefer that the Court's competence in such cases should be explicitly defined and that States should be asked to consent beforehand to the reference of their disputes, pending before the Council, to the Court for an advisory opinion. The Estonian Government considers, moreover, that such consent might be given by means of a special protocol similar to that embodying the valuable optional clause providing for the Court's compulsory jurisdiction.

This method would also have the advantage of avoiding discussion on the thorny question whether the relevant decisions require unanimity or merely a majority. As the consent of the parties would have been given in advance, the Council can take its decision without concerning itself with the opposition of either of the parties, which hitherto has constituted the most serious impediment to the Council's action in such matters. As the votes of the parties would no longer be taken into account, the unanimity rule could be applied without any question arising.

Finland.

[*Translation.*] October 29th, 1936.

In connection with the proposals for the reform of the Covenant, the Finnish Government, in agreement with the Governments of the other northern countries, has already expressed the opinion that it would be eminently desirable that requests for advisory opinions of the Permanent Court of International Justice should be facilitated and that it should therefore be agreed, at least as a general rule, that such requests may be conveyed to the Court as the result of mere majority decisions. Such is still the Finnish Government's view. If, however, the other Member States of the League of Nations are not all prepared to accept such a rule outright, the Finnish Government ventures to suggest a compromise solution based upon a classification of the cases in regard to which advisory opinions might be requested. The Finnish Government has no desire to deal exhaustively with this aspect of the problem in the present memorandum and confines itself to pointing out that certain advisory opinions may not involve more than the elucidation of a legal point incidental to a much bigger problem. In such a case, the advisory opinion would not prejudge that problem in its entirety, so that here at least a simple majority decision in favour of the request should be all that is required. It is, however, conceivable that, even in cases in which the advisory opinion merely deals with one detail of a comprehensive problem, the Court cannot settle that detail without so far prejudging the main issue that, by implication, its opinion settles the latter also. In such cases, a stricter procedure in respect of votes on requests for advisory opinions would perhaps be justified. This applies *a fortiori* to cases in which the subject of the advisory opinion is not merely one detail of a comprehensive problem but the whole matter at issue.

If such a classification of the cases in regard to which advisory opinions might be requested is accepted as a basis for the rules governing votes, it will still be necessary to face the fact that, generally speaking, their application will require to be studied separately in regard to each case as it arises.

Latvia.

[*Translation.*] December 22nd, 1936.

While it does not feel able to express any definite opinion for or against the necessity of a unanimous vote by the Council or the Assembly on requests for advisory opinions, the Latvian Government would stress the fact that the chief difficulty does not appear to lie in the question frequently raised during the discussions on the conditions of voting requests for advisory opinions, and particularly in the First Committee in 1928, as to whether such a vote must be unanimous, or whether a simple majority may suffice, but rather in the question what weight and what authority should be attached to advisory opinions given by the Permanent Court of International Justice.

This points to a distinction between requests for advisory opinions relating to disputes and those dealing with points of law, and it would be more practical to turn this distinction into one between requests for advisory opinions entailing political consequences and requests for opinions which do not entail such consequences.

While it realises the existing difficulties, which would also have to be overcome in order to decide in which of these two classes a request for an advisory opinion should be placed, the Latvian Government is inclined to think that the best solution would be to decide that a simple majority will suffice in the case of the second class of requests, while a unanimous vote would remain the rule in the case of the first class.

Netherlands.

[*Translation.*] October 29th, 1936.

At the sixteenth Assembly, in the course of the discussion in the First Committee, it was suggested that the decline in the business of the Court might be due to the conditions which hitherto have governed the obtaining of advisory opinions from it. Assuming this to be correct, such consultation might become more frequent were it laid down that henceforward decisions to request an opinion might be taken by a majority vote of the Council. Though it would have been happy to contribute, through its reply, to a solution likely to increase the Court's activities, the Netherlands Government cannot support an interpretation of the Covenant under which decisions to request an advisory opinion might, as a general rule, be taken by a majority of the Council. In the minds of the authors of the Covenant, the unanimity rule, as laid down in Article 5, was one of the essential principles of the League's constitution, so that it may only be disregarded in cases in which an exception has expressly been made. To regard the consultation of the Court as a matter of procedure within the meaning of paragraph 2 of Article 5 of the Covenant would, however, appear to be inadmissible. Even though the Court's opinions are binding neither upon the Council nor upon the parties, it must nevertheless be recognised that the distinction between consultation of the Court and the appointment of a committee of experts is enhanced by the Court's

unique position as the juridical organ of the community of nations. It is scarcely likely that, having refrained from making the Court's jurisdiction compulsory, the authors of the Covenant would have attempted, by this indirect means, to compel States to agree to all disputes being taken before the Court, irrespective of their wishes. The fact that the Court itself has more and more closely assimilated its advisory procedure to its contentious procedure is a further reason for ceasing to regard consultation of the Court as a matter of procedure.

In the opinion of the Netherlands Government, the only cases in which the principle of unanimity may really be departed from are those in which unanimity in the Council is, under special provisions, not required for decisions on the merits. Such a case might arise if the Council were empowered, under a special Convention, to take decisions on the merits of a case by a majority vote. Similarly, in the event of a dispute between two Members of the League which is likely to lead to a rupture and is brought before the Council under Article 15 of the Covenant, the Council would be entitled to ask the Court for an advisory opinion even if the parties did not consent. For it would appear to be illogical that, while competent to decide upon the merits of a dispute without the parties' consent, the Council should require to obtain such consent in order to ask the Court for an opinion on points of law arising in the course of its examination of the dispute. The attitude taken up by the Permanent Court in the case of Eastern Carelia in 1923, when it declared itself unable to give an opinion because the Union of Soviet Socialist Republics refused to take part in the proceedings, is not in contradiction with the rule set forth above, as the Union of Soviet Socialist Republics was not then a Member of the League.

Poland.

[*Translation.*] September 22nd, 1936.

On September 28th, 1935, the Assembly expressed the desire that the Council "should examine in what circumstances and subject to what conditions an advisory opinion might be requested under Article 14 of the Covenant".

The Council having asked, by its resolution of January 23rd, 1936, to be informed of the views of Members of the League on this subject, the Polish Government now has the honour, in reply to the Secretariat's invitation, to communicate the following observations :

The real crux of the problem which the Council is called upon to consider is whether the decision to apply to the Permanent Court of International Justice for an advisory opinion under Article 14 of the Covenant must necessarily be unanimous, or whether a majority vote may suffice.

