

The World Court and the Anschluss

Maurice Finkelstein

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THE WORLD COURT AND THE ANSCHLUSS

LAW rises to its loftiest heights when it aspires to become the substitute for war between nations. Within the realm of a single nation, jurisprudence has made great strides. In America, it is familiar history how thirteen colonies, each with a tradition and pride of its own, have been welded together into a great empire by the aid of a court. It did not matter that the wisdom of its decisions was often challenged, that resentment often led to threatened and obstinate rejection of its decrees. In the end, all have bowed down and lived by the judicial fiat until today the Supreme Court of the United States wields a power that many absolute monarchs might have envied, for its decisions are not only controlling but they constitute the national concept of justice.

There are those who hope that in time the Permanent Court of International Justice will become the Supreme Court of the nations, that through its wise decisions the peoples of the earth will be welded together into a peaceful world-community between whom war will be as unthinkable as it is between the States of the United States.¹ Judicial

¹ See, for example, Hugh H. L. Bellott, in the GROTIUS SOCIETY PUBLICATIONS No. 8, p. 19 (1921): "This great achievement and I trust this brief survey of the history and functions of the Supreme Court of the United States, the instrument of that achievement, will have impressed upon your mind the fact that, faced with the problem of establishing a permanent court of international justice, we are not limited to *à priori* speculations, but have at our service the rich experience of great nations, organized on a federal system of divided sovereignty and the inheritor of English legal traditions." See also an address by Professor Manley O. Hudson before the Chicago Council on Foreign Relations, delivered Dec. 29, 1923, in NATIONAL LAW PAMPHLET, Vol. 33, No. 5, at p. 28: "I hope that Mr. Borchard and I are going to look back upon a time when decisions of this court will so greatly have changed the minds of us all, will so greatly have contributed to the creation of that 'will to peace' which both he and I want, that we can say it was a great work that was being done, a great contribution that was being made to the development and administration of international law."

wisdom of a high order will be required to accomplish so vast an undertaking, and just as the Supreme Court was met with criticism, not only by defeated suitors but also by partisans who saw in its decisions ruin of their favorite policies, so the World Court will encounter like hostility and, no doubt, even greater obstruction, for the World Court does not have convenient to hand a friendly executive and legislature to help it to enforce its decrees. Even greater, therefore, is the necessity for that high judicial statesmanship which is the marrow of all public law.

It is, therefore, of greatest importance to examine with care the decision of the Permanent Court of International Justice in the *Austro-German Customs Union* case, its first *cause celebre*, for it there had before it an issue which, at other times, might have led to serious difficulty between the nations yet the calm way in which the decision of the Court was accepted has given renewed hope for the future destiny of that great tribunal.²

On the 19th of March, 1931, the sovereign states of Germany and Austria entered into a treaty or protocol. The form of this treaty is familiar in international relations. It was a Customs Union.³ By its terms, both countries agreed to put into effect simultaneously, in their respective realms, a like tariff law, to be agreed upon between them. There was to be free trade between the two countries and the revenues derived from the agreed tariff were to be divided between the two countries according to a fixed quota. There were certain necessary administrative provisions, and it was pro-

² "It must be admitted, however, that this almost equal division of the World Court, when asked to interpret a treaty, does not heighten its prestige. Apparently, political questions, although the World Court specifically renounces any right or intention to deal with them, got mixed up with the legal question. * * * But Americans have to remember that their own Supreme Court is often divided, when handing down decisions by 5 to 4. That does not impair its authority or lead anyone to question its indispensable place in our system of government. The hope is, of course, that the World Court will work out for itself a similar recognition as the ultimate arbiter in all international disputes that are justiciable."—From the *N. Y. Times*, Sept. 7, 1931, p. 12:1. "The important fact is that a really dangerous political crisis was avoided because the Court was in existence and because the nations of Europe had sufficient confidence in it to turn to it in a grave emergency."—Quoted from a speech by Nicholas Murray Butler in the *N. Y. Times*, Oct. 6, 1931, p. 20:2.

