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Judgment No. 25
28 June 1937

PERMANENT COURT OF INTERNATIONAL JUSTICE
Judicial Year 1937

The Diversion of Water from the Meuse

Netherlands v. Belgium
Judgment

BEFORE:	President:	Guerrero
	Vice-President:	Sir Cecil Hurst
	Judges:	Count Rostworowski, Fromageot, de Bustamante, Altamira, Anzilotti, Negulesco, Jhr. van Eysinga, Nagaoka, Cheng, Hudson, de Visscher
Represented By:	Netherlands::	M. B. M. Telders, as Agent
	Belgium:	M. de Ruelle, as Agent

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[p5] The Court, composed as above, delivers the following judgment:

[1] By an Application instituting proceedings filed in the Registry of the Court on August 1st, 1936, in accordance with Article 40 of the Statute and Article 32 of the Rules of Court, the Government of the Kingdom of the Netherlands has instituted before the Court proceedings in regard to the diversion of water from the river Meuse. In order to establish the jurisdiction of the Court, the Applicant relies on the declarations made by the Netherlands and by Belgium recognizing as compulsory the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute of the Court.

[2] According to the Application, the subject of the dispute is the question whether, on the one hand, the execution by Belgium of various works in connection with the construction of the Albert Canal and, on the other hand, the manner in which, without the consent of the Netherlands, Belgium at present supplies and appears to intend in future to supply with water existing or projected canals in the north of her territory, are consistent with the rights ensuing to

the Netherlands from the Treaty signed at The Hague on May 12th, 1863, establishing the regime for taking water from the Meuse.

[3] After a brief statement of the facts and of the grounds on which the claim is based, the Application asks the Court:

"I. To adjudge and declare that:
(a) the construction by Belgium of works which render it possible for a canal situated below Maestricht to be supplied with water taken from the Meuse elsewhere than at that town is contrary to the Treaty of May 12th, 1863 ;
(b) the feeding of the Belgian section of the Zuid-Willems-vaart, of the Campine Canal, of the Hasselt branch of that canal and of the branch leading to Beverloo Camp, as also of the [p6] Turnhout Canal, through the Neerhaeren Lock with water taken from the Meuse elsewhere than at Maestricht, is contrary to the said Treaty;
(c) Belgium's project of feeding a section of the Hasselt Canal with water taken from the Meuse elsewhere than at Maestricht is contrary to the said Treaty ;
(d) Belgium's project of feeding the section of the canal joining the Zuid-Willemsvaart to the Scheldt between Herenthals (Viersel) and Antwerp with water taken from the Meuse elsewhere than at Maestricht is contrary to the said Treaty.
II. To order Belgium
(a) to discontinue all the works referred to under I (a) and to restore to a condition consistent with the Treaty of 1863 all works constructed in breach of that Treaty ;
(b) to discontinue any feeding held to be contrary to the said Treaty and to refrain from any further such feeding."

[4] On August 1st, 1936, notice of the Netherlands Government's Application was given to the Belgian Government; on August 7th the communications provided for in Article 40 of the Statute and Article 34 of the Rules were despatched.

[5] As the Court, at the beginning of the proceedings, included on the Bench no judge of Belgian nationality, the Belgian Government availed itself of its right under Article 31 of the Statute, and nominated in that capacity Professor Ch. De Visscher, who was subsequently elected, on May "27th, 1937, by the Assembly and Council of the League of Nations to be a member of the Court.

[6] As the Court was not sitting, the acting President, by an Order made on August 6th, 1936, fixed the time-limits for the filing of the Memorial, Counter-Memorial, Reply and Rejoinder. The documents of the written proceedings were duly filed within the time-limits thus fixed, the last of which, namely that for the filing of the Rejoinder, expired on April i2th, 1937; the case thus became ready for hearing on that date.

[7] In its Memorial, the Netherlands Government repeated the submissions made in the Application.

[8] In the Counter-Memorial, the Belgian Government presented the following submissions :

"May it please the Court,
To declare the submissions of the Applicant to be ill-founded,
To adjudge and declare:
1. That the mere possibility of works being used for purposes inconsistent with the Treaty of May

12th, 1863, governing the taking of water from the Meuse, does not suffice to justify the condemnation of such works and to secure their demolition, since bad faith may not be presumed; [p7]
2. That the feeding of the Zuid-Willemsvaart and the canal joining the Meuse and the Scheldt and its branches is not rendered incompatible with the Treaty mentioned above by the fact that lockage water arising front the working of the Neerhaeren Lock–operated bona fide for the passing of boats–is added to the water from the Meuse coming from the intake at Maestricht–as the Neerhaeren Lock cannot be treated more unfavourably than the Bosscheveld Lock;
3. No breach of Belgium's engagements under the above-mentioned Treaty will result from the circumstance that after the Albert Canal is brought into use, water derived from the Meuse near Liege will, between Hasselt and lock IV, pass along the section of that canal coinciding with a section of the Hasselt branch of the canal joining the Meuse and the Scheldt;
4. Similarly, no inconsistency with Belgium's engagements will result from bringing water derived from the same source into the section of the Albert Canal between Pulle and Antwerp which coincides with the canal joining the Meuse and the Scheldt ;
May it also please the Court, adjudicating upon a counterclaim in accordance with Article 63 of the Rules of Court,
To adjuge and declare:
1. That the Borgharen barrage has been constructed in breach of the stipulations of this same Treaty which is alleged by the Netherlands Government to have been disregarded by the Belgian Government as regards certain stipulations ; that is to say, that the local situation at Maestricht provided for by the Treaty of 1863 has been altered by the unilateral decision of the Netherlands Government; that this alteration has rendered the proper application of the Treaty impossible, because the level of the Meuse has been raised by the Borgharen barrage and the water-gauge which had been placed there in accordance with the Treaty to enable the diversion of water to be regulated in accordance with the level of the water has been submerged ;
2. That the Juliana Canal, being a canal below Maestricht, within the meaning of Article I of the Treaty, is subject, as regards the supply of water to it, to the same provisions as the canals on the left bank of the Meuse below Maestricht;
3. To reserve the rights accruing to Belgium from the breaches so committed."

[9] In its Reply, the Netherlands Government prayed the Court:

"I. Rejecting all submissions to the contrary,
to give judgment in accordance with the submissions formulated by the Netherlands Government in its Memorial presented to the Court on October 31st, 1936.
II. To declare that the submissions of the counter-claim presented by Belgium are ill-founded. [p8]
III. To adjudge and declare,
1. That the establishment and working of the Borgharen barrage is not inconsistent with the Treaty of May I2th, 1863, above mentioned and that no right or interest on the part of Belgium is thereby injured;
2. That the Juliana Canal is not, as regards its water supply, subject to the same provisions as the Zuid-Willemsvaart and the other canals on the left bank of the Meuse below Maastricht ;
3. That in any case the feeding of the Juliana Canal has not been and is not inconsistent with the Treaty of 1863 and that the mere fact that it would be possible for the Netherlands to use certain locks on this canal in a manner contrary to that Treaty does not in itself constitute a breach of that Treaty."

[10] In its Rejoinder, the Belgian Government prayed the Court:

"Rejecting all submissions to the contrary,
To find in favour of the Respondent's submissions of January 28th, 1937.
Alternatively,
In case the Court should be unable on certain points to find in accordance with the submissions of the Respondent,
To declare in any case that the Applicant is committing an abuse of right (abus de droit] in invoking the Treaty of May I2th, 1863, in order to protect new interests (the Juliana Canal and the canalized Meuse) which were not contemplated at the time of the conclusion of that Treaty, while the interests which that Treaty was intended to protect are not in any way threatened ;
As a second alternative,
To declare that, by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent;
As a third alternative,
To declare that the works forming part of the Albert Canal, including the Briegden-Neerhaeren section, are merely the necessary consequences of the works in connection with the Juliana Canal. By constructing the latter canal, the Netherlands Government has caused it to be believed that a new situation has arisen ; that is to say, that the Netherlands Government is abandoning the use of the [p9] common section of the Meuse as a waterway; it is not entitled to complain because the Respondent has taken action in accordance with this new situation ;
As a fourth alternative,
To declare that the Treaty of 1863 has lapsed as a result of the action of the Applicant in carrying out works which have altered the situation on which the Treaty was based, that is to say, in particular, the raising of the level of the Meuse at Maestricht and the construction of a new waterway which deprives the common section of the Meuse of its function as a navigable waterway."

[11] In the course of public sittings held on May 4th, 5th, 7th, l0th, 11th, 12th, 18th, 20th and 21st, 1937, the Court heard:
M. Telders, Agent for the Netherlands Government,
and M. de Ruelle, Agent, Maitre Marcq, Counsel, and M. Delmer, technical adviser for the Belgian Government.

[12] The submissions presented in the documents of the written proceedings were maintained in their entirety on either side at the oral proceedings.

[13] Numerous documents in support of their contentions have been produced on behalf of each Party as annexes to the Application and to the documents of the written proceedings and in the course of the oral proceedings [FN1].

[FN1] See list in Annex.

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[14] At the hearing on May 7th, 1937, the Agent for the Belgian Government suggested that the Court should pay a visit to the locality in order to see on the spot all the installations, canals and waterways to which the dispute related. This suggestion met with no opposition on the part of the Netherlands Government, and the Court decided, by an Order made on May 13th, 1937, to

comply with it. Adopting the itinerary jointly proposed by the Agents of the Parties, the Court carried out this inspection on May 13th, 14th and 15th, 1937. It heard the explanations given by the representatives who had been designated for the purpose by the Parties and witnessed practical demonstrations of the operation of locks and of installations connected therewith.

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[15] The questions at issue in the present case depend on the interpretation and application of the Treaty which was concluded between Belgium and the Netherlands on May 12th, 1863 [FN2], and came into force on July 14th of that year. The purpose of this Treaty is defined in its Preamble as being "to settle permanently and definitively the regime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels" (de regler d'une maniere stable et definitive le regime des prises d'eau a la Meuse pour l'alimentation des canaux de navigation et d'irrigation).

[FN2] For text of this Treaty, see Annex.

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[16] The Treaty was concluded because for a long time the two countries had been unable to agree on a variety of questions connected with the use of the waters of the Meuse.

[17] The Meuse is an international river. It rises in France in the Department of the Haute-Marne, leaves French territory [p10] near Givet, crosses Belgium, forms the frontier between the Netherlands and Belgium below Lixhe and enters Netherlands territory a few kilometres above Maestricht.. Between Borg-haren (a few kilometres below Maestricht) and Wessem-Maas-bracht, the Meuse again forms the frontier between Belgium and the Netherlands, then below Wessem-Maasbracht both banks of the river are in Netherlands territory.