This being a legal question, its solution should be attempted by legal methods. Such a solution cannot, moreover, be sought elsewhere than in the Covenant itself, more particularly in Article 5, which governs the matter and which reads as follows :

> " 1. Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.
>
> " 2. All matters of procedure at meetings of the Assembly or of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting."

This text suggests two observations. In the first place, paragraph 1 does not merely say " except where otherwise provided " but " except where otherwise *expressly* provided ", to emphasise the strictness of the rule laid down. In the second place, paragraph 2 enumerates the exceptions to the rule in paragraph 1, so that its terms are in no wise amenable to extensive interpretation.

Apart from a few occasions on which it was merely raised incidentally, the problem of the conditions of voting requests for advisory opinions was first brought up in general in 1926 at the Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, which had been called together to examine the reservations attached by the American Senate to the accession of the United States. The fifth of these reservations was obviously prompted by the conviction that requests for advisory opinions are governed by the unanimity rule. This is very clearly confirmed by the following passage from a speech by Senator Walsh :

> " Under the Covenant of the League of Nations, each of the great nations had a representative on the Council of the League ; and any one of them, therefore, because the Council proceeds by unanimity, can prevent submission to the Court of any request for an advisory opinion which it does not want to have submitted. This reserve gives to the United States exactly the same power. . . ."

The fifth American reservation gave rise to protracted discussions in which, however, no real attempt was made to come to grips with the problem. For the most part, speakers merely pointed out the difficulties of the question, while recognising that the Conference was not competent to settle it. In the end, the Conference confined itself to expressing the view that, in any case, the United States should be assured of a position of equality with Members of the League.

Consideration of the American reservations was resumed in 1929 concurrently with the proceedings for the revision of the Statute of the Court. A Committee of Jurists framed a

draft protocol which was adopted by the Conference of States and subsequently signed by almost all the Members of the League. Although that protocol laid down no specific rule regarding the voting of requests for advisory opinions, paragraph 5 was so drafted as to appear indirectly to recognise the need for unanimity.

The problem was formally brought before the First Committee of the Assembly in 1928 through a motion of the Swiss delegation recommending the Council " to consider whether it would not be desirable to submit to the Permanent Court of International Justice, for an advisory opinion, the question whether the Council or the Assembly can, by a simple majority, request an advisory opinion under Article 14 of the Covenant of the League of Nations ".

The Swiss proposal led to a comprehensive discussion in which clear-cut opinions were for the first time expressed. On the substance of the question, opinion was divided ; nevertheless, the predominant view was that recourse to the Court would be premature and inadvisable and that it would be wiser to leave the question open and not attempt to force an immediate solution. The report of the Committee merely expressed the hope " that the Council would have a study made of the question when circumstances permitted."

The Swiss proposal was revived in 1935 by five States : Belgium, the Netherlands, Norway, Sweden and Switzerland. After keen discussion, in which the views of 1928 were repeated even more categorically, the First Committee submitted its report to the Assembly. The latter adopted the resolution referred to at the beginning of this statement.

To leave no doubt as to its attitude to this problem, the Polish Government must state that, in its view, decisions of the Council or the Assembly to request advisory opinions must always be absolutely unanimous.

This opinion, which the Polish Government has already maintained on several occasions, has a secure and firm foundation both in the provisions of the Covenant and in the real character of advisory opinions.

* * *

It is clear from the various discussions of this problem that the chief legal argument — and in the present instance, legal considerations are paramount — advanced in favour of the theory that a majority vote is enough, is that advisory opinions have not the same binding force as judgments. As its name implies — it is argued — an advisory opinion is one which does not bind the authority by which it is requested. The Council is always free to adopt or reject it. The Council, it is true, has generally tended to fall in with the views expressed in advisory opinions, but that is merely due to the Court's prestige. A request for an advisory opinion is, therefore, nothing more than a form of investigation. Intrinsically, it does not differ from the appointment of a committee of enquiry or a committee of experts — in other words, it is a mere matter of procedure which, in accordance with Article 5, paragraph 2, of the Covenant, the Council or Assembly can decide by a simple majority vote.

The weaknesses of such reasoning are sufficiently obvious. In the first place, it should be observed that, even if it were true that the Council remains entirely free to adopt the Court's opinions or not, as it thinks fit, it would by no means follow that such opinions are to be assimilated to the reports of a committee of enquiry. Even if advisory opinions were distinguished by no other features than their particularly authoritative character and the practical consequences that that entails, this would in itself prevent their being ranked with mere methods of investigation. In law, no doubt, advisory opinions have no binding force. The Council will nevertheless always tend to follow them, to avoid finding itself at variance with the Court.

The Council might, perhaps, have been able to retain a certain independence and freedom of action in regard to advisory opinions if the procedure had always been that of a consultation of the Court, in the strict sense of the term — that is to say, if the opinions were given confidentially and intended solely for the use of the Council, and if no contact were established with the parties. Such was, perhaps, the original idea of those by whom Article 14 of the Covenant was drafted, but in any case the Court departed from this conception from the very outset. It applied, in respect of opinions, the full contentious procedure with the same opportunities for argument on both sides and the same publicity ; it has even provided in the Rules of the Court for the appointment of national judges. In this connection, it is of interest to quote a passage from the report of a Committee of Three appointed by the Court in 1927 :[1]

> " The Court, in the exercise of this power, deliberately and advisedly assimilated its advisory procedure to its contentious procedure ; and the results have abundantly justified its action. Such prestige as the Court to-day enjoys as a judicial tribunal is largely due to the amount of its advisory business and the judicial way in which it has dealt with such business. In reality, where there are, in fact, contending parties, the difference between contentious cases and advisory cases is only nominal. The main difference is the way in which the case comes before the Court . . . So the view that advisory opinions are not binding is more theoretical than real."

It should be noted that, until very recently, the Statute of the Court made no reference to the advisory procedure ; the assimilation of the procedure in these two classes of cases was brought about by the Rules of the Court. The new Statute which came into force on February 1st, 1936, gave formal sanction to the previous practice and the provisions of the Rules of the Court by expressly providing in Article 68 as follows : " In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognises them to be applicable ".

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[1] See the fourth annual report of the Court, page 72.

The Court certainly cannot be blamed for attaching to its opinions the same procedural guarantees as to its judgments or for endowing them with increased value and authority. On the other hand, it is impossible to close one's eyes to this state of affairs and to its natural consequences.