³ The text of the protocol is set forth as an appendix to the opinion of the Court. See PUBLICATIONS OF THE WORLD COURT OF INTERNATIONAL JUSTICE, Series A/B, No. 41, p. 99 (1931).

vided that the protocol might be denounced at any time after three years from its date, upon one year's notice by either party to it.

France, Italy and Czecho-Slovakia challenged the protocol on the ground that Austria had violated its solemn international obligations by entering into it. It was claimed that it constituted, if not an immediate alienation of Austrian independence, at least a step in that direction and, as such, it was prohibited by the express provisions of the treaty of Saint-Germain and of the treaty of October 4, 1922. In both documents, Austria had undertaken to preserve its independence and to avoid all conduct which might compromise its independence.⁴

Time and place affect everything. Thus it would probably not be claimed that such a treaty between Austria and England and the United States was at all dangerous to the independence of Austria. There is nothing in a Customs Union as such to bring disquietude to the nations. Such treaties have a long and respected history. But the location of the two countries, their common traditions, their recent alliance and the consanguinity of their peoples led to the anxieties that were manifested by some of the neighboring powers.

Particularly uneasy was the Government of France. In a memorandum which it circulated among the nations, it expressed its attitude as follows:⁵

“International public opinion cannot understand why these negotiations should have been carried on in secret, if—as those who took part in them declare—their purpose was in strict conformity with the international obligations of the contracting parties and with the principles of the League of Nations and the European Union. Public opinion has gained the disagreeable impression that an attempt has been made to confront it with an accomplished fact. This impression was only partially removed when the German

⁴For text of the relevant portions of the treaties involved, *id.* at pp. 42, 43, 44.

⁵PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, Series C, No. 53, p. 630 (1931).

and Austrian Governments publicly announced their intention to accept the procedure of the Council of the League of Nations. The French Government noted this welcome declaration with the greatest satisfaction."

In the same memorandum, the view is expressed that not only was the Régime Douanier violative of the legal obligations of Austria but that it was also inimical to the economic and political interests of Europe.⁶

"In the present memorandum the French Government will, first of all, state its own view of the legal aspect of the problem which is before the Council; attention will then be directed to the consequences which the carrying out of the intentions announced in the protocol of March 19th may have from the economic point of view, particularly as regards Austria, and to their political consequences; and, lastly, it will be considered whether the spirit or the methods which presided over the elaboration of this protocol are inspired by the ideas underlying the investigations undertaken for the realization of European union and by the principles on which the Covenant of the League of Nations is based."

With such a formidable attack before it, the Council of the League of Nations met on the 18th and 19th of May, 1931, to consider the problem and to decide on a course of conduct.⁷ Mr. Henderson spoke first. In his opinion,⁸ "the issue raises important economic and even political questions; but the aspect of the case with which we as a Council are concerned this morning is essentially one of juridical nature and it is therefore eminently one on which it would be desirable for the Council to request an advisory opinion from the Permanent Court of International Justice. To follow any other course would mean protracted discussion in this Coun-

⁶ *Ibid.* at p. 613.

⁷ *Ibid.* at pp. 10-40.

⁸ *Ibid.* at p. 11.

cil and, of necessity, a careful examination of the legal instruments bearing upon the issue which has been raised, and, in the end, a possible failure to reach a conclusion."

All the nations were agreed that this was the proper course to pursue but trained diplomats do not agree without more. It was necessary for each plenipotentiary to state his agreement in fitting language and the views of the various contestants were thus given at great length. Acrimony was not wanting.⁹ "I think that the Permanent Court of International Justice and the Council of the League were set up precisely in order that no power might allege that there existed certain political facts which concerned nobody but itself. We must not forget that the last great war broke out because one great power asserted that a particular fact concerned only itself, and refused all suggestions of reference to the Hague Court, of interventions or conferences."