[18] Until it reaches Venlo, in the Netherlands, the course of the river is rapid and, in general, the river is shallow. It is a river which is fed by rainfall, and not by the melting of readers ; consequently the flow of water varies greatly. In its natural condition the Meuse above Venlo is of no great assistance to navigation. Though for the most part it has been canalized, the most important function of the Meuse, at any rate in Belgium and in the Netherlands, is that of a reservoir for other waterways. As a result of the geological formation, canalization works between Liege and Venlo are difficult and costly. On the other hand, the people of the territory through which the Meuse flows are accustomed to make use of water transport, and where canals have been constructed for this purpose they must in the main be supplied with water from the Meuse.

[19] In the XVIIth century, and again during the Napoleonic era, the construction of a canal from Antwerp via Venlo to the Rhine was contemplated. Though only a small part of this canal was actually constructed, the subsequent schemes which were carried into effect were in part founded on the same plans.

[20] After the constitution in 1815 of the Kingdom of the Netherlands, William I initiated the construction of a canal from Maestricht to Bois-le-Duc. This canal, known as the Zuid-Willemsvaart, was brought into use about the year 1826. The water to feed the canal was derived from the Meuse at Maestricht, through an intake known as lock 20.

[21] During the troubled conditions which prevailed between 1830 and 1839, the supply of water to the Zuid-Willernsvaart was temporarily interrupted by the military authorities at Maestricht, and in order to secure a supply of water for the canal a new intake was created at Hocht by the inhabitants. After the separation of the Netherlands and Belgium, the place at which the Hocht intake was situated became Belgian territory.

[22] In 1845, under a treaty concluded between the Netherlands and Belgium in that year, a new canal was constructed from Liege to Maestricht. This new canal constitutes, in effect, a prolongation of the Zuid-Willemsvaart to Liege, and had formed part of the original plans of King William I. It connects [p11] with the Zuid-Willemsvaart at a spot inside the fortifications of Maastricht, close to lock 20.

[23] After the completion of the Liege-Maestricht Canal, the Zuid-Willemsvaart was fed from three different sources : firstly by water which came from the Liege-Maestricht Canal; secondly, by water obtained directly from the Meuse through lock 20 ; and, thirdly, by water also obtained directly from the Meuse through the Hocht intake.

[24] At first there seems to have been no trouble with regard to the supply of water for the Zuid-Willemsvaart. Subsequently, however, the Belgian Government commenced the construction of a series of new waterways, running westward from the northern end of the Belgian section of the Zuid-Willemsvaart so as to effect a junction with the river Scheldt and to provide means of communication for the district of the Campine. This series of canals includes the Canal de la Campine, the Canal de Turnhout, the Canal de Hasselt, and the Canal du Camp de Beverloo.

[25] The Campine is a heathy, district with a soil of a porous nature, and owing to this latter circumstance large quantities of water were required for keeping the Canal de la Campine supplied. A great deal of water leaked away.

[26] The sandy and unfertile nature of the Campine district led the Belgian Government to initiate extensive irrigation schemes. The idea prevailed at the time that if only it could be supplied with water, this district might be converted into a fertile and prosperous agricultural area. These irrigation works caused flooding in the Netherlands district of Brabant and constituted one of the many sources of disagreement that prevailed between the two countries at the time when the Treaty of 1863 was concluded.

[27] As the canals of the Campine area came into use and so long as the extensive irrigation schemes were still considered feasible, Belgium desired to obtain large supplies of water. The only supplies available were derived from the Zuid-Willemsvaart and, therefore, ultimately from the Meuse. Neither the supplies drawn from the intake at Hocht, nor the lock-water which came into the Zuid-Willemsvaart from the Meuse, were adequate to supply the quantities which Belgium sought to draw out at the northern end of the canal. She therefore found herself obliged to construct at the side of the Hocht Lock a lateral channel so that water could be drawn from the Liege-Maestricht Canal irrespective of the use of the lock for the normal purposes of navigation. By so doing she obtained a sufficient quantity of water but she converted a part of the Zuid-Willemsvaart into a waterway more like a swiftly flowing river than a canal. The rapidity of the current m the canal impeded the navigation, and though efforts were [p12] made to allow these additional supplies to pass into the canal at night-time, when the barge traffic was

not in progress, the use of the canal for traffic was gravely inconvenienced.

[28] For some ten years the technical experts of the two Governments searched for a solution of the problem, the condition of things which had arisen on the Zuid-Willemsvaart being equally inconvenient to the barge traffic of both countries. Two successive Mixed Commissions proved abortive, and a treaty, which was negotiated and signed in 1861, failed to secure ratification because it was rejected by the Netherlands Second Chamber. It was not until 1863 that the two countries were able to conclude a treaty which was acceptable to both sides. This Treaty, dated May 12th, 1863, is still in force and constitutes the treaty which has to be applied by the Court in the present case.

[29] It will be of assistance towards an understanding of the general economy of the Treaty of 1863 to give a short description of the unratified agreement of 1861.

[30] Both treaties were worked out upon the footing that Belgium must have, in order to supply her requirements, a definite quantity of water and, so far as concerns the Netherlands, that this quantity of water would not be such as to injure Netherlands interests. No stable situation could be achieved as regards the use of the waters of the Meuse unless these needs and interests were recognized. The mere provision of the water, however, was not the only element to be taken into account; there were the interests of navigation in the canals, particularly in the Belgian section of the Zuid-Willemsvaart, a waterway which was of common interest to both Parties ; there were also the interests of the navigability of the Meuse itself in the sector below Maestricht, where there was no lateral canal, except in so far as the Zuid-Willemsvaart itself served that purpose.

[31] The 1861 treaty was drafted on the following basis: the Netherlands undertook to allow a fixed quantity of water to pass into the Zuid-Willemsvaart through the lock at Maestricht. (The actual quantity was 7 cubic metres per second in winter; 5 2/3 per second in summer.) This water was to come from the Liege-Maestricht Canal and was, therefore, taken from the Meuse at Liege. Any quantity of water coming from the Liege-Maestricht Canal over and above the amounts so fixed was to be turned into the river. Out of the water so passed into the Zuid-Willemsvaart, the Netherlands were to get 1 ½ cubic metre per second, which was to be evacuated through the lock at Weert (in Netherlands territory). There was no provision in the 1861 treaty which affected the intake at Hocht. Belgium remained free to take what she could through that [p13] intake. During the seasons when the Meuse is low, the amount of water which Belgium could obtain at Hocht was not, in reality, very great, because the level of the canal was so little below the level of the river that the amount that could pass was necessarily restricted.

[32] This treaty appears to have been rejected because, amongst other reasons, the authorities of the Netherlands province of Limburg pointed out that it did not solve the problems which interested them, particularly the excessive speed of the current in the Zuid-Willemsvaart.

[33] The solution of the difficulties between the two countries as regards the waters of the Meuse was ultimately found by approaching them on a much wider basis. By including the solution of various other problems which were affecting the relations between the two countries at that date means were found justifying each Party in making concessions which it would not have felt justified in making unless it had received satisfaction in other directions. The treaty with regard to the Meuse became part of a settlement embracing discontinuance of the tolls on the Scheldt and the commercial relations between the two countries.

[34] The three treaties into which the arrangement of 1863 was divided were concluded on the same day, and the exchange of ratifications also took place on the same date–July I4th, 1863– and was recorded in a single instrument, but there is no juridical connection between the three; each of the three treaties is entirely independent of the others ; in its application and interpretation the treaty with regard to the waters of the Meuse, therefore, stands entirely by itself. The interdependence is found only in the fact that the concessions made by one or other of the Governments in one of the treaties would not have been made without the concessions made by the other Government in the other treaties.

[35] As regards the treaty relating to the waters of the Meuse, the acute problem as stated above had been the excessive speed of the current developed in the Zuid-Willemsvaart owing to the amount of water which Belgium was taking from it. The Treaty of 1863 surmounted this difficulty by the combined effect of three sets of stipulations: by raising the level of the canal all the way from Maestricht to Bocholt, so as to increase the transverse section and thereby enable more water to pass along without increasing the speed of the current; by concentrating in one new intake the withdrawal of water from the Meuse, this new intake being situated higher upstream where it could feed the canal despite the fact that the level of the canal was raised; and by enlarging the programme of works to be carried out in the joint section of the Meuse so that more water could [p14] be withdrawn from the Meuse without injury to the navigability of the joint section of the river, a subject which at that time was of interest to both countries.

[36] The new intake was located on Netherlands territory. It was not without great reluctance that the Belgian Government accepted the plan that there should be a single intake and that situated on foreign territory.

[37] For some time after its conclusion, the Treaty of 1863, subject to some technical modifications introduced in 1873, must have satisfied the requirements of both Parties. By the close of the century, however, it was becoming clear that larger and better canals were required in order to meet the commercial development which was taking place in the Netherlands and Belgium, particularly as regards the development of the Netherlands coalfields in the province of Limburg.

[38] In 1906, a joint commission was appointed, on the suggestion of the Netherlands Government, to consider works for the improvement of the navigation of the Meuse. At the time when the Netherlands Government suggested the appointment of this Commission, it would appear that they had in view works which could not be carried out without the concurrence of both Governments.

[39] When the report of this Commission had been received in 1912, the Netherlands Government proposed that the two Governments should together undertake the canalization of the joint section of the Meuse. Negotiations on this subject had not been completed at the time when the war of 1914-1918 broke out, as Belgium would only agree to participate in this work if satisfaction were given to her on certain other points.

[40] In 1921 a project for the construction of a lateral canal on the right bank of the Meuse from Maestricht to Maasbracht was submitted to the Chambers by the Netherlands Government. This was a work to be carried out entirely on Netherlands territory and at the expense of the Netherlands. It embodied what is now the Borgharen barrage and the Juliana Canal. It led to diplomatic correspondence between the Netherlands and Belgium, in which Belgium maintained

that such works would prejudice the navigation on the joint section of the Meuse and would interfere with the working of the 1863 Treaty. She therefore maintained that this scheme could not be carried out without her consent.

[41] Though the Parties were not able, in the diplomatic discussions which followed, to come to an agreement as to the points raised by the Belgian Government, other negotiations which were already in progress led to the signature in 1925 of a new and comprehensive treaty which would have enabled the waterways [p15] desired on either side to be constructed. This treaty however was rejected by the Netherlands First Chamber.