The Court's attitude in the case of the status of Eastern Carelia gives an idea of its own conception of the task conferred upon it by Article 14 of the Covenant. In its Opinion of July 23rd, 1923, it expressed the following views :

> " The Court is aware of the fact that it is not requested to decide the dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."

The foregoing observations on the Court's advisory functions are all the more valuable as they come from the most authoritative source. If the words " advisory opinions " could be given their ordinary and usual meaning — that on which the advocates of the majority rule attempt to base their argument — the absence of Russia could in no way have prevented the Court from expressing its opinion on the questions submitted to it in the light of the documentary material alone, though naturally — such information being incomplete — with the necessary reservations. The Court, however, refused to do this and gave the absence of Russia as its reason — a line of argument which can only be justified on the assumption that the consultation of the Court initiated a suit in the proper sense of the term. Similarly, the fact that Russia was not a member of the League could only affect the Council's competence in the matter ; it could not constitute an obstacle preventing the Court from advising the Council on certain legal aspects of the case.

The close assimilation of the Court's advisory functions to those of a tribunal which declares the law — an assimilation, be it repeated, which was brought about at the very outset — is an established fact, which must be duly taken into account. It follows that, between the matters of procedure referred to in Article 5, paragraph 2, and a request for an advisory opinion, there is a difference which precludes any analogy between the two. The conclusions of the report of a committee of enquiry drawn up in private and in accordance with the procedure laid down by the Council and the pronouncements on points of law of an opinion are two totally different things ; the distinction between the two cannot, moreover, be reduced to the difference in the degree of authority enjoyed by the bodies from which they respectively emanate.

Advisory opinions, indeed, have come to resemble judgments of the Court ; they contribute to the same extent to the precedents of the Court and play the same part in its work of developing international law and deducing its rules.

The logical consequences of this position in fact and in law are easily perceptible. It has frequently been pointed out, with justice, that, in contentious cases, the recognition of the majority rule with regard to requests for advisory opinions is almost tantamount to imposing, by roundabout methods, compulsory arbitration on the parties contrary to Article 12 of the Covenant, which expressly leaves the parties free to choose between arbitration or judicial settlement and enquiry by the Council. It is clear that a party having recourse to the Council expects a political settlement of its case untrammelled by legal considerations. In such a case, a majority decision to consult the Court is equivalent to the substitution of a judicial for a political settlement without the consent of those concerned, with the additional risk that, once the case has been settled legally, the Council's proper task of mediation will become more difficult.

Even in matters where a clear-cut dispute has not developed, the importance of advisory opinions is no less great and their true character remains the same. Mention has already been made above of the importance of advisory opinions in the Court's body of precedents and of their importance in the development of the international law which governs relations between States. An advisory opinion involves findings on points of law which may affect the interests of States. At the same time, it must not be forgotten that the effects of such opinions are not confined to the case in which they are rendered, but that, as is well known, their findings on points of law also influence the decisions of other jurisdictions.

The champions of the majority rule lay great emphasis upon the difference between the Council, as the political authority, and the Court, as the legal authority. When, they argue, the Council has recourse to the Court, it is solely to obtain information on certain points of law ; the Court's legal findings are merely intended to guide the Council in reaching the final decision which it alone is competent to render.

Closer scrutiny of this argument soon reveals its fallacies.

If the Council requires enlightenment on certain questions of law, clearly that can only mean that such questions have actually been raised and that the States at issue are relying in their contentions on what they claim to be their rights. The Court, it is true, only pronounces upon the legal aspect of the case ; but the Council could scarcely declare it to have been mistaken ; for the Council, the Court's opinion is bound to carry great weight, and its political task may well be complicated by such an opinion, with which it would be very difficult for it not to comply.

All these considerations directly raise the question whether, in the circumstances, such a serious step as a consultation of the Court can be regarded as equivalent to the appointment

of a mere committee of enquiry. Surely the answer can only be in the negative, and that would in itself be enough to settle the matter.

Opponents of the unanimity rule have professed to find an argument in Article 14 of the Covenant on the ground that, having signed the Covenant, Members of the League who bring a dispute before the Council know to what they are laying themselves open, as Article 14 provides that the Council may request an advisory opinion in all disputes.

This argument clearly is the result of confused thinking. No one would deny that the Council has power to consult the Court ; the difficulty is how the decision to request such an opinion is to be taken. The two questions are distinct and are separately dealt with in the Covenant.

Consideration must also be given to another contention, according to which the unanimity theory would be contrary to the provisions of the Covenant or of special conventions empowering the Council to take decisions either by an ordinary majority vote, or by a special majority vote, or by a qualified unanimous vote — that is to say, unanimously, the votes of the parties to the dispute being left out of account, as provided, for example, in Article 15. It would, it is argued, be paradoxical to require unanimity for a request for an opinion when such unanimity is not necessary for a decision on the merits.

The force of this argument is seen to be only apparent when it is considered that, in the above-mentioned case, it is the provisions which establish special conditions in regard to voting which themselves invest the Council with power to pronounce upon the issues before it. By proceding in this way, the signatories of parties to the clauses in question gave the competence conferred by those clauses to the Council and only to the Council. To attempt, by the roundabout method of an advisory opinion and, without their consent, to have such matters decided by another authority would be the exact opposite of what they intended. In so far, therefore, as advisory opinions are concerned, unanimity is required in all the cases cited and for the same reason that applies to the cases dealt with in Article 15 of the Covenant.

The exact terms of Article 5 of the Covenant may now be usefully re-examined.

It is clear that, while enumerating certain exceptions to the unanimity rule, paragraph 2 is completely silent with regard to requests for advisory opinions. The fact becomes particularly significant when it is considered that, at the same time, Article 14 of the Covenant invested the Court, for the exclusive use of the Council and the Assembly, with advisory functions quite foreign to a court of justice. Had the authors of the Covenant intended that requests for advisory opinions were to be treated as " the matters of procedure " mentioned in paragraph 2, it is inconceivable that, while expressly mentioning the appointment of committees of enquiry whose character could scarcely be in doubt, they should have omitted to mention the very special powers of the Council and Assembly to consult the Court. The omission from the text of any reference to requests for advisory opinions supplies a decisive argument against any attempt to assimilate them to matters of procedure within the meaning of paragraph 2.