To which the German representative replied,¹⁰ "I particularly regret the fact that M. Marinkovitch justified his observations on this point by a reference to historical facts which, to my mind, should be left out of account."

Nor was the discussion devoid of its lighter moments. Naturally the debate veered to historic precedents and it was soon discovered that the assembled diplomats had divergent views even with regard to the truths of history. Then up spake Mr. Henderson:¹¹ "Mr. President, in view of the character of this discussion, I think it is time I gave notice that I will ask to be permitted to add a rider to my resolution that these speeches go to the Court for an advisory opinion as to which speech is historically accurate."

"I do not wish to prolong this discussion," said Mr. Hymans, "but you will understand that I feel obliged to say a few words. I think that it is essential, since the Permanent Court of International Justice is, in Mr. Henderson's proposal, being asked for an advisory opinion as to historical accuracy."

In due course, the case came before the great tribunal. Arguments written and oral were considered by the judges

⁹ *Ibid.* at p. 32.

¹⁰ *Ibid.* at p. 33.

¹¹ *Ibid.* at p. 39.

and in the end, of the fifteen judges who considered the matter, eight decided against the legality of the customs regime and seven dissenting judges thought it was perfectly legal.

Americans who are accustomed to five to four decisions of the Supreme Court have an attitude towards them which it will be difficult for the uninitiate to understand. Depending on the view of the critic, he regards one group of judges as impelled by logic and reason and the other by the force of inarticulate major premises. This is especially so in the case of decisions construing the due process clause of the Federal Constitution. Here the scope of judicial discretion is wide and the field for constructive statesmanship is wide. It is inevitable that men should disagree as to policy and that each should regard his view as made necessary by reason and logic.

Perhaps in international law the situation is even more aggravated, for here the problems are essentially political no matter what else may be said about them. Quarrels do not arise between nations in the same manner in which disputes between individuals arise. Nations are almost always impelled to act by political and economic considerations. In modern times, such considerations predominate in the minds of statesmen. Hence disputes that lead to reprisals and war are essentially political and economic and a court which is established to substitute judicial determination of points of difference between nations for armed conflict must necessarily, therefore, concern itself with these political and economic matters. The Court has been in turn criticized and praised for having taken into consideration, in the instant case, matters strictly political. It has been pointed out that the Supreme Court of the United States has avoided this pitfall,¹² yet even the German representative at the Council was aware of the necessities of the situation.¹³ "I am no pedant in legal matters: I know that behind legal phrases and forms there stand the active forces of economic, national and international life. Hence, to my mind, it is plain that we

¹² Cf. Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338, and, also, *Further Notes on Judicial Self-Limitation* (1925) 39 HARV. L. REV. 221.

¹³ *Supra* note 5 at p. 33.

cannot counter the Vienna Protocol solely from the standpoint of legal forms. We can, however, confidently leave it to the judges of The Hague to determine how far they need to take into account the forces that lie behind the formulæ and give birth to them."

Before considering the decision of the Court, it will be interesting to follow the arguments, both written and oral, which were presented to the judges. Of those who signed the Treaty of Saint-Germain and the Protocol of 1922, only France, Italy and Czecho-Slovakia appeared against the Customs Regime. Austria and Germany defended.

The request for the advisory opinion which was made by the Council merely required the Court to give its opinion as to whether an arrangement such as that set forth in the Protocol of Vienna was compatible with the obligations undertaken by Austria in the Treaty of Saint-Germain and the Protocol of 1922. Both documents affirm the inalienable independence of Austria. The treaty also contains the further provision that Austria undertakes "to abstain from any act which might directly or indirectly or by any means whatever compromise her independence." And in the protocol, Austria undertakes "that it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence."¹⁴