[42] After the rejection of the treaty of 1925, the Netherlands proceeded to construct and complete the Juliana Canal, a waterway which would enable barges of larger size to reach Maestricht and from there would make contact with the Liege-Maestricht Canal. She also constructed a new lock, the Bossche-veld Lock, situated just below the intake constructed at Maestricht under the Treaty of 1863 and giving access to the Zuid-Willemsvaart from the Meuse. This new lock was brought into use in September 1931. The Borgharen barrage had been finished in 1929 and the Juliana Canal was opened to navigation in 1934.

[43] Faced with the prospect of the completion of the Juliana Canal, the Belgian Government decided that they must construct a canal from Liege to Antwerp, and laid before the Belgian Parliament a scheme for the construction of what is now known as the Albert Canal. The submission of this scheme to the Belgian Parliament provoked an enquiry from the Netherlands Government as to the feeding of this great new waterway. Discussions followed through the diplomatic channel, but they led to no result, as the Netherlands were unable to give satisfaction to Belgium as regards the construction of a new waterway to improve the communications between Antwerp and the Rhine.

[44] The construction of the Albert Canal was commenced in 1930 ; it is not yet finished.

[45] The Albert Canal is intended to connect Liege with Antwerp. It will be fed with water obtained from the Meuse immediately above a barrage constructed at Monsin. For about sixteen kilometres it practically follows the course of the old Liege-Maestricht Canal. It then turns north-westward and is carried in a deep cutting through the hills till it reaches Briegden. From Briegden a junction canal, which is already in use, runs to Neerhaeren where connection is established with the Belgian section of the Zuid-Willemsvaart through the Neerhaeren Lock.

[46] From Briegden the Albert Canal will be carried by a section which is not yet completed to a spot near Hasselt. There, just north of the Curange Lock, it will join the existing Hasselt branch of the Campine Canal, which will be reconstructed and considerably [p16] widened and deepened, and will follow the line of that branch as far as Quaedmechelen. From Quaed-mechelen the Albert Canal will be carried on via Herenthals to Viersel, where it takes the place of the existing Canal de la Campine which has been in the same way reconstructed, widened and deepened. Through the new Wyneghem Lock it will connect with the Antwerp waterways. A part of the western end of this section is already in use.

[47] As no further progress could be made in the settlement of the points at issue between the two States, the Netherlands initiated the present proceedings against Belgium in the Court by an Application dated August 1st, 1936, based on the ground that some of the works already executed or to be executed by Belgium in connection with the Albert Canal constituted an

infringement of the Treaty of 1863. Belgium in due course raised by her counter-claim the question whether the Juliana Canal and the Borgharen barrage were themselves compatible with the Treaty of 1863.

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[48] From the history of the dispute given above, it will be seen that one of the difficulties in achieving a settlement of the differences between the two States has been the Belgian desire to obtain the Netherlands' consent to the construction of a new canal connecting Antwerp and the Rhine, a point upon which one may infer that the Netherlands Government have felt themselves unable to accede to the wishes of the Belgian Government because of the commercial rivalry between Antwerp and Rotterdam. With this aspect of the question the Court is in no way concerned. Its task is limited to a decision on the legal points submitted to it as to whether or not certain works constructed by the Belgian Government do or do not infringe the Treaty of 1863, and, as regards the Belgian counter-claim, as to whether or not certain works constructed by the Netherlands Government do or do not constitute an infringement of the Treaty of 1863.

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[49] In the course of the proceedings, both written and oral, occasional reference has been made to the application of the general rules of international law as regards rivers. In the opinion of the Court, the points submitted to it by the Parties in the present case do not entitle it to go outside the field covered by the Treaty of 1863. The points at issue must all be determined solely by the interpretation and application of that Treaty.

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[50] Before proceeding to consider in detail the dispute submitted to the Court, it will be well to make a brief survey of the provisions of the Treaty of 1863 which must be applied in the decision of the case. [p17]

[51] Article I provides for the construction below Maestricht at the foot of the fortifications of a new intake which will constitute the feeding conduit for all canals situated below that town and for irrigation in the Campine and in the Netherlands. Article II provides that the lock at Hocht (No. 19) is to be suppressed and replaced by a new lock in the Zuid-Willemsvaart above the intake provided for in Article I. The part of the canal between the site of the old lock at Hocht and the site of the new lock was to be enlarged and deepened so as to be of the same dimensions and depth as the reach from Hocht to Bocholt. Article III provides that the level of the canal between Maestricht and Bocholt was to be raised so that the quantity of water prescribed by the succeeding Articles IV and V could pass along the canal without raising the average current to a speed exceeding 25 to 27 centimetres per second. Article IV fixed the quantity of water to be taken from the Meuse at ten cubic metres per second when the level of the river was above the normal low level; when at or below the normal low level it was fixed at 7½ cubic metres from October to June and 6 cubic metres from June to October. Normal low level was defined by reference to the gauge on the bridge at Maestricht and corresponded to a minimum depth between Maestricht and Venlo of 70 centimetres. A gauge was to be fixed at the mouth of the new intake, and no further use was to be made of the intake at Hocht. Under Article V the Netherlands was to have a fixed proportion (2 or 1½ cubic metres) out of the total quantity of water fixed by Article IV as the amount to be withdrawn from the Meuse by the new intake; the Netherlands share of this water was to pass through lock 17 at Loozen. The second paragraph of

this Article gives the Netherlands a right to increase the water to be withdrawn from the Meuse at Maestricht, provided the speed of the current in the canal was not raised above that stipulated in Article III.

[52] Article IX provided for the preparation and execution of a programme of works in the bed of the Meuse between Maestricht and Venlo over a series of years, Belgium to pay two-thirds and the Netherlands one-third of the costs.

[53] The remaining articles are of less importance in connection with the present case.

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[54] In the first submission I a of the Netherlands' Memorial, the Agent of the Netherlands Government asks the Court: [p18]

"To adjudge and declare that
(a) the construction by Belgium of works which render it possible for a canal situated below Maestricht' to be supplied with water taken from the Meuse elsewhere than at that town is contrary to the Treaty of 1863."

[55] The intention of this submission is made clearer by the explanations which are given in the Memorial :

"The infringements of the regime established by the Treaty in 1863 forming the subject of the complaint of the Netherlands Government may be classified under two heads :
(A) Infringements of the Netherlands' privilege of control over diversions of water from the Meuse by means of the Maestricht intake resulting from the construction of works making it possible to feed canals situated below Maestricht with water taken from the Meuse elsewhere than at that town ; (B) Infringements of the treaty regulations governing the allocation of Meuse water resulting from the feeding of canals situated below Maestricht with water taken from the Meuse in excess of the quantities fixed and allotted to Belgium by the Treaty of 1863."

[56] Submission I a refers to infringements of this so-called privilege of control claimed by the Netherlands Government.

[57] The nature of this Netherlands claim has not been set out with great precision, either in the written proceedings or in the oral arguments. The Court understands it as a claim to a special privilege going beyond the power of supervision which the Netherlands necessarily derive from the fact that the intake is situated in Netherlands territory. There can be no doubt that, so far as the right of supervision is derived from the position of the intake on Netherlands territory, the Netherlands, as territorial sovereign, enjoys a right of supervision which Belgium cannot possess.

[58] What the Netherlands Agent has claimed on behalf of his Government is not merely to be able to control what happens in their own territory, but to control the supply of water drawn from the Meuse to feed the system of canals referred to in the Treaty: the important thing for the Netherlands being, not the ability to supervise the mere working of the Maestricht feeder, but the power to make sure at any time that the quantities of water drawn from the Meuse to supply the canals below Maestricht do not exceed the total quantities fixed in the Treaty. To this end, and in order to effect that full control of all supplies from the Meuse for the feeding of these canals, the

right of supervision arising from the position of the intake in Netherlands territory had to be supplemented, and is supplemented, by an obligation to refrain from certain action imposed upon Belgium, an obligation not to construct [p19] works by means of which she could, apart from the Maestricht feeder, supply one or more canals situated below that town. The Netherlands Agent finds in Article I of the Treaty the justification for that claim when it provides that the Maestricht feeder should be "the", that is to say, the only, feeder for all canals situated below Maestricht. It follows, according to his contention, that the mere fact of constructing in Belgian territory a second feeder is, in itself, a breach of the Article. It is of no importance whether actual use is made of this feeder or whether it is left idle. Once a second feeder exists the Maestricht feeder is no longer the only one and the Treaty of 1863 is thereby broken.

[59] It was in support of this view that the Netherlands Agent in his argument laid such stress on the fact that the design of the Neerhaeren Lock in the Briegden-Neerhaeren junction canal embodied side-channels for filling and emptying the lock chamber which by the simple expedient of removing an electric interlocking device could be converted into a lateral conduit, enabling water to be conveyed in large quantities from the upper to the lower reach, irrespective of any use of the lock for navigational purposes. The Netherlands Agent did not suggest that the side-channels had been used in the past for this purpose, or were being so used at present. It was in the fact that by this simple method the side-channels could be converted into a lateral conduit and thereby render possible without the knowledge of the Netherlands Government the passage of water into the Zuid-Willemsvaart, that the Netherlands Agent saw a violation of the right of control conferred upon his Government.

[60] The Netherlands contention necessarily implies that the Treaty of 1863 intended to place the Parties in a situation of legal inequality by conferring on the Netherlands a right of control to which Belgium could not lay claim. The Netherlands Agent, with regard to the Belgian Government's counter-claim, stated in his reply that Belgium was not entitled to dispute the lawfulness of the works constructed by the Netherlands merely on the ground that such works would make it possible to feed a canal situated below Maestricht with water diverted' from the river elsewhere than at the treaty feeder, because Belgium did not possess any right of control similar to that conferred on the Netherlands by the Treaty. [p20]

[61] The Court is unable to accept as well-founded a contention which would alter the character of the Treaty of 1863 and considerably enlarge the scope of the actual terms used by its authors; for that Treaty is an agreement freely concluded between two States seeking to reconcile their practical interests with a view to improving an existing situation rather than to settle a legal dispute concerning mutually contested rights.

[62] It would only be possible to agree with the contention of the Netherlands Agent that the Treaty had created a position of inequality between the contracting Parties if that were expressly indicated by the terms of the Treaty ; but the text of Article I is not sufficient to justify such an interpretation. The text of this Article is general; it furnishes no evidence of any differentiation between the two Parties. Article I is a provision equally binding on the Netherlands and on Belgium. If, therefore, it is claimed on behalf of the Netherlands Government that, over and above the rights which necessarily result from the fact that the new intake is situated on Netherlands territory, the Netherlands possess certain privileges in the sense that the Treaty imposes on Belgium, and not on them, an obligation to abstain from certain acts connected with the supply to canals below Maestricht of water taken from the Meuse elsewhere than at the treaty feeder, the argument goes beyond what the text of the Treaty will support.