* * *

This study of the problem would be incomplete without consideration of the intermediate theories which were also put forward in the course of the discussions and which can be briefly summarised as follows :

(*a*) Advisory opinions may be requested by a majority decision, but if such opinions are of a nature to decide issues of substance, the majority must include the votes of the States parties to the dispute, unless they have accepted the Court's compulsory jurisdiction.

(*b*) The question of the conditions of voting requests for advisory opinions assumes a different complexion in each case, and the reply must vary according to circumstances. If the opinion requested would decide the substance of the dispute before the Council or the Assembly, the procedure in regard to the vote would be the same as that required in respect of the question actually at issue ; as a rule, that is to say, a unanimous decision would be necessary. When the opinion would not have any bearing upon the substance of the dispute, a majority vote may suffice.

It will be seen that the first theory differs essentially from the second in that the only rule which it recognises is the majority rule, though at the same time it concedes that, in cases in which the opinion would decide issues of substance, the majority must include the parties. Both theories, however, have this in common ; that they are prompted by considerations of practical expediency. Another and more important feature which they have in common and which perhaps derives from the first is that they both are entirely without any foundation in the provisions of the Covenant.

It need not be pointed out that the theory outlined under (*a*) above would introduce a new voting procedure unknown to the Covenant, in the text of which it would require to be inserted if it is to be generally binding. Such a procedure would be not so much a rule already embodied, even if only implicitly, in the provisions in force as an actual addition to the Covenant. Furthermore, is not the concession in regard to the parties to the dispute — obviously made to escape the criticism that they are being forced to accept compulsory arbitration — really a disavowal of the whole theory that a majority vote is sufficient on the ground that an advisory opinion is nothing more than a means of investigation ? If this is not the case, what logical reason can there be for the rule that the majority must include the votes of the parties to the dispute ?

Both theories would make procedure differ according to the questions put to the Court. There is no justification for making such a distinction in regards to the conditions for voting

a request for an opinion or for treating the request sometimes as a mere act of procedure and sometimes as a matter calling for unanimity. The questions brought before the Court may indeed vary, but the intrinsic character of the opinion does not change any more than the character of a judgment changes according, for example, as it deals with a plea to the jurisdiction, or is declaratory, or it orders a payment to be made. Whenever the Court gives an opinion, it rules upon a question of law, and thus each time adds to its body of precedents.

But even if for the moment we accepted the theory that on questions not affecting the substance of the dispute an opinion might be requested by a majority decision, the difficulty would then be to decide which questions came within this category.

It would be very difficult to lay down any hard and fast definition, and opinions on the matter might easily differ. Who then would decide between them ? Who is competent to decide ? In this connection, it is sufficient to recall the discussion which took place in the Council in 1931 in the course of the Sino-Japanese dispute, when it was proposed to send an invitation to the United States. We have here a new and no less complicated problem which creates a new difficulty and thereby makes both the above theories unworkable.

Similar practical considerations should be borne in mind when considering the all too frequent objection that the application of the unanimity rule to requests for advisory opinions paralyses the action of the Council. This argument should be used with some caution, especially when interpreting the Covenant. In the Covenant, there are many cases of the highest importance in which the Council might find itself greatly hampered by the need for unanimity. If the above argument is to be used, it will be necessary in all such cases to reduce this rule, which constitutes the fundamental principle of the League's constitutional charter, to a dead letter. No attenuation or modification of the unanimity rule can be introduced otherwise than through an amendment to the Covenant. In the form in which it is at present embodied in the Covenant, it is obligatory and must be strictly observed. To return once more to the above-mentioned argument, it is necessary to enquire whether there is any real justification for the assertion that the application of the unanimity rule to requests for advisory opinions hampers the Council in its work. If it requires enlightenment on a point of law, the Council can at any time apply to the Legal Section of the Secretariat or consult a committee of legal experts which it can set up by a mere majority vote. The argument is therefore without foundation.

* * *

After the foregoing legal considerations, attention may also be turned to the practical aspects of the problem.

It may be asserted with some confidence that the acceptance of the majority rule in respect of requests for opinions might be highly detrimental to the Court's prestige. Its opinions ought to be adopted by the Council and it must never be forgotten that such adoption must be unanimous. It cannot, however, be denied that, while unanimous agreement on the part of Members of the Council to approach the Court affords some guarantee that the latter's opinion will also be unanimously accepted, a procedure under which decisions to request opinions can be forced through by a majority vote would inevitably incline members of the minority to oppose the adoption of the Court's opinions ; and, obviously, it is not the theory that the advisory opinion binds no one and that the Council is free to reject it which would deter the dissentients from using their right of veto. As a result, cases in which the Court's opinions failed to secure adoption through lack of unanimity would become frequent. It is unnecessary to dwell upon the mischievous and harmful consequences which this would have for the prestige and authority of the highest international jurisdiction. In this connection, attention may very usefully be directed to the prudent warning of that eminent lawyer, now President of the Permanent Court of International Justice, Sir Cecil Hurst, who in 1928 was the United Kingdom delegation's representative on the Committee :

> " If it were now to be definitely laid down that a majority of the Council could seek the Court's opinion, it was necessary to consider what the effect of such a rule would be. Was it likely that the minority — against whose desires the question had been formulated — would accept that solution ? The almost inevitable result of the crystallisation of the doctrine that opinions might be asked for by a majority vote would be to divide the Council itself with respect to its practice of adopting without question the opinions rendered. Could that be a good result from the point of view of the Court's prestige ? It would reduce the Court to the level of a mere committee of enquiry."

In order to exhaust the problem, consideration must also be given to the suggestion that the question of the conditions of voting requests for opinions should be submitted to the Court for an advisory opinion. This was put forward in the first place at the Conference of States in 1926. The suggestion was revived in the Swiss proposal of 1928, and again by the five States in 1935.

The Polish Government does not think it useful or wise to have recourse to this procedure, the results of which, in its opinion, could not, in any case, prove entirely satisfactory.