The precise question, therefore, before the Court was whether the Customs Regime, as set forth in the Protocol of 1931, was (1) a present alienation of Austrian independence or (2) an act or engagement directly or indirectly calculated to compromise that independence. In order to hold that the Vienna Protocol was created in violation of the obligations of Austria, it was, therefore, not necessary for the Court to be of the opinion that the independence of Austria was thereby effectively injured, it was sufficient for the Court to come to the conclusion that the protocol was a step in the direction of the alienation of Austrian independence and that it put the independence of Austria in danger of being lost, or at least that it increased the hazard of a political union

¹⁴ *Supra* note 4.

between Austria and Germany. Mr. Justice Holmes has pointed out with great force that an act which taken by itself might be entirely innocent and devoid of legal consequences might, nevertheless, constitute a link in a conspiracy by virtue of which fact the act would become illegal and void.¹⁵

The importance of the problem which was thus presented to the Permanent Court can best be stated in the language of M. Scialoja, the Italian advocate:¹⁶

“The problem of the political and economic independence of Austria is one of the most delicate and dangerous problems in present-day Europe. It is so delicate and so dangerous that the treaties of peace and the acts which followed them have established a quite exceptional special regime to guarantee that independence which is considered as an indispensable condition to the peace of Europe.” (Translation ours.)

This was said in reply to Professor Kaufmann, the Austrian advocate, who had challenged a prior remark of M. Scialoja, for apparently the opposition to the Customs Union was not content to abide by an adverse decision of the Court but had suggested that even after the decision of the Court political considerations still remained which might be considered by the Council of the League.¹⁷ “If you declare,” said M. Scialoja, “that the Council has nothing to do with it, that declaration may become tomorrow a declaration of war.” (Translation ours.) It is thus apparent that the problem which was presented for the Court was not an ordinary case

¹⁵ *Akins v. Wisconsin*, 195 U. S. 194, 205, 25 Sup. Ct. 218, 220 (1904). “But an act, which in itself is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.”

¹⁶ *Supra* note 5 at p. 586.

¹⁷ *Ibid.* at p. 478.

but was a dispute involving considerations of a most serious nature for the settlement of which war itself was not considered an unlikely instrument.

A question of such vast importance was necessarily considered by the Court at great length. Fourteen daily sessions were occupied by the arguments of counsel and the Court took a month to decide the case. The first public sitting took place on July 20, 1931, and the last on August 5, 1931. The decision of the Court was not rendered until the 5th of September, 1931. The circumstances of the presentation of this case to the Court recalls the early days of the Supreme Court of the United States when arguments of counsel consumed days and briefs were of moderate length. Here, too, the combined written arguments of all the parties occupied only 137 pages of the printed record while the oral arguments spread over 381 pages. All these are set forth in full in a publication of the Permanent Court which is put forth under the unassuming title "Series C, No. 53"; a document which may some day prove to be of great historic importance.

The arguments cover a wide field. There are technical points taken up entirely with a discussion of the true meaning of the word "independence". It is attempted to show, on the one hand, that independence and sovereignty are synonymous terms; that as long as a nation, through its duly authorized officials, has the power to determine its internal affairs, it is independent. On the other hand, it is argued that independence is lost when a nation puts itself under an obligation to determine its internal affairs according to a fixed policy or according to the determinations of another power. There are endless historical arguments which consider similar customs unions which were entered into by many lands in many periods of the world's story. There is reliance upon the authority of judges, jurists and publicists generally. There are sociological arguments which discuss the factual situation and attempt to show that the realities obtaining in Austria and in Germany render this particular protocol violative of the treaty obligations of Austria no matter what might be said of the same kind of protocol between Austria and any other country. There are even philosophical arguments that discuss the applicability of the

doctrine of causality, and, indeed, we find reference in one of the briefs to Immanuel Kant.¹⁸

While the German Government rested its case on the proposition that the Customs Regime was a mere agreement as to fiscal policies between the two nations involved and that it in nowise affected the freedom of action of either nation and could, therefore, not be said to be hostile to their respective independence, and while the Austrian Government asserted that the protocol was an act of a free nation and that to proscribe it was to limit rather than enhance the independence of the contracting parties, the opposition, on the other hand, sought to go beyond the words of the texts before the Court and to read the treaties in the light of current events.¹⁹