[63] The Court finds that none of the documents produced by the Netherlands Government in support of their claim of control controverts the conclusion reached by the Court and that, on the contrary, some of these documents confirm that conclusion.

[64] For the above reasons, the submission I a of the Netherlands Memorial must be rejected.

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[65] The Netherlands Government in its submission formulated under I b in the Netherlands Memorial prays the Court :

"To adjudge and declare

.....

(b) that the feeding of the Belgian section of the Zuid-Willemsvaart, of the Campine Canal, of the Hasselt branch of that canal and of the branch leading to Beverloo Camp, as also of the Turnhout Canal, through the Neerhaeren Lock with water taken from the Meuse elsewhere than at Maestricht, is contrary to the said Treaty [Treaty of May I2th, 1863]."

[66] It will be observed that, in this submission, the Netherlands Government does not specify the particular provision of the [p21] Treaty alleged to be infringed by the feeding of the Zuid-Willemsvaart, the Campine Canal, its Hasselt branch, its branch leading towards Beverloo Camp and the Turnhout Canal, through the Neerhaeren Lock, with water taken from the Meuse elsewhere than at Maestricht.

[67] The Treaty brought into existence a certain regime which results from all of its provisions in conjunction. It forms a complete whole, the different provisions of which cannot be dissociated from the others and considered apart by themselves.

[68] When the Treaty of 1863 is examined in this way it is seen that, more particularly in Articles I, III, IV and V, it established a treaty regime governing, to quote the words of the Preamble, "diversions of water from the Meuse for the feeding of navigation canals and irrigation channels" ; this regime was instituted both by the construction at Maestricht in Netherlands territory of the new intake on the Meuse, which was to constitute the feeder for all the canals situated below that town, and by the fixing of the volume of water to be discharged into the Zuid-Willemsvaart at a quantity which would maintain a minimum depth in that canal and would ensure that the velocity of its current did not exceed a maximum of 0.25 metre to 0.27 metre per second. The canals which the Treaty thus had in view when it referred to "all canals situated below Maestricht", are the Zuid-Willemsvaart and the canals which branch off from it and are fed by it.

[69] Any work which disturbs the situation as established by the Treaty constitutes an infraction of the latter, and this holds good for works above Maestricht just as much as for works situated below Maestricht.

[70] It is evident that neither the functioning of the former intake at Hocht, in Belgian territory, nor of any intake other than the treaty feeder would have been compatible with the regime thus established. Accordingly, it was laid down (Art. I) that the intake at Maestricht would constitute "the" feeder–that is to say, the only feeder–and that no further use would be made of the intake at Hocht (Art. IV, last para.).

[71] In this connection, it is necessary to consider whether the passage of water through a lock, instead of through the new intake, constitutes an infraction of Article I.

[72] A lock is not, in itself, a feeder. A lock is a construction designed to retain the water in an upper reach and to enable barges to pass from this upper reach to a lower reach, and vice versa. It functions intermittently, with more or less frequency, according as the traffic is more or less intense. If the waterway is a canal, it is manifest that if the canal is not to run dry, more or less rapidly according to its length, the lock cannot function unless the summit-level reach of the [p22] canal is itself fed by an intake providing a sufficient supply of water.

[73] It can scarcely be contested that water discharged by a lock–or lock-water–which passes in this way from reach to reach, constitutes a means, and no doubt the normal means, of feeding the successive reaches of a canal.

[74] It has been argued on behalf of the Belgian Government that it cannot have been the intention of the Treaty that the existence and functioning of a lock should be considered as an infraction of the Treaty, for the following reason. The Treaty itself lays down in Article II that lock No. 19 at Hocht is to be reconstructed at a different site. This lock 19 is the one which establishes communication between the Zuid-Willemsvaart and the Liege-Maestricht Canal. Every time that the lock is operated–and it is clear that the Treaty intended that shipping should continue to use this route–a certain quantity of lock-water, originally derived from the Meuse, though not through the treaty feeder, is necessarily discharged into the Zuid-Willemsvaart ; consequently, lock-water–i.e., water passing through a lock in the course of its normal functioning–cannot be equivalent to the "feeding" of the canal which is forbidden by Article I.
[75] On the other hand, it has been contended, on behalf of the Netherlands Government, that the foregoing argument does not take sufficiently into account the small dimensions of lock 19, nor the fact that the average total volume of lock-water discharged by the daily normal functioning of the lock, is less than the margin of error allowed in measuring the ten cubic metres per second fixed in Article IV. It is for this reason–it is contended–that no account was taken in the Treaty of the water passing through lock No. 19 into the Zuid-Willemsvaart ; to allow the same rule however to operate in connection with the Neerhaeren Lock would upset the equilibrium established by the Treaty. The dimensions of the Neerhaeren Lock are so much greater than those of lock 19 that 3,900 m3 of water are discharged into the Zuid-Willemsvaart every time that the lock is operated, and the average quantity of water passing through in the course of a day amounts to 1 m3 per second, which represents a very substantial addition to the ten m3 per second fixed by Article IV as the maximum quantity to be passed through the new intake. It is therefore argued on behalf of the Netherlands Government that, in interpreting the Treaty, no account should be taken of lock 19 ; but that in the case of the Neerhaeren Lock the discharge of lock-water should be regarded as an infraction of Article I. [p23]

[76] The Court considers that neither the Belgian nor the Netherlands contention can be accepted in its entirety. When it is remembered that the provisions of the Treaty of 1863 were adopted in order to overcome certain actual difficulties connected with the feeding of the canals below Maestricht, it is seen to be impossible to isolate Article I, and to interpret it without reference to those difficulties. That Article has indeed to be interpreted in conjunction with the other articles, with which it forms a complete whole. To adopt the Belgian contention, according to which no lock, when used for navigation, and no volume of water discharged through a lock when being utilized for that purpose, could constitute an infraction of Article I, would open the door to the

construction of works and the discharge of water in such quantities that the intentions of the Treaty would be entirely frustrated. On the other hand, to adopt the Netherlands contention and to hold that any discharge of water into the Zuid-Willemsvaart through the Neerhaeren Lock, instead of through the treaty feeder, must result in an infraction of Article I–irrespective of the consequences which such discharge of water might produce on the velocity of the current in the Zuid-Willemsvaart, or on the navigability of the joint section of the Meuse–would be to ignore the objects with which the Treaty was concluded.

[77] If any distinction can be drawn between a lock of small dimensions, such as lock 19, and a large lock, that distinction must be based not simply on the difference between the respective dimensions of the two locks, but on the difference between the effects which they respectively produce. The Court would be prepared to consider that the use of the Neerhaeren Lock is contrary to the Treaty, notwithstanding the existence and functioning of lock 19, if it were shown that the use of the Neerhaeren Lock contravened the object of the Treaty, that is to say if it were shown that the use of the Neerhaeren Lock produced an excessive current in the Zuid-Willemsvaart or a deficiency of water in the Meuse.

[78] The Court has not found any reason in the documents submitted to it which would lead it to conclude that the water discharged through the Neerhaeren Lock has set up an excessive current in the Zuid-Willemsvaart, or has depleted the Meuse to such an extent as to prejudice navigation on that river.

[79] In the foregoing remarks, the question of the utilization of the side-channels of the Neerhaeren Lock for feeding the reach below the lock is not taken into consideration. The Court is only considering the normal use of this lock for purposes of navigation. There is no doubt that the use of these side-channels for feeding the lower reach would transform them into a feeder and would thus be contrary to the Treaty. [p24]

[80] Another circumstance which must be borne in mind in connection with this submission I b is the construction of the Bosscheveld Lock by the Netherlands Government. That lock was completed and brought into use prior to the construction of the Neerhaeren Lock. Its dimensions are even greater than those of the Neerhaeren Lock. It is situated a short distance below the treaty intake of 1863, and it leads directly from the Meuse into the Zuid-Willemsvaart.

[81] As regards the Bosscheveld Lock, as in the case of the Neerhaeren Lock, no evidence has been produced, and the Court finds no reason in the documents that have been produced, which would lead it to suppose that the use of the Bosscheveld Lock has caused effects, either in the Zuid-Willemsvaart or in the Meuse, which are inconsistent with the object of the Treaty of 1863.

[82] During the oral proceedings before the Court, the construction of this lock was defended by the Netherlands Agent on the ground that the Treaty (Art. V, para. 2) entitles the Netherlands to increase the volume of water "taken from the Meuse at Maestricht". The Netherlands consider that, in virtue of these words, they are entitled to take water from the Meuse elsewhere than at the treaty feeder, and that in consequence the discharge of water into the Zuid-Willemsvaart through the Bosscheveld Lock is not contrary to the Treaty. This view cannot be accepted, for these same words "taken from the Meuse" are also used in the first paragraph of this same Article V, and also in Article IV, and they cannot be understood in any other sense than: the taking of water through the feeder referred to in Article I, to the exclusion of its withdrawal elsewhere.

[83] Another reason against the acceptance of the Netherlands argument that Article V, paragraph 2, justifies the diversion from the Meuse of water discharged into the Zuid-Willemsvaart through the Bosscheveld Lock is that the right thus conferred on the Netherlands was that of taking supplementary water for their own use; this supplementary water has to be discharged through the lock at Loozen. The Netherlands Government has never contended that water flowing through the Bosscheveld Lock simply in connection with the passage of boats was to constitute this additional water intended to increase the share allotted to it by Article V of the Treaty, and that this water should consequently be restored to the Netherlands at Loozen. In reality this water is merged in the whole body of water in the Zuid-Willemsvaart system ; it is of common benefit to the navigation of both countries, and it increases the Belgian quota for irrigation and for the feeding of the Belgian canals. [p25]

[84] The Court cannot refrain from comparing the case of the Belgian lock with that of the Netherlands lock at Bosscheveld. Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder, though without producing an excessive current in the Zuid-Willemsvaart. In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.

[85] Accordingly, as has been explained above, in the absence of evidence as to the effects which the use of the Neerhaeren Lock produces on the current in the Zuid-Willemsvaart, or on the Meuse itself, the Court does not consider that the normal use of this lock is inconsistent with the Treaty. The Court is also of opinion that there is no ground for treating this lock less favourably than the Netherlands lock at Bosscheveld. It is thus unable to accord to the Netherlands Government the benefit of its submission.

[86] Submission I b must, therefore, be rejected.