There is little prospect of a request in that form being unanimously supported in the Council, though even the advocates of the majority rule could not in this case question the need for unanimity, as the matter would be no longer one of procedure in a specific case, but a question of the general interpretation of the Covenant. But even assuming that such unanimity is secured, the question would then arise of who is competent to interpret the Covenant. Is the Court itself competent to do so ? Undoubtedly it can interpret the

Covenant, like any other international Convention — but solely for the purposes of a specific case. Under Article 36 of its Statute, it can also settle disputes regarding the interpretation of a treaty, but only within the limits laid down in Article 59 of the Statute, which provides that the decision of the Court has no binding force except between the parties and in respect of the particular case. It is a generally recognised principle that the only authority competent to interpret a law is that by which the law was made. There can be no doubt that the Court is not competent to give an abstract interpretation of the Covenant which would be binding upon Members of the League and, finally, dispose of any difference of opinion in this respect. It may appositely be pointed out that, by a strange coincidence, the suggestion that the Court be asked finally to settle this matter by an advisory opinion was supported by the advocates of the majority rule, who emphasise the non-binding character of advisory opinions.

Nor can the Polish Government agree to the view that to settle this problem is a matter of any urgency. In this connection, it prefers to be guided by the wise and prudent practice of the Council, which has always attempted to obtain the unanimous consent of its Members before requesting an advisory opinion. The twenty-eight advisory opinions hitherto given by the Court, indeed, do not include a single precedent for a request decided upon by a mere majority vote. An attempt is sometimes made to use the case of Turkey in the matter of the frontiers of Iraq as an example of such a decision. But though the statements made by the Turkish delegate when the Court's opinion was adopted seem to show that Turkey had been opposed to the Court being consulted, the Minutes contain no evidence whatever of any formal opposition to the adoption of the report regarding the request for an advisory opinion; the case is not, therefore, conclusive.

The practice followed by the Council has had no unfortunate results on the cases considered. On the contrary, it has frequently been instrumental in avoiding painful conflicts, and also in safeguarding the Court's prestige. The Polish Government therefore considers that the proper course is to continue this practice, the results of which have not been bad, and which is in conformity with the Covenant.

Portugal.

[*Translation.*] November 1st, 1936.

The Council of the League of Nations has asked Member States to express their views on the question in what circumstances and subject to what conditions an advisory opinion may be requested under Article 14 of the Covenant.

It should, at the outset, be emphasised that what is at present required of Member States is not that they should make proposals *de jure consliluendo* — that is to say, indicate the system which they regard as most appropriate and most expedient in regard to advisory opinions — but that they should resolve questions *de jure constiluto* — that is, *interpret* the Covenant in the light of the cases and circumstances in which the Council or Assembly may, according to positive international law, request an advisory opinion of the Permanent Court of International Justice.

The question of whether the present system is good or bad or whether it should be maintained or abrogated is not at present at issue.

What is required is that the system should be defined and that an end should be put to the present diversity of interpretations and the uncertainties to which they give rise.

Legal Characler and Binding Force of Advisory Opinions.

According to Article 14 of the Covenant, " the Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

The Court thus discharges a two-fold function, at once *judicial* and *advisory*, as it delivers *judgments* at the suit of the parties to disputes and *opinions*, at the request of the Council or Assembly, either upon *actual disputes* or upon *hypothetical questions* — that is to say, upon questions which are not the subject of an actual dispute or, in the words of the Court itself " d'une opposition de thèses juridiques ou d'intérêts entre deux personnes " (a conflict of legal claims or interests between two parties).

In the first case, the decisions taken are applicable as they stand; they have the force of *res judicala*, are legally binding upon the parties and have the character of authoritative awards — that is, of judgments in the strict sense of the term. In the second case, they are not applicable as they stand, do not possess the force of *res judicata* and are not binding upon the parties, where the subject is an actual dispute, or even upon the Council or Assembly, which can always depart from the Court's findings without infringing the Covenant; they are merely the *opinions* of an *advisory body*.

In a majority of cases, no doubt the Council or Assembly will, *in actual fact*, be bound by advisory opinions, as these issue from the authority officially recognised as most competent to settle questions of international law and to deal impartially with disputes between States.

Even after a question has been elucidated by the Permanent Court of International Justice, however, the Council or Assembly remain free, *legally*, to take such decisions as they may think fit, particularly — and this is a point of essential importance — as the Council issues its recommendation or recommendations as a *mediator*; they are therefore *polilical*

rather than legal in character, " the recommendations *which are deemed just and proper* in regard " to the dispute (Covenant, Article 15, paragraph 4).

Even when the advisory opinion has been delivered, there is, therefore, nothing to prevent the Council from drawing up a report at variance with its findings and from recommending a settlement which, though less strictly legal, is more appropriate to the circumstances, more likely to be freely accepted by *both parties* and more in keeping with the requirements of international peace and the common interests of the nations.

It may, however, be objected that though in any given dispute the Council may depart from the *legal findings* of the Court's opinion and recommend such political settlement as it deems proper, or even more equitable and, *de jure constituendo*, juster, the fact remains that it can no longer represent it as the settlement demanded by *positive law*, just as consultation of the Court on a given *point of law* would prevent the Council's taking decisions contrary to the Court's opinion on that point.

That means that though the Court's opinions are not *absolutely binding* upon the Council, which in any given dispute may always draw up a report containing recommendations which differ from the settlement suggested in the advisory opinion, they are nevertheless binding on the Council in that the latter cannot represent recommendations not in keeping with the advisory opinion as inevitable under international law, as this would mean dissenting from the Court's interpretation and application of that law.

Is this contention justified ?

We think not.

When a public authority is required by law to give opinions at the request of another authority, such opinions have no binding force unless the law explicitly provides to the contrary ; this is especially the case when the decisions of the consulting authority are not legally subordinated to prior consultation of the advisory authority.

Now, prior consultation of the Court is not provided for in Article 14 of the Covenant, which, moreover, does not make its advisory opinions binding.

Such being the case, the authority of such opinions, their binding force, if any, will be, not legal, but political or moral ; they will have no authority *de jure*, but merely *de facto*, and, in our opinion, the latter need not be taken into account in determining their legal character.

Neither is it possible to maintain that the judicial character of the Permanent Court prevents its acting in certain cases as a mere advisory body ; for though the desirability of investing the same tribunal with judicial and advisory duties is indeed open to discussion, there is *no legal impediment* to such a combination of functions, which is common in municipal law, particularly in the case of administrative tribunals.

Unanimity or Majority.

The question is asked whether Council or Assembly decisions to request an advisory opinion must always be unanimous, or whether a majority will suffice.

This question has been answered in various ways : some insist upon absolute unanimity, others are content with unanimity apart from the representatives of the parties to the dispute, while still others favour a mere majority decision — not to mention those who demand unanimity in some cases while contenting themselves with a mere majority in others.