“It is hardly possible to assert that all Customs Unions involve a suppression or a limitation of independence. In fact, it is not necessary to show in this connection that all Customs Unions lead necessarily to such a suppression or limitation. It is therefore unnecessary to engage in a detailed discussion of all Customs Unions that have ever existed; it is sufficient to find analogous cases, that is to say, to present a certain analogy with the proposed Austro-German Customs Union and here it is well to note that the situation which obtains in Austria and Germany recalls the situation which existed in Germany in the nineteenth century. If we examine the situation which existed in the third decade of the nineteenth century in Germany, we will see that the states which were joined together by means of a Customs Union had contiguous territory, an identity of language and the sentiment of a common race (or as expressed by the German authors, a consciousness of being one people—*einheitliches Volksbewusstsein*—and a common parentage—*Blutsverwandtschaft*). It is a fact well known and accepted that during the period in which the first Customs Unions between Prussia and the other Ger-

¹⁸ *Ibid.* at p. 452.

¹⁹ *Ibid.* at p. 172.

man states were concluded, there existed a movement tending toward political unity that nourished the ideal of a grand German Empire, firmly established.” (Translation ours.)

The analogy is pressed very closely by M. Pilotti, speaking on behalf of the Government of Italy: ²⁰

“No one doubts their good faith; but the point is another. The Treaty of Saint-Germain certainly had in view the maintenance of the political independence of Austria; that is the very thesis of our opponents. It had equally in view, we may add, to safeguard that independence against anything that might directly or indirectly expose it to danger. Does not the conclusion of this proposed Customs Union weaken by resistance against unification and give added strength to the economic fusion of the two countries and to those characteristics which they already had in common. It would be, in our opinion, to close our eyes to reality, to forget that there exists now for a long time a strong movement for the political unification of Austria and Germany, and that that movement can develop only to better advantage if the project of a Customs Union is effected. All the good will of the Austrian Government, all the care that it has taken for the economic needs of its people will perhaps not impede the progress of the idea of the Anschluss—I speak only of the idea—and despite this good will and this care it is none the less true that the Government, by one of its acts, will give an opportunity for the development of this idea. That we think is contrary to the international engagements of Austria.” (Translation ours.)

The Court thus had before it a problem the solution of which depended upon the application of a juristic principle. It had to determine whether it would proceed to resolve the controversy solely upon the record before it and close its eyes

²⁰ *Ibid.* at p. 462.

as a court to what it knew as a body of men; whether it would stick closely to the texts of the treaties or take into consideration the political and economic background in which the treaties were written and in which the interpretation was to be made. Of necessity, a choice between these two views had to be made. On this very issue it was that the Court divided.

M. Anzilotti, in his concurring opinion, points out that political and economic problems are necessarily involved in the decision and he also demonstrates the necessity of considering such problems.²¹ "I grant that the Court may refuse to give an opinion which would compel it to depart from the essential rules governing its activity as a tribunal (Advisory Opinion, No. 5, p. 29), but I am unable to admit that the Court can answer a question other than that which has been put to it or confine itself to answering a part of that question. To my mind, that would be an abuse of its powers."

Criticism of the Court has been made because of these very words.²² It has been urged that the Court should not have taken into consideration political questions. The analogy to the Supreme Court has been pressed and it has been suggested that just as the United States Supreme Court has refused to consider matters political so the World Court must do likewise. The argument overlooks much that is vital in the hopes and aspirations that surround the existence of the first real International Tribunal. Of necessity, matters which come before the World Court will have political connotation. There does not exist, side by side with the Court,

²¹ From the opinion of the Court, *supra* note 4 at p. 69.