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[87] The third claim of the Netherlands Government which is formulated in submission I c of the Netherlands Memorial prays the Court

"To adjudge and declare that:

.....

(c) Belgium's project of feeding a section of the Hasselt Canal with water taken from the Meuse elsewhere than at Maestricht is contrary to the said Treaty."

[88] This claim of the Netherlands Government is fundamentally concerned with the construction and putting into operation of the Albert Canal from Liege to Antwerp, though that canal is not mentioned by name. For the line of the Albert Canal, a broad and deep canal of a total length of 125 kilometres, makes use for a certain distance in its course towards Antwerp, between the so-called Curange Lock and the so-called Quaed-mechelen Lock, of the bed of the old Hasselt Canal which branches off the Canal de la Campine.

[89] The Netherlands do not contend that the intake at Liege-Monsin which feeds the Albert Canal, is in itself contrary to the said Treaty, or that the Treaty applies to the whole of the Albert Canal. [p26]

[90] The line of argument of the Netherlands Government is that when the Albert Canal is brought into operation, the old Hasselt Canal, i.e. that part of it henceforward comprised in the Albert Canal, will be fed, like the latter, with water taken from the Meuse at Liege-Monsin, that is to say elsewhere than at the treaty feeder. The situation resulting from the bringing into use of this section of the Albert Canal would be contrary to the Treaty.

[91] The Court finds nothing either in the arguments of the Netherlands or in the text of the Treaty of 1863 which would prevent either the Netherlands or Belgium from making such use as they may see fit of the canals covered by the Treaty in so far as concerns canals which are situated in Netherlands or Belgian territory, as the case may be, and do not leave that territory. As regards such canals, each of the two States is at liberty, in its own territory, to modify them, to enlarge them, to transform them, to fill them in and even to increase the volume of water in them from new sources, provided that the diversion of water at the treaty feeder and the volume of water to be discharged therefrom to maintain the normal level and flow in the Zuid-Willemsvaart is not affected.

[92] The question whether in fact it is true that, between Hasselt and Quaedmechelen, the old canal is only fed with water from the River Demer, as maintained by Belgium, or also with water coming from the Canal de la Campine which comes in turn from the Zuid-Willemsvaart, as maintained by the Netherlands, is in reality irrelevant.

[93] No matter whence the water supplying the old Hasselt Canal is obtained, Belgium is not prohibited from using that canal as she may see fit, from transforming it or from in effect abolishing a portion of it by more or less merging it in the new Albert Canal which has its own water supply.

[94] The contention of the Netherlands Government is invalidated by the singular result to which it would lead in practice. For it would amount to criticizing Belgium for having made the new canal follow the line of the old canal. She need only have sited the new canal a few yards to one side and have abandoned this section of the old canal and then, according to the contention of the Netherlands, she would not have contravened the Treaty. No such effect can have been intended by the contracting Parties, nor can it result from a proper interpretation of the terms of the Treaty.

[95] Submission I c must therefore be rejected. [p27]

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[96] The fourth claim of the Netherlands Government which is formulated in submission I d of the Netherlands Memorial prays the Court:

"To adjudge and declare that:

.....

(d) Belgium's project of feeding the section of the canal joining the Zuid-Willemsvaart to the Scheldt between Heren-thals (Viersel) and Antwerp with water taken from the Meuse elsewhere than at Maestricht, is contrary to the said Treaty."

[97] This claim is similar to the preceding one in regard to the Hasselt Canal.

[98] From Viersel to Antwerp, the course of the Albert Canal coincides with the latter part of the old Canal de la Campine which branches off the Zuid-Willemsvaart and is therefore comprised in the system of canals situated below Maestricht and fed from the treaty feeder.

[99] The grounds on which the Belgian Government is criticized in the Netherlands Memorial in this connection are the same as in the case of the Hasselt-Quaedmechelen section of the Albert Canal which coincides with a portion of the old Hasselt Canal.

[100] The reasons which have led the Court to reject the contention of the Netherlands Government in the latter case also apply in this case.

[101] It is true that it is not denied that this section of the old Canal de la Campine which is joined at Wyneghem near Antwerp by the Turnhout Canal, is fed with water originally coming from the Zuid-Willemsvaart. But, as has been stated, the origin of the water feeding the canals comprised in the system contemplated by the Treaty has no bearing on the right of Belgium, or of the Netherlands, to make such use as they may see fit of these canals when situated exclusively in their own territory, provided that the regime governing the diversion of water at the treaty feeder and the volume of water to be discharged by that feeder to secure at all times the normal level and flow of water in the Zuid-Willemsvaart is not thereby affected.

[102] The Court accordingly considers that the criticism made in the Netherlands Memorial is no more justified in the case of the Herenthals (Viersel) Canal than in the case of the Hasselt Canal. The submission made in the Netherlands Memorial must therefore be rejected. [p28]

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[103] In a second series of submissions at the end of" their Memorial, the Netherlands Government pray the Court :

"To order Belgium
(a) to discontinue all the works referred to under I (a) and to restore to a condition consistent with the Treaty of 1863 all works executed in breach of that Treaty;
(b) to discontinue any feeding held to be contrary to the said Treaty and to refrain from any further such feeding."

[104] Since the Court has arrived at the conclusion that there is no justification for the various complaints made by the Netherlands Government against the Belgian Government in the submissions of the former Government which have been examined above, it can only reject the claim presented by the Netherlands Government in respect of penalties to be imposed upon the Belgian Government and is not called upon to examine this claim.

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[105] Having rejected the four submissions made by the Netherlands as Applicant in the principal suit, the Court considers that there is no occasion for it to pass upon the four alternative submissions presented by the Belgian Government in its Rejoinder. These submissions were only presented "in case the Court should be unable to find in accordance with the submissions of the Respondent". The submissions of the Netherlands having been rejected, the Court considers that

these alternative submissions have ceased to have any object, and this view is confirmed by what was said by the Belgian Agent at the hearing on May I2th, 1937.

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[106] The Belgian Government, for its part, formulates in its Counter-Memorial a counter-claim alleging : (i) that the Netherlands Government has committed a breach of the Treaty of 1863 by constructing the Borgharen barrage on the Meuse below Maestricht ; (2) that the Juliana Canal constructed by the Netherlands alongside to the Meuse below Maestricht from Limmel to Maasbracht, is subject, as regards its water supply, to the same Treaty.

[107] As this claim is directly connected with the principal claim, it was permissible to present it in the Counter-Memorial. [p29]

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[108] In its first submission, regarding the Borgharen barrage, the Belgian Government prays the Court,

"To adjudge and declare that:
I° The Borgharen barrage has been constructed in breach of the stipulations of this same Treaty which is alleged by the Netherlands Government to have been disregarded by the Belgian Government as regards certain stipulations ; that is to say, that the local situation at Maestricht provided for by the Treaty of 1863 has been altered by the unilateral decision of the Netherlands Government; that this alteration has rendered the proper application of the Treaty impossible, because the level of the Meuse has been raised by the Borgharen barrage and the water-gauge which had been placed there in accordance with the Treaty to enable the diversion of water to be regulated in accordance with the level of the water has been submerged".

[109] This submission formulated by the Belgian Government contains both the claim itself and the grounds adduced in support of it.

[110] In the first place, according to the Belgian Government, the local situation at Maestricht has, contrary to the Treaty, been altered by the Netherlands Government without previous agreement with the Belgian Government.

[111] Article IV, paragraph 2, of the Treaty runs as follows :

"The normal low level, which at present varies between the 30 and 40 centimetre marks above zero on the gauge at the Maestricht bridge, corresponds to a minimum depth of water of seventy (70) centimetres between Maestricht and Venlo."

[112] It is clear that the construction of the Borgharen barrage had the effect–it could scarcely have been otherwise–of raising the level of the Meuse above the barrage, with the result that no matter what may have been the low level of the river, as actually determined in 1863, the volume of water discharged by the feeder, according to the height of the Meuse, is always the maximum volume.

[113] The Belgian Government does not contend that, by the raising of the level of the Meuse resulting from the construction of the Borgharen barrage, a volume of water greater than the

maximum fixed is discharged from the feeder. What it does contend is that the situation has been altered without its consent.

[114] Nowhere in the Treaty, however, is to be found a provision forbidding the Netherlands from changing the depth of water in the Meuse at Maestricht without the consent of Belgium, provided that neither the discharge of water through the feeder nor the volume which it must or can supply, nor again the [p30] current in the Zuid-Willemsvaart are thereby affected. It is subject to this condition, and not at their arbitrary discretion, that the Netherlands are entitled, under the Treaty of 1863, to dispose of the waters of the Meuse at Maestricht.

[115] The Belgian Government alleges that the raising of the level of the Meuse at Maestricht has submerged the gauge placed, in accordance with Article IV, paragraph 3, at the entrance to the feeder in order to enable the volume of water to be passed through the feeder to be checked, in accordance with the height of the low water level. But the submerging of the mark on this gauge would only be subject to criticism if, because it was no longer possible to verify the volume of water discharged by the feeder, this volume in fact exceeded the maximum fixed by the Treaty. This however does not appear to be the case, nor does the Belgian Government contend that it is so.

[116] Lastly, the Belgian Government, in the course of its argument, if not in its submissions, has contended that the Netherlands Government, by means of the Borgharen barrage, has interfered with the navigability of the Meuse below Maestricht, that is to say, that part of the river common to both States.

[117] The Netherlands allege in reply on this contention that it followed from Article V, paragraph 2, and Article XI of the Treaty of 1863, that Belgium had relinquished her interest in the navigation of the common section of the Meuse and that the interests of navigation in that section were left to the discretion of the Netherlands. On the contrary, Article IX of the Treaty affords proof that Belgium did not relinquish her interest in the joint section of the Meuse. For that Article expressly provides for the carrying out of works for the improvement of the navigability of the Meuse between Maestricht and Venlo and for the financial participation of Belgium in the carrying out of these works.

[118] On the other hand, in alleging that the navigability of the common section of the Meuse had suffered, the Belgium Government should, in support of its contention, have produced evidence regarding the intensity of the traffic and of the injurious effect upon it of the barrage. Belgium has not produced this evidence. It would probably have been somewhat difficult for her to do so, because in actual fact, from the point of view of navigability, the joint section of the Meuse is no longer of much importance save for small local vessels and these only require a small depth of water. Barge traffic, under whatever flag, now has at its disposal the waterway provided by the Juliana Canal which is much better adapted to its needs.

[119] The submission of the Belgian Government in regard to this question must therefore be rejected. [p31]

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[120] The second submission in the counter-claim of the Belgian Government relates to the Juliana Canal and asks the Court

"To adjudge and declare that:

.....