What is the cause of these differences of opinion ?

Apart from certain exceptions expressly indicated in the Covenant, decisions both of the Council and Assembly always require the agreement of all members represented at the meeting (Article 5).

The whole problem is thus reduced to the question of whether there is or is not any special rule under which the decisions in question can be taken by a majority vote.

In certain quarters it is argued — to our opinion rightly — that such a rule is to be found in paragraph 2 of Article 5, which reads as follows :

> " *All questions of procedure* at meetings of the Assembly or of the Council, including the appointing of committees to investigate particular matters, shall be regulated by the Assembly and by the Council and may be decided by a majority of the Members of the League represented at the meeting."

The point to be settled, therefore, is whether advisory opinions are or are not to be classed as matters of *procedure*.

Views differ, because while certain authorities on international law regard advisory opinions as mere opinions without binding force, others take the view that a request for an advisory opinion means leaving the dispute to be settled by the Court instead of the Council, or, in other words, that, in fact, a request for an advisory opinion is tantamount to a surrender of jurisdiction on the part of the authority to which the opinion is to be given.

Now, if the advisory opinion is binding upon the Council, if it is virtually to settle the dispute and if, therefore, what takes place is really a kind of *delegation of powers* to the Court, the request cannot, it is argued, be classed with mere *matters of procedure*.

Is this really the case ?

We have already seen that, legally speaking, advisory opinions are not binding upon the Council or Assembly, as their force is that not of arbitral or judicial decisions but of mere

opinions ; this is true, irrespective of their *de facto* authority or their moral or political force, and irrespective of the rules followed by the Court in framing them.

The Court's advisory procedure may be and, indeed, is attended by the same guarantees as those which ensure the legal value of its judicial decisions and justify the presumption *juris et de jure* that they are in accordance with the law ; the truth is, however, that such guarantees are not sufficient to alter the *legal* character of the Court's findings, which always take the form of a mere opinion and not of a judgment in the strict sense of the term.

There can be no doubt that an advisory opinion concerning any given dispute will be based upon a consideration of all the aspects of the case, so that the Court's findings will be in every way identical with the decision it would have taken had the parties asked it to determine the dispute judicially.

We repeat, however, that this identity of content is not enough to divest the advisory opinion of its peculiar legal character and justify its being considered, not as a mere opinion, but as a judgment.

It is indeed argued that, though the above statement is true in *abstract* law, in *theoretical* law, it is not in accordance with *real law* — that is, the law of actual realities — since the latter show that, save in quite exceptional cases, requests for advisory opinions are, in fact, equivalent to a complete *change of jurisdiction*, whereby the settlement of disputes is transferred from the Council or Assembly to the Permanent Court of International Justice.

That is true.

But as we have already shown, the *legal possibility* of the Court's opinion not being followed — a possibility which is in no way nullified by any *absolutely insurmountable* obstacle in actual practice — justifies the view that consultation of the Permanent Court is a mere matter of *procedure*, such as can be settled by a majority decision.

However great the moral and *de facto* authority of an advisory body, either in municipal or international law, it does not make that body's *opinions* binding unless such binding force is specifically conferred upon them by the rules defining the advisory body's jurisdiction.

If the law requires any administrative or deliberative body to consult a given advisory body without, however, specifically investing that body's opinions with *legal* binding force, failure to consult the advisory body would be universally regarded as a mere *procedural irregularity*, and consultation as a mere *matter of procedure*, unless at any given time it could be established that a rule of law had grown up through usage ; this is clearly not the case with regard to requests for advisory opinions, which, even if rarely, have nevertheless on occasion — at least twice — been decided on by a majority vote.

To sum up : the Permanent Court of International Justice may be *consulted* on *actual disputes* or *differences* or on *points of law* — that is to say, on questions not forming the subject of an actual dispute ; but in all these cases, the advisory opinions will always, legally speaking, be of a non-binding character and may therefore be requested either by the Council or by the Assembly in virtue of a majority decision.

Sweden.

[*Translation.*] October 30th, 1936.

The advisory jurisdiction of the Permanent Court of International Justice is based upon Article 14 of the Covenant of the League of Nations, which provides that " The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly ". The question on which the Circular Letter invites the Swedish Government to express an opinion is that of the rules which should govern Council or Assembly decisions regarding the consultation of the Court. The essential provisions in this matter are those of paragraphs 1 and 2 of Article 5 of the Covenant, which read as follows :

> " 1. Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.
>
> " 2. All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting."

The Swedish Government has on several occasions expressed the view that decisions relating to the consultation of the Court should be regarded as matters of procedure within the meaning of paragraph 2. That paragraph expressly provides that decisions to appoint committees to investigate particular matters, including therefore decisions to appoint a committee of jurists to examine a point of law, are to be regarded as matters of procedure. Now it is clear that the examination of a question of law by the Court affords the League in general, as well as the interested parties, fuller guarantees of reliability than its examination by a committee of jurists appointed *ad hoc*. If the majority rules are to be different in the two cases, it would appear that those governing decisions to consult the Court need not be as strict as the rules applicable to decisions to obtain the opinion of a committee of jurists, since

the risk that the Council or Assembly will be led to base its recommendations on an incomplete or unreliable consideration of the matter would be greater in the latter case than in the former.

To this argument it has been objected, more particularly, that, in practice, an advisory opinion of the Permanent Court of International Justice is binding upon the parties whose interests may be concerned. To admit that the Court may be consulted under a majority decision would therefore be tantamount — whenever the advisory opinion related to a current dispute — to obliging the parties by roundabout means to accept compulsory arbitration in disputes which they may have expressly excepted from the arbitration treaties to which they are parties or which they may be unwilling to submit to arbitration for some other reason.

To this objection the Swedish Government replies that it is, indeed, to be assumed that the Council or Assembly will fall in with the Court's findings on points of law, but that this does not in the least mean that its final recommendation will be confined to reproducing those findings.

In the case of a dispute brought before it under Article 15 of the Covenant, the Council is required to make known " the recommendations which are deemed just and proper in regard thereto ". It may therefore, even while recognising that the contentions of one of the parties are justified in law, recommend a solution based on equity. Even though the Court may, for example, have stated that a claim for damages brought by either of the parties is legally justified, the Council is not thereby precluded from taking the view that the circumstances of the case call for a recommendation that the claim be reduced or even withdrawn. In such a case, the Court's opinion would have cleared up the legal position, without, however, having the character or the scope of an arbitral award. It should, moreover, be pointed out that even a unanimous recommendation adopted by the Council under Article 15 has not the same binding force as a legal judgment or an arbitral award, its effects being limited.