²² See a note of Professor Edwin M. Borchard, 25 AM. J. INT. LAW 711, 715 (1931): "Thus a great court, it is respectfully submitted, converts a legal into a political question and decides it on considerations involving exclusively political speculation. * * * 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." Cf. reply to the above by Philip C. Jessup, 26 AM. J. INT. LAW 105, 110 (1932): "It will hardly be denied that the interpretation of treaties is a judicial function, even if the treaty enjoyment is one against doing acts which may have certain economic or political consequences." Cf. also Pugh, *Austro-German Customs Union and World Court Decision* (1931) 5 CIN. L. REV. 442, 454, 455: "If the World Court is to be a tribunal limited exclusively in its opinions to what appears on the face of treaties or protocols submitted to it for decision or advice, without authority to take into consideration actual existing circumstances and those likely to come into existence, it is not probable that it will be of much use in settling controversies between nations. Such disputes must nearly always involve political considerations and consequences."

an executive or a legislature upon whose shoulders contentious issues may be thrown. War, as we have said, is the result in this era of considerations that are largely political and economic. Its avoidance, therefore, requires the solution of such problems by an impartial tribunal. If the Permanent Court of International Justice is to be that tribunal, it must assume its burden of deciding cases in the full light of the politics and the economics involved in the problems set before it. To do anything else is to reduce itself to a non-entity in world affairs.

The dissenting opinion would seem to indicate that the judges who concurred in it had a narrow view of the functions of the World Court, that they were ready to base their decision solely on the record²³ without regard to the realities surrounding the record. "The decision of the Court must necessarily be based upon the material submitted for its consideration. Unless the material submitted to and passed upon by the Court justifies the conclusions reached, these conclusions cannot amount to more than mere speculations." It is submitted that it would be impossible to include in a record before the Court some of the criteria for judgment which necessarily must affect the determination of disputes between nations. Indeed, the purposes that animated the contracting parties when they signed the Vienna Protocol might well have an important bearing upon the problem of whether or not the agreement constituted a violation of Austria's international obligation.

The majority of the Court took a broader view of the case. The prevailing opinion concludes with the following words:²⁴

"Finally if the regime projected by the Austro-German Protocol of Vienna in 1931 be considered as a whole from the economic standpoint adopted by the Geneva Protocol of 1922, it is difficult to maintain that this regime is not calculated to threaten the economic independence of Austria and that it is, consequently, in accord with the undertakings specifically

²³ *Supra* note 4 at p. 76.

²⁴ *Ibid.* at p. 52.

given by Austria in that protocol with regard to her independence."

We have seen that the concurring opinion of M. Anzilotti is based on the same juristic point of view and that only the dissenting judges would have us believe that the World Court is foreclosed from considering any matters which are not specifically in the record before it.

On the merits of the issue, there might have been room for debate whether it is reasonable to assume that under the facts as they obtain in Germany and Austria the Customs Union is a step in the direction of the Anschluss. It is a matter about which men may differ. It is difficult to declare out of hand that an affirmation of that proposition is unreasonable. We should not quarrel with the dissenting judges had they been of the opinion that the economic plight of the world made the Customs Union reasonable and of slight effect upon the movement for unification between the contracting nations. If that had been their point of view, they might have justified themselves on the basis of an argument which might perhaps be established factually. But to attempt to sustain the customs regime without regard to the realities of the case and relying solely upon a verbal interpretation of the treaty seems to us to fly in the face of all sound jurisprudence and to reduce the Court to an ineffective vehicle in international relations.

A similar problem confronts the Supreme Court of the United States when it is required to pass upon the constitutionality of legislation. Is a statute within or without the orbit of due process? Most often, the determination must be made in the light of social and economic facts which bear heavily upon the reasonableness of the legislative effort. It is the refusal of the Court to take such matters into account that has led to the famous divisions of opinion. Given the facts, a judgment can be made on the reasonableness of the conduct. Without the facts, the judgment is a decision *in vacuo*.