2. The Juliana Canal, being a canal below Maestricht, within the meaning of Article I of the Treaty, is subject, as regards its water supply, to the same provisions as the canals on the left bank of the Meuse below Maestricht".

[121] The entrance of the Juliana Canal, a lateral canal of the Meuse, is on the river, in Netherlands territory a little below Maestricht, and the canal debouches at Maasbracht, also in Netherlands territory, a little below the point at which the Belgian frontier leaves the Meuse and the river ceases to be common to both countries. It is therefore beyond dispute, from a geographical point of view, that the Juliana Canal is situated below Maestricht. But it does not follow that it is, as the Belgian Government contends, "a canal below Maestricht within the meaning of Article I of the Treaty".

[122] The provision in Article I which stipulates that the new intake at Maestricht shall be "the feeder" for all "canals situated below that town", and the consequential provision in Article IV, last paragraph, to the effect that "no further use shall be made of the intake at Hocht" imply by their very terms, if any indication were needed, that the feeder is situated on the left bank of the Meuse and that, in consequence, the canals which it has to feed are also on the left bank of the river. Moreover, the canals the feeding of which had occasioned difficulties, and which are referred to in the Treaty, are the Zuid-Willemsvaart itself and the canals which branch off from it and thus derive their supply of water from it. It is manifest that an intake situated on the left bank of the river cannot be regarded as intended to feed canals situated on the right bank. The latter cannot therefore come under the regime of water supply instituted by the Treaty.

[123] The Juliana Canal, which is below Maestricht but is situated on the right bank, cannot therefore be considered or treated as "a canal below Maestricht within the meaning of Article I of the Treaty" according to the terms of the Belgian submission.

[124] As the situation of the Treaty feeder on the left bank of the Meuse makes it impossible in practice to regard the Juliana Canal, situated on the right bank, as being subject to the same rules regarding its water supply as the canals on the left bank, the submission in- the Belgian Counter-Memorial must necessarily be rejected. [p32]

[125] As is stated in the Netherlands Government's submission, the Juliana Canal is not therefore, as regards its water supply, subject to the same provisions as the Zuid-Willemsvaart and the other canals on the left bank of the Meuse below Maestricht. But it in no way follows from this that the Treaty authorizes the Netherlands Government to use the water of the Meuse at Maestricht as it pleases for feeding the Juliana Canal. This argument, based on the theory that Belgium had relinquished interest in the navigation of the joint section of the Meuse, is, as has already been explained, inconsistent with the general plan of the Treaty.

[126] The question of how the Juliana Canal is, in fact, at present supplied with water would only require to be considered if it were alleged that the method by which it is fed was detrimental to the regime instituted by the Treaty for the canals situated on the left bank. Belgium does not however allege that this is the case, and, moreover, the navigability of the joint section of the Meuse cannot be considered in this connection otherwise "than it was regarded above, in connection with the Borgharen barrage.

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[127] The Belgian Government has added to its two submissions, referred to above, a third submission praying the Court :

"3. To reserve the rights accruing to Belgium from the breaches so committed".

[128] As no violation of the Treaty of 1863 has been found by the Court to have been committed by the Netherlands Government, the reservation of rights requested by Belgium cannot be accorded.

[129] FOR THESE REASONS,
In regard to the principal claim:
The Court, by ten votes to three,
Rejects the various submissions of the Memorial presented by the Netherlands Government in pursuance of its Application dated August 1st, 1936.
As regards the counter-claim presented in the Belgian Counter-Memorial, dated January 28th, 1937 :
The Court, by ten votes to three,
Rejects the submissions of the aforesaid counter-claim. [p33]
The present Judgment has been drawn up in French in accordance with the provisions of Article 39, paragraph i, of the Court's Statute, the Parties having declared themselves agreed that the whole case should be conducted in French.

[130] Done at the Peace Palace, The Hague, this twenty-eighth day of June, one thousand nine hundred and thirty-seven, in three copies, one of which will be deposited in the archives of the Court while the others will be transmitted to the Government of the Netherlands and to the Government of Belgium, respectively.

(Signed) J. G. Guerrero,
President.
(Signed) J. Lopez On van,
Registrar.

[131] M. Anzilotti declares that he is unable to concur in the judgment given by the Court and, availing himself of the right conferred upon him by Article 57 of the Statute, has appended to the judgment the separate opinion which follows.

[132] M. Altamira and Jonkheer van Eysinga declare that they are unable to concur in all the findings of the Court's judgment and have appended to the judgment the separate opinions which follow.

[133] Sir Cecil Hurst, Vice-President of the Court, declares that he is unable to concur in the findings of the Court's judgment in regard to the counter-claim of the Belgian Government and has appended to the judgment the separate opinion which follows.

[134] Mr. Hudson, whilst concurring in the judgment, has appended certain observations.

[135] M. de Visscher declares that he is unable to concur in the findings of the Court's judgment in regard to the counter-claim of the Belgian Government.

(Initialled) J. G. G.
(Initialled) J. L. O. [p34]

Dissenting Opinion of Sir Cecil Hurst.

[136] I am unable to agree with the decision of the Court on the Belgian counter-claim.

[137] The first submission of that counter-claim relates to the Borgharen barrage. I am not able to regard the construction of this barrage by the Netherlands Government otherwise than as a violation of the Treaty of 1863.

[138] Article IV of the Treaty provided that a certain quantity of water was to be withdrawn by the new intake constructed under the provisions of Article I. The quantity varied according to the level of the river. When the level of the water in the river stood at or below a certain point on the gauge at the bridge at Maestricht, the ten cubic metres per second was to be reduced to 7 ½ cubic metres, or to 6 cubic metres, according to the season of the year.

[139] The level of the Meuse so fixed as the determining factor in deciding whether the larger or the smaller quantity of water was to be withdrawn from the Meuse is stated in the Treaty itself (Art. IV, para. 2) to correspond to a minimum depth of water between Maestricht and Venlo. This shows that the purpose which the Treaty had in view was that the quantity of water to be withdrawn from the Meuse should depend on the depth of water in the sections of the river below Maestricht. It is therefore permissible to draw the deduction that the intention of the framers of the Treaty was that the maximum of ten cubic metres per second should only be withdrawn from the river when there was a certain depth of water in the river below Maestricht and down to Venlo.

[140] The effect of the construction of the Borgharen barrage is twofold :–firstly, the level of the water at the mouth of the intake and at the bridge at Maestricht stands permanently so high that the ten cubic metres per second is at all times being withdrawn by the new intake; secondly, the level of the water at the gauge at the bridge at Maestricht has ceased to correspond with a particular depth of water in the Meuse between Maestricht and Venlo. The depth of water in the river between Maestricht and Venlo has in fact ceased to be the factor upon which depended ultimately the amount of water to be withdrawn from the Meuse under the Treaty of 1863.

[141] The Treaty does not make express mention of the fact, but it seems clear that this provision as to the depth of water in [p35] the river between Maestricht and Venlo had reference to the interests of navigation. It was only in connection with navigation that the depth of water in the river between Maestricht and Venlo was of importance.

[142] The action of the Netherlands Government in constructing the Borgharen barrage has had the effect of excluding altogether the application of a provision in the Treaty which must be regarded as having been intended to safeguard the interests of navigation on the Meuse between Maestricht and Venlo. Such action is incompatible with the Treaty, and for that reason the first

submission in the Belgian counter-claim should be admitted.

[143] The provision in the second paragraph of Article V enabling the Netherlands Government to increase its share of the water withdrawn from the Meuse at Maestricht affords no justification for the construction of the Borgharen barrage. There is nothing to show that it was with a view to the exercise of its rights under that Article that the barrage was constructed.

[144] The second submission in the Belgian counter-claim relates to the Juliana Canal.

[145] It is to the effect that the canal being a canal below Maestricht within the meaning of Article I of the Treaty is subject as regards the supply of water to it to the same provisions as the canals on the left bank.

[146] From the wording of the second and third submissions in the Reply of the Netherlands Government, one may infer that it is not disputed by that Government that the Juliana Canal is a canal below Maestricht within the meaning of that Article. It is merely submitted that the canal is not as regards its water supply subject to the same provisions as the canals on the left bank, and that the feeding of the canal is not and has not been inconsistent with the Treaty of 1863, as also that the mere fact that it would be possible for the Netherlands to use certain locks on this canal in a manner inconsistent with the Treaty does not in itself involve a breach of the Treaty.

[147] The questions how the Juliana Canal has been supplied with water in the past and how it is being supplied at present are questions of fact. If it is maintained on behalf of the Belgian Government that the Juliana Canal has been and is being supplied with water from the Meuse in breach of the Treaty of 1863, the burden of proof lies on that Government. No sufficient evidence has been submitted on behalf of the Belgian Government that the Juliana Canal is or has been fed with water from the Meuse. On the contrary the evidence submitted by the Netherlands Government shows that it was not with Meuse water that the Juliana Canal was gradually filled as soon as its construction was completed, and that it is not fed with water [p36] from the Meuse at present. A finding to that effect would in my opinion have been sufficient to dispose of the case as regards the Juliana Canal, and to justify the rejection of the Belgian submission. The question whether or not the Juliana Canal is a canal below Maestricht within the meaning of Article I need not in that case have been considered.

[148] The judgment of the Court proceeds upon the basis that, as the new intake constructed in accordance with Article I of the Treaty was situated on the left bank of the river, and therefore cannot have been intended to feed canals on the right bank, canals on the right bank cannot come under the regime of water supply instituted by the Treaty.

[149] There is no doubt that in 1863 the canals situated below Maestricht were all situated on the left bank of the river, and there is nothing to show that at that date any such canal as the Juliana Canal had been thought of. It does not follow, however, that it was the intention of the Treaty that the prohibition contained in Article I of the Treaty was not intended to apply to a canal on the right bank.

[150] The Treaty was certainly intended to introduce a limitation on the withdrawal of water from the Meuse for feeding canals. In 1863 navigation on the river below Maestricht was of importance, and such navigation was bound to suffer if the withdrawals of water were excessive. Despite the fact therefore that the new intake was situated on the left bank, and that the canals as

to which difficulties had arisen before 1863 were also situated on the left bank, there can be no sufficient reason for reading into the Treaty of 1863 a supposed intention to restrict its operation to the left bank if the plain language of the text is broad enough to cover canals on the right bank.

[151] The phrase used in Article I "pour tous les canaux situes en aval de cette ville" is quite general: it covers canals on the right bank as much as canals on the left bank, and it is in that sense in my view that it must be interpreted.