Or it might be that the question of law submitted to the Court merely represents one aspect of the dispute and that, for this reason alone, the Council cannot confine itself in its recommendation to a mere reproduction of the findings of the Court.

It should furthermore be pointed out that the fact that a majority decision was enough would not mean that every proposal to request the opinion of the Court would always obtain the support of a majority. If it was clear at the outset that a legal opinion could not contribute to the settlement of the dispute, there is, indeed, every reason to suppose that it would be impossible to find a majority to support recourse to the Court. In cases of this kind, so far as is known, the majority has never hitherto appointed a committee of jurists, even when it could unquestionably have done so.

The view that unanimity, including the votes of the parties, is always necessary before the Court can be asked for an advisory opinion would appear to lead to inadmissible results.

Under provisions of the Peace Treaties and certain special treaties, the Council is empowered to decide questions of substance by a mere majority vote. The contention that, when such a question is under examination, the Court cannot be consulted save by virtue of a unanimous decision would clearly be illogical.

The Council might also desire to consult the Court on a question held by a majority of its Members to be a question of procedure, but regarded by one of them as a question of substance requiring unanimity — *e.g.*, whether a State not represented on the Council should be invited to take part in its proceedings. In such a case, it would be equally inadmissible that the veto of a single Member should prevent the Council from asking the Court for an advisory opinion.

If, in connection with a dispute brought before the Council under Article 15 of the Covenant, one of the parties contends that the matter lies solely within its domestic jurisdiction, within the meaning of paragraph 8, the Council might desire to consult the Court and it would clearly be inadmissible to insist that it could not proceed to do so unless all its Members, including the parties, were agreeable.

These examples would appear to establish clearly that in any case the unanimity rule could not be accepted as generally applicable to the decisions here considered.

If in the view of any Member State it did not, by the mere fact of entering the League, agree that the Council or Assembly should be free to apply to the Court for an advisory opinion, even if certain of their members dissented, it is fully entitled to urge its own interpretation of the Covenant before the Court. If the Court were asked, against the wishes of any State, for an advisory opinion affecting its interests, that State could in the course of the proceedings defend its view and see that it was duly considered. The Court has, indeed, shown in practice that it believes that it should itself consider whether it can give an advisory opinion that has been requested by the Council without the agreement of one of the parties to the dispute.

Turkey.

[*Translation.*] November 2nd, 1936.

The Ministry for Foreign Affairs considers it to be preferable that requests for advisory opinions should be made by unanimous vote.

MEMORANDUM BY THE INTERNATIONAL LABOUR OFFICE.

1. On September 28th, 1935, the Assembly of the League of Nations adopted a resolution calling upon the Council to examine in what circumstances and subject to what conditions the Permanent Court of International Justice may be asked for advisory opinions under Article 14 of the Covenant. In pursuance of this resolution, the Council decided on January 23rd, 1936, to invite Members of the League to state their views on the subject.

The purpose of the present memorandum is to explain the attitude of the International Labour Office to the above-mentioned resolution of the Assembly.

2. The question whether decisions of the Council or Assembly to ask the Permanent Court of International Justice for advisory opinions must be unanimous or whether a majority vote is sufficient has long been a subject of debate. The various discussions on this subject have seemed to reveal a tendency to consider the question more or less in the abstract. The Labour Office prefers to adopt a different approach to the problem, its interest in the exercise of the Court's advisory jurisdiction being practical and specific. For the Labour Organisation, indeed, this is an organic question of fundamental importance.

3. Article 37 of the Constitution of the International Labour Organisation (Article 423 of the Treaty of Versailles and the corresponding articles of the other Treaties of Peace) reads as follows :

> " Any question or dispute relating to the interpretation of this Part of the present Treaty or of any subsequent convention concluded by the Members in pursuance of the provisions of this Part of the present Treaty shall be referred for decision to the Permanent Court of International Justice."[1]

The effect of this article is to give the Permanent Court of International Justice a general jurisdiction over the activities of the International Labour Organisation.

4. Generally speaking, the Court's jurisdiction is of two kinds : the contentious jurisdiction, in which the Court's findings take the form of judgments, and the advisory jurisdiction, in which they take the form of opinions. Article 14 of the League Covenant provides, in the first place, that the Court " shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it " ; and, in the second place, that it " may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly ".

5. In the exercise of its contentious jurisdiction, the Court delivers judgments deciding between the parties. But according to Article 34 of its Statute, " only States or Members of the League of Nations may be parties in cases before the Court ". It follows that the contentious jurisdiction can only be exercised in the case of a dispute between States. Otherwise recourse can only be had to the Court under the advisory procedure. Not being States, the International Labour Organisation's own organs — that is, the Governing Body of the International Labour Office or the International Labour Conference — have no direct access to the Court ; so that their only means of bringing matters before it is recourse to the advisory procedure through the Council or Assembly, in accordance with Article 14 of the Covenant.

6. Experience has shown that, in practice, the Court's jurisdiction under Article 37 of the Constitution of the Labour Organisation normally takes the advisory form. On six different occasions, indeed, the Court has already passed upon questions directly concerning the Labour Organisation, and on each of these it was the advisory procedure that was followed. This fact alone suffices to show that, to the Labour Organisation, the conditions governing votes upon requests for an advisory opinion of the Court are a matter of vital importance. The manner in which this question is settled will, indeed, largely determine the Organisation's possibility of access to its proper judge.

7. During the discussions preceding the adoption by the Assembly of the resolution of September 28th, 1935, the general issue does not appear to have been regarded as entailing a choice between two mutually exclusive courses. It was maintained that the majority principle and the unanimity principle were not absolutely irreconcilable, and that the procedure to be adopted might vary according to the circumstances of each case. This view would appear to have prevailed, as the resolution adopted by the Assembly recommends the examination of " the question in what circumstances and subject to what conditions an advisory opinion may be requested ".

However that may be, the Labour Office has no desire to express an opinion on the problem in general. It prefers to limit its remarks to the question of the exercise of the jurisdiction provided for in Article 37 of the Constitution of the International Labour Organisation. It proposes to show that, whatever the procedure thought to be expedient or necessary in other cases, there is no need for unanimity in the Council or Assembly in order to request the Court's opinion on the interpretation of the Constitution of the International Labour Organisation, or of the Conventions adopted thereunder.