Ultimately the importance of this decision by the Permanent Court will be found to lie in the fact that it was made and acquiesced in. The pain of the moment will pass

but the fact will remain that the Court has determined a political issue that for a time seemed without solution. Such was the history of the Supreme Court of the United States. When *Marbury v. Madison*²⁵ was decided, no one knew what the genius of Marshall had accomplished. Few realized that by it he had established the superiority of the judiciary over the legislature, but it was not long before its effect began to be felt so that now it is a matter of course that statutes must run the gauntlet of judicial review before their validity can be attested. So with the World Court. Criticism there will be and must be. The dissatisfaction of those against whom the mandate of the Court has run is, of course, keen. But when the fire has died down, the Court will emerge with a powerful precedent to guide it in future determinations. That result is, of course, of far greater importance to the future of world peace than the rightness or wrongness of the particular decision. A different judgment must be passed upon the decision when we consider it from the point of view of the alignment of the judges.

When we consider the nationality of the various judges who constitute the prevailing majority and compare it with the nationality of the judges who constitute the dissent, interesting conclusions will appear. The line-up of the judges is as follows:

Prevailing Judges:

M. Guerrero, Salvadorean
 Count Rostworowski, Polish
 M. Fromageot, French
 M. De Bustamante, Cuban
 M. Altamara, Spanish
 M. Anzilotti, Italian
 M. Urrutia, Colombian
 M. Negulesco, Roumanian

and among the dissenters:

M. Adatci, Japanese
 Mr. Kellogg, American

²⁵ 1 Cranch (U. S.) 137 (1803). See 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) 251, 255.

Baron Rolin-Jacquemys, Belgian
Sir Cecil Hurst, English
M. Schucking, German
M. Jonkheervaneysings, Dutch
M. Wang, Chinese

It is passing strange that all the judges on the bench representing Latin-American countries followed the lead of French and Italian judges, as did also the judges representing Spain and Poland, while in the minority we find only England, the United States, Holland, Belgium, Japan, China and Germany. It does not need much persuasion to recognize that England and the United States have interests in Germany that are for the moment paramount. The present problems in Manchuria had not arisen at the time of this decision and it is plain that most of the political affiliations of Japan and China were with the United States and Great Britain rather than with France and its allies. Nor does it require erudition to note that the French and Italian judges have had the concurrence of the judges of the countries allied to France in constructing the majority, such as those of Spain and Poland. Again, the United States is not popular in Latin-America and the attachment of the Latin-American countries to Spain, which is in a sense their mother country, is also not very obscure.

That the first far-reaching decision by the Court should have lined up the judges on a political basis is much to be regretted. Popular opinion was not slow to seize upon this one fact as an element of adverse criticism. But the fact is of small importance when it is measured with the permanent good that the decision may ultimately accomplish, for a bitterly contentious issue was resolved in this instance by a judicial process.

Both sides have willingly accepted the judicial fiat and it, therefore, stands as a beacon light by which future ships of state may be steered. The future of world peace through judicial action demands a strong court which will not hesitate to make decisions and settle controversies so that in the

end we may all come to look upon the Permanent Court as the mecca of international justice.²⁶

MAURICE FINKELSTEIN.

St. John's College School of Law.

²⁶ Cf. John W. Davis, *The World Court Settles the Question* (Jan., 1932) *ATL. MONTHLY*, p. 130: "Even if the correctness of the Court's deliverance through its majority were more doubtful than I suppose it to be, I should still think it is a great advance that a question so embroiled had been referred to the Court instead of being left to the arbitrament of force as the rival alternative. It is a welcome sign of progress that great nations were willing to submit to the Court matters of such vital consequence and reason out their case before it in open argument and debate. The decision of the World Court in the Austro-German case will stand in history for what it is—a decision sound in itself and a milestone on the path to the final reign of law. Whatever criticism or protest it may have evoked today will soon be of purely antiquarian interest."