[152] It is unnecessary to attempt a precise definition of the term "en aval de Maestricht". The Parties are in agreement that the prohibition in Article I extended not only to canals which existed in 1863, but to canals which might be constructed at a later date. Though they were not agreed as to the exact meaning of the term, it is impossible to conceive any interpretation of the term which would not cover a great waterway such as the Juliana Canal, which is in direct connection with the Meuse and is situated only a few kilometres below Maestricht. [p37]

[153] For these reasons, the Juliana Canal would in my opinion fall within the prohibition prescribed by Article I of the Treaty if it was fed with water from the Meuse. It is merely because of lack of proof as to this point that the Belgian submission should be rejected.

(Signed) Cecil J. B. Hurst. [p38]

Separate Opinion by M. Altamira.

[Translation.]

[154] My dissent from the foregoing judgment is mainly in respect of the two following points: the interpretation of the Treaty of 1863 and the findings upon the submissions of the Applicant.

[155] I will confine myself to indicating my interpretation of the Treaty in so far as is necessary to explain why I cannot accept all the grounds on which the judgment is based, though this does not prevent me from arriving for different legal reasons at the same conclusions as the findings of the judgment, with the sole exception of the finding in regard to the Neerhaeren Lock.

I.

[156] The Treaty of May 12th, 1863, constitutes, in my view, a well constructed and complete system in which the various articles are interconnected, each serving to explain and complete the others, thus achieving the objects which are fully and reasonably set out in the Preamble itself.

[157] Regarding the Treaty as a whole, it is possible to discern three groups of provisions : one comprising Articles I, II, III, IV, V, VI, VII, VIII and XI, which deal with the feeding of and navigation upon certain canals referred to in Article I ; another comprising Articles X and XIII which relate to the carrying out of works made necessary by the provisions of the first group, and a third comprising Articles IX and XII, which concern navigation on the Meuse at different points. This structure of the Treaty, which is due to the needs with which the Parties were concerned in 1863, serves to explain the import of the Preamble.

[158] Before analyzing the articles of the Treaty, I find it necessary to make two general

observations.

[159] First of all, I would say that, in my view, every one of the obligations, whether common to the two contracting Parties or peculiar to one of them, contained in the Treaty, is essential in respect of the type of interests to which it relates ; but it follows that none of them takes precedence over the others and still less can render them superfluous. On the contrary, each article of the Treaty requires the precise fulfilment of that part of the agreement between the contracting States which it represents ; the interdependence which may exist between that part and the provisions of other articles (e.g. Art. IV and Arts. Ill, V and XI) merely places conditions or limits upon the exercise of each right or the fulfilment of each obligation ; but, subject to these conditions or limits, where they exist, the [p39] provisions of each article remain intact and nothing should prevent their application. For otherwise the Treaty would cease to be a harmonious whole and would fail to fulfil one or more of its objects instead of serving them all in accordance with the plan jointly adopted by the Parties.

[160] Besides this general consideration which, in my view, governs the Treaty as a whole and each of its articles, there is the fact–entirely natural since we are dealing with a treaty–that the Treaty of May 12th, 1863, involves obligations and that these obligations must be fulfilled. The fact that the Treaty is chiefly concerned with the adjustment of the Parties' interests and not with differences of a really legal nature does not mean that no legal relationship is established as regards the fulfilment of the agreement in regard to interests. These interests may have been the reason for the conclusion of the Treaty, but once the Treaty has come into existence, the rights and obligations which it expressly or implicitly creates take precedence. The interests remain in the background and can only be taken into account in so far as is permitted by the legal provisions embodied in the agreement between the Parties. They can never take the place of these provisions or impede their execution.

[161] Having made these general observations, I now come to the interpretation of the articles of the Treaty.

[162] Article I is for many reasons of considerable importance for a proper understanding of the Treaty. It has been very much discussed by the Parties in this case. It is connected with all the other articles relating to the diversion and allocation of water, and more especially with Article II and Article IV.

[163] An analysis of its terms gives the following results: an obligation to construct at Maestricht a work for the diversion of water from the Meuse ; the definition of this work as "the feeder", i.e. the only feeding conduit for certain canals and irrigation channels ; the qualification of these canals by the words "situated below" Maestricht, and of the irrigation channels as those "of Campine and of the Netherlands". The character of the new feeding conduit as the only feeder which is expressed by the wording of the Article, is confirmed by the terms of the last paragraph of Article IV, which stipulates that the intake of Meuse water previously existing at Hocht is not to be used, that is to say its abolition in practice, since no other source for the feeding of the canals referred to in Article I may exist once the feeding conduit through which is discharged the volume of water taken from the Meuse at Maestricht has been constructed.

[164] Two obligations naturally ensue from this circumstance. One– common to both Parties–is the obligation not to make–or [p40] not to retain–another intake having the same purpose or the same result in practice as that which the Maestricht feeder is henceforward alone to serve. To my

mind, it is obvious that the obligation covers the two following points : the intention to supply water and the actual fact of the supply of water to canals "below Maestricht", since though it is impossible to imagine that an intake would be made with the express object of feeding these canals unless that object were fulfilled–for otherwise the intention would not be carried out–there is the possibility that though the object were lacking, the feeding might nevertheless take place. It is clear that, in Article I, the actual feeding of the canals and not the construction of the intake with its feeding conduit is the essential point. Unless the feeding actually takes place, the intake would be of no use for the fulfilment of the object of the agreement between the Parties.

[165] The other obligation, likewise common to both Parties, is the obligation to do nothing which–apart from a supplying of water from a source forbidden by the first obligation–would make it impossible to execute Article I completely and consequently also the other articles which constitute its complement or corollary. This second obligation, so far as Belgium is concerned, relates to the volume of water to be assigned to the Maestricht intake which naturally depends on the total volume of water in the Meuse above Maestricht in Belgium territory. Thus, if intakes intended for the supply of water for some object other than canals referred to in Article I, were made above Maestricht to carry off quantities of water which would make it impossible for the Maestricht feeder to fulfil its function under the conditions laid down by the Treaty, it is clear that this would be contrary to Article I, as well as– as we shall see–to Articles IV and V. Of course, though this obligation appears particularly to concern Belgium, it also concerns the Netherlands in so far as it may be possible for action taken in their territory to interfere with the fulfilment of the function of the treaty feeder. In my opinion, this is all that is to be found or can be deduced from the terms of Article I–which is very clear–without going beyond its scope. Any further obligation or right on the part of the Netherlands Government or the Belgian Government is only to be found in the following articles of the Treaty.

[166] As regards what canals were referred to by the words in the Article "below Maestricht", everyone knew quite well in 1863 which canals were meant, and the Treaty did not need to enumerate them. It is fair to assume that the authors of the Treaty thought it unnecessary to mention them by name. Moreover, the judgment does so in more than one passage in its grounds, and there is nothing further to add. [p41]

[167] The first paragraph of Article II simply draws a conclusion from Article I. If the new intake was thenceforth to be the sole "feeder" for the canals–a service hitherto performed by the intake at Hocht, about to be abolished–the lock connected with the Hocht intake became useless where it was. But since the function it performed was still required for purposes of navigation, it had to be transferred to the place where the new intake was to be built. We shall see later that this paragraph of Article II has also a special significance in connection with the finding concerning Neerhaeren.

[168] The second paragraph of this Article II is only important in the present case as emphasizing the importance of navigation on the canals. It anticipates a consequence following from the execution of Article I, the first paragraph of Article II and the last paragraph of Article IV and, to remedy the resulting inconvenience, orders the execution of certain hydraulic works. Article III pursues the same aim on another part of the canal.

[169] Paragraphs 1 and 2 of Article IV fix the quantity of water which can be taken from the Meuse by the Maestricht intake, varying with the level of water in the river. Thus they determine the flow of the intake provided for in Article I. The two paragraphs mark the limits of this flow

and thereby impose an obligation upon the Netherlands, in whose territory the new feeder operates, not to exceed these limits, subject to a right in favour of the Netherlands Government, which is not expressed in Article IV, but in paragraph 2 of Article V.

[170] The third paragraph of Article IV prescribes the placing at the mouth of the new intake of a gauge indicating the low water level fixed in the preceding paragraph.
Finally, the last paragraph of Article IV formulates expressly, as already said in reference to Article I, one of the main consequences ensuing from that Article: viz., the discontinuance of the Hocht intake, already mentioned in Article II–an intake which was situated in Belgian territory above Maestricht.

[171] Article V, paragraph 1, fixes, on the basis of the maximum volume which can be taken from the Meuse by the Maestricht feeder, the distribution of this water between the two interested countries. The allocation is not made on terms of equality, Belgium being the more favoured Party, but the reasons for this inequality of treatment are of no importance to the questions now at issue. We need only note the obligation which this paragraph imposes upon the Netherlands to discharge the [p42] two cubic metres per second allotted them (ij when bound by the minimum as provided in Art. IV) through lock 17 at Loozen in the direction of Netherlands territory, these two metres being intended for "the canals and irrigation channels of the Netherlands".

[172] On the other hand, paragraph 2 of Article V grants permission to the Netherlands Government to "increase the volume of water taken at Maestricht" (i.e. the total maximum volume fixed in Art. IV and requiring to be passed through the new feeder). This increase will in practice affect the quantity of water allowed to the Netherlands by paragraph i of Article V, as is clearly shown by the words in this same paragraph 2 : "this surplus water will also be discharged through lock 17 at Loozen" (as well as the two cubic metres of para. 1).

[173] The right thus to increase the volume of water especially assigned to the Netherlands is not restricted to a certain number of cubic metres, but is limited in this same paragraph by the fact that the increase may not be of such amount as to cause "the speed of the current in the canal .... to exceed the limits fixed in Article III". This "average" speed shall not exceed "a maximum of 25 to 27 centimetres per second".

[174] Within these limits therefore, the right granted to the Netherlands is purely discretionary.

[175] Article VI deals particularly with irrigation, which, according to the Preamble, is the second aim of the Treaty. I need not analyze this Article, as it is of little importance to our case. The same applies to Article VII, which imposes a further obligation upon Belgium, and to Article VIII.

[176] Article IX introduces the second group of treaty provisions to which I referred at the beginning. It concerns the improvement of navigation, not on the canals mentioned in Article I, .but on the Meuse in the part of the river between Maestricht and Venlo, which in 1863 presented serious obstacles to safe navigation. It has no connection with the Maestricht feeder nor with the supply of the canals referred to in Article I.

[177] Article X is again concerned with the intake of Article I, but only from the technical point of view of works to be constructed there and of the works mentioned in Article II. It adds nothing essential in regard to the questions now at issue. The same is true of Articles XII and XIII. Article

XIV deals only with ratification of the Treaty.

[178] Article XI, on the other hand, supplements paragraph 2 of Article V in case the exercise of its right by the Netherlands [p43] Government should require the execution by it of certain hydraulic works. In this event, but only in this event, "the question of the co-operation of the Belgian Government.... will be settled between the two Governments", in regard to the "measures necessary to secure discharge of the water through the Zuid-Willemsvaart". It appears to me clear that, as long as the increased volume granted to the Netherlands Government is furnished by the Maestricht feeder, the water is bound to be discharged into the Zuid-Willemsvaart, since the feeder communicates only with that canal. Article XI seems to me to provide for the possibility of new hydraulic works being constructed between the feeder and the said canal or in some other way allowing the surplus water permitted by Article V to be discharged in some other direction. The possible effect of this surplus water on the current of the canal is already provided for in Article V.

[179] In this interpretation of the 1863 Treaty, I have been at pains to state by an analysis of its articles the express or implied obligations contained in each of them. The Treaty does not seem to me to impose any other obligation upon either Party. In my view, however, each of these obligations must be observed irrespective of the others, and the fulfilment of the others cannot excuse the non-fulfilment of one.

[180] Before concluding this part of the present opinion, I would point out, among the practical consequences to be drawn from an interpretation of the 1863 Treaty–thus passing beyond the sphere of law–the fact that the obligations under this Treaty are perhaps somewhat restrictive, having regard to circumstances that have since developed. This is certainly not a question for the Court or for a judge to examine, but it arises quite naturally from a study of the legal elements contained in the Treaty and from knowledge of present-day conditions. As long as the Treaty remains in force, it must be observed as it stands. It is not for the Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument.

II.

[181] To explain the grounds of my dissent from the finding concerning the Neerhaeren Lock, as contained in the reasons for the present judgment, I need only apply my interpretation [p44] of Article I of the Treaty of 1863 and my general remarks on the Treaty system.

[182] The canals referred to in Article I may not be fed otherwise than from the Maestricht intake and its feeding conduit, firstly because that is the only place where feeding is permitted and secondly because the quantity of water to be diverted for this purpose may not exceed the maximum volume fixed by Article IV, and, as regards the surplus allowed to the Netherlands by Article IV, paragraph 2, only the Netherlands Government may supply it within the limits fixed in that paragraph.

[183] The case of lock 19 cannot, in my view, be invoked to refute the foregoing argument. This lock was created by the Treaty, and this fact confers upon it a legal status which renders it consistent with the rest of the convention, a status which no other lock not recognized by the Treaty and discharging water into the canals by conduits other than the Maestricht feeder, would possess. Nor is there anything in Article II which, in my view, would justify the deduction that

the Treaty recognizes the general principle that water discharged by locks, of which water the principal and normal purpose is not that of feeding the canals referred to in Article I but which in fact does constitute a feeding of such canals with water not taken from Maestricht, may be assimilated to water from the new lock 19, and still less to water passing into the Zuid-Willemsvaart by the Maestricht conduit. The fact that the water hitherto discharged by the Neerhaeren Lock has not increased the speed of the current does not seem to me to alter the character of the supply of water discharged by that lock. The provisions of Articles I, IV and V are in my view contrary to this conclusion.

(Signed) Rafael Altamira. [p45]

Dissenting Opinion of M. Anzilotti.

[Translation]

[184] I.–There are two points in the judgment in regard to which I am unable to agree with the opinion of the Court: these are the rejection of submission I b of the Application (the Neerhaeren Lock) and the rejection of submission i° of the Counter-claim (the Borgharen barrage). In my opinion, the Court should have accepted both these submissions.

[185] As my dissent is based on an interpretation of the Treaty of May I2th, 1863, differing from that adopted by the Court, it is fitting that I should state the reasons for it in a few words.

[186] Before giving my individual opinion on the two points in question, I must however make a general observation.

[187] The operative clause of the judgment merely rejects the submissions of the principal claim and of the Counter-claim. In my opinion, in a suit the main object of which was to obtain the interpretation of a treaty with reference to certain concrete facts, and in which both the Applicant and the Respondent presented submissions indicating, in regard to each point, the interpretation which they respectively wished to see adopted by the Court, the latter should not have confined itself to a mere rejection of the submissions of the Applicant : it should also have expressed its opinion on the submissions of the Respondent ; and, in any case, it should have declared what it considered to be the correct interpretation of the Treaty.

[188] It is from the standpoint of this conception of the functions of the Court in the present suit that the following observations have been drawn up.

[189] 2. – The question whether the functioning of the Neerhaeren Lock, the effect of which is to discharge into the Zuid-Willemsvaart water diverted from the Meuse elsewhere than at the feeder prescribed, by Article I, is or is not contrary to the Treaty, depends, mainly, on the scope of the obligation which the two Parties contracted when they laid down in this Article that the new intake on the Meuse "shall constitute the feeder for all canals situated below that town", etc. Is this an obligation merely to refrain from constructing other intakes on the Meuse constituting feeders for the aforesaid canals ? or is it an obligation to refrain from feeding these canals with water diverted from the Meuse elsewhere than at the treaty feeder, no matter by what method such feeding may be effected (by a conduit, by lockage, by pumping, etc.) ? [p46]

[190] If the text is taken literally, it seems only to refer to "feeders" of the same sort as the one

which the Treaty ordered to be constructed.

[191] But it is always dangerous to be guided by the literal sense of the words before one is clear as to the object and intent of the Treaty ; for it is only in this Treaty, and with reference to this Treaty, that these words–which have no value except in so far as they express the intention of the Parties–assume their true significance.

[192] The Treaty of May I2th, 1863, is based, in my opinion, on the fundamental principle that a certain quantity of water, and no more, will be taken from the Meuse to supply the needs of the canals situated below Maestricht and for the irrigation works in the Campine and the Netherlands. The quantity of water to be withdrawn from the Meuse is fixed with reference to the level of the river (Art. IV) ; and this provision is closely connected with the other object of the Treaty, which is to institute a regime on the Meuse, by means of a programme of works that would maintain and improve the navigability of that river in spite of the relatively large quantity of water which it was proposed to withdraw from it (Art. IX).

[193] If that is really the system of the Treaty–and I do not see how it can be questioned–it follows that the essential purpose of Article I is not to exclude other feeders. Its object is rather to exclude any feeding of the canals in question with water withdrawn from the Meuse elsewhere than at the treaty feeder; for it is only at that feeder that the water can be measured, and it is only if its volume remains within the limits laid down, that the Treaty is being regularly executed. That is the reason, and that is the significance, of the single feeder which is sanctioned by Article

I.

[194] It follows that the obligation which the Parties assumed when they laid down that the new intake would "constitute the feeder for all canals...." is not merely an obligation to refrain from constructing other feeders, but is an obligation to refrain from supplying these canals with water taken from the Meuse elsewhere than at the treaty feeder, no matter by what method it is taken or by what method it is discharged into the canals in question. Moreover, it cannot be disputed that engineers regard lockwater as an important, in some cases the most important, factor in the feeding of canals.

[195] Founding myself on this interpretation of the Treaty, I am led to the conclusion that the functioning of the Neerhaeren Lock, the effect of which is to discharge into the Zuid-Willemsvaart a certain quantity of Meuse water diverted at Monsin in excess of the quantity laid down in Article IV, is contrary to this Treaty. [p47]

[196] It matters little that this surplus water discharged into the Zuid-Willemsvaart has not increased the velocity of the current in this canal beyond the maximum limit laid down in Article III. That maximum constitutes a limit for the volume of water which may lawfully be withdrawn at the treaty feeder, in virtue of Article V, paragraph 2 ; the fact that it is not exceeded could not have the effect of legalizing a withdrawal of water from the Meuse which is, in itself, contrary to the Treaty.

[197] It is true that this Treaty provides (Art. II) for the construction of a lock, the result of which would be to discharge into the Zuid-Willemsvaart Meuse water conveyed from Liege by the Liege-Maestricht Canal. It must however be pointed out that the construction of that lock was a necessary consequence of the works prescribed by the Treaty (Arts. II and III) in order to enable

the Zuid-Willemsvaart to discharge the water received through the new intake. The only argument which can be drawn from it, in support of the opposite view, is, therefore, that the water discharged through this lock is not included in the quantity laid down in Article IV. But it is admitted–and both Parties are agreed on this point–that the total average quantity of lock-water discharged by this lock is very small, and is less than the margin of error allowed in measuring the volume of water prescribed in Article IV. It was therefore quite natural that the authors of the Treaty should not have taken this water into account.

[198] But it would be going beyond the reasonable intentions of the Parties to seek to infer from this fact that, because lock 19, in affording passage to barges, discharges into the Zuid-Willemsvaart a volume of water which supplements that taken from the Meuse by the treaty feeder, it is lawful to construct other locks, performing the same function and producing the same effects. This would subvert the whole system of the Treaty.

[199] 3.–Submission I & of the Application must however be considered also from another point of view.

[200] Before Belgium had constructed the Neerhaeren Lock, the Netherlands had constructed and brought into use the Bosscheveld Lock, which also had the effect of conveying into the Zuid-Willemsvaart a certain quantity of water drawn from the Meuse elsewhere than at the treaty feeder, and, consequently, in excess of the volume laid down in Article IV of the Treaty. The Netherlands allege that they were entitled to construct the Bosscheveld Lock because in virtue of Article V, paragraph 2, they were authorized to withdraw water from the Meuse elsewhere than at the treaty feeder, and to discharge it into the Zuid-Willemsvaart, subject only to the condition [p48] that the speed of the current of that canal was not caused to exceed the maximum limit laid down in Article III. Belgium disputes that interpretation, and maintains that, subject to the possibility of increasing the volume of water that may be diverted through the treaty feeder, the rights and obligations of the two States were identical.

[201] Having regard to the foregoing, it is clear that the first thing to. do is to ascertain what is the attitude of the respondent Party in regard to the claim concerning the Neerhaeren Lock.

[202] The Belgian Government, in opposing submission I b of the Application–in addition to its general request that the submission of the applicant Party shall be declared to be ill-founded –asks the Court to adjudge and declare that "the feeding of the Zuid-Willemsvaart and the canal joining the Meuse and the Scheldt and its branches is not rendered incompatible with the Treaty mentioned above by the fact that lockage water arising from the working of the Neerhaeren Lock–operated bona fide for the passing of boats–is added to the water from the Meuse coming from the intake at Maestricht, as the Neerhaeren Lock