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[1] The French text of this provision reads as follows :

" Toutes questions ou difficultés relatives à l'interprétation de la présente Partie du présent Traité et des conventions ultérieurement conclues par les Membres, en vertu de ladite Partie, seront soumises à l'appréciation de la Cour permanente de Justice internationale."

8. In this connection, the most obvious argument is that, having been duly provided for, the jurisdiction defined in Article 37 of the Labour Organisation's Constitution must be allowed to function. Now under the various instruments by which these matters are at present governed, the power to consult the Court is vested exclusively in the Council and Assembly of the League. It therefore follows of necessity that, in order to obtain a decision of the Court in the form of an advisory opinion, the Labour Organisation is obliged to make application to the Council or Assembly.

On such occasions, the Council or Assembly doubtless may, of their own motion, add to the initial question any question they may choose, as their own right to consult the Court is unrestricted. But, in such cases, they could not entirely hold up such requests for an opinion, as this would be equivalent to preventing the exercise of the jurisdiction provided for in Article 37 of the Labour Organisation's Constitution. Under that article, the Council and Assembly have an organic function to perform, and it is inconceivable that they should be able, whenever they think fit, to evade the performance of a duty arising out of the very treaties by which they themselves were created.

9. The view that, in certain cases, the Court can only be asked for an advisory opinion if the Council or Assembly are unanimously in favour of such a request is to be explained by the fact that the Court's opinion is regarded as equivalent to a decision by the Council or Assembly themselves. Such is, indeed, usually the case, but it would appear to be obvious that insistence on unanimity would be quite unjustifiable when the Court's opinion is to be sought under a clause previously accepted by all members of the Council or Assembly. Now such precisely is the position in regard to a request for an opinion under Article 37 of the Constitution of the International Labour Organisation.

Members of the League are Members of the Labour Organisation also and, as such, are bound by Article 37 of the Organisation's Constitution. It is clear that the States Members of the Council or Assembly could not oppose the application of a provision previously accepted by and binding upon them all. It is scarcely conceivable that any State could refuse, as a Member of the Council or Assembly, to allow the exercise of a jurisdiction which it had formally accepted as a Member of the Labour Organisation. Even if, generally speaking, the unanimity principle be inherently reasonable, its application in such a case would clearly be contrary to all the canons of law.

10. It should further be pointed out that the procedure of the International Labour Organisation is not based upon the principle of unanimity. On the contrary, the Organisation's Constitution expressly provides that the decisions of the Organisation's competent organs require, according to circumstances, either a plain majority or a stated special majority. In no case does the Constitution require unanimity. The purpose of these rules would therefore be defeated if it were laid down that a unanimous decision of the Council or Assembly of the League is required to give effect to a request for an opinion formulated by a body whose decisions, as provided in the treaties, only require a majority.

11. In actual fact, the question of the conditions that should govern votes on requests for opinions to the Permanent Court of International Justice has, to some extent been linked up with the question of the accession of the United States of America to the Protocol of Signature of the Statute of the Court. In this connection, it is important to note that, since August 20th, 1934, the United States has been a member of the International Labour Organisation. It therefore takes part in the sessions of the International Labour Conference and, on account of its industrial importance, is entitled, of right, to a seat upon the Governing Body of the International Labour Office. In this way, it is enabled to discuss, on a footing of perfect equality with all other States, any request for an advisory opinion arising within the Labour Organisation.

Generally speaking, moreover, it may be observed that, by becoming a Member of the International Labour Organisation, the United States accepted the provisions of Article 37, as of all the other articles of the Constitution of the International Labour Organisation.

12. By inviting the Council to examine in what circumstances and subject to what conditions the Court may be asked for an advisory opinion, the Assembly would appear to have recognised, as stated above, that unanimity in the Council or Assembly is not, generally speaking, an indispensable condition which must be fulfilled before the advisory procedure can be set in motion.

The International Labour Office has deliberately confined itself in the present memorandum to considering the special case of requests for opinions addressed to the Court under Article 37 of the Constitution of the International Labour Organisation and initiated by its organs. It finds that, in this case, the Court's jurisdiction has been formally pre-established by an unambiguous text binding upon all Members of the League of Nations. Such being the case, it considers that the Council or Assembly is obliged to transmit to the Court any request for an advisory opinion under Article 37 of the Constitution of the International Labour Organisation, and that, in such cases, the Council's or Assembly's decisions do not require to be unanimous.

ANNEX.

REPORT PRESENTED BY THE REPRESENTATIVE OF ITALY AND ADOPTED BY THE COUNCIL ON JANUARY 23RD, 1936.

The resolution adopted by the Assembly on this subject on September 28th, 1935, was as follows :

" The Assembly,

" Whereas by its resolution of September 24th, 1928, it expressed the desire that the Council, when circumstances permitted, would have a study made of the question whether the Council or the Assembly may, by a simple majority, ask for an advisory opinion within the meaning of Article 14 of the Covenant of the League of Nations ;

" Observing that such a study has not yet been made and that uncertainty on the matter still persists and may have contributed to diminish the activity of the Permanent Court of International Justice ;

" Considering that it is desirable for the security of the legal rights of Members of the League of Nations that, in cases where it appears indispensable for the accomplishment of the task of the Council or the Assembly that advice should be obtained on some point of law, such advice should, as a general rule, be requested from the Permanent Court of International Justice :

" Expresses the desire that the Council will examine the question in what circumstances and subject to what conditions an advisory opinion may be requested under Article 14 of the Covenant."

The Assembly wishes the Council to examine the circumstances and conditions in which, in application of Article 14 of the Covenant, an advisory opinion can be asked.

The mere statement of the question shows its complexity. It is, moreover, a question which has given rise to many discussions in which very different opinions have been put forward.

It seems, then, that it would be well that the Members of the League should have the opportunity of expressing their views.

Accordingly, subject to my colleagues' observations, I feel I may propose that the Council instruct the Secretary-General to invite the Members of the League to express their views, if they so desire, by a fixed date. This date should be chosen in such a way as to permit of a serious study of the problem. To facilitate this study, the Secretary-General might draw up for the use of the Members of the League a memorandum calling their attention to the occasions on which the problem has been discussed in various organs of the League and giving references to the principal authors who have examined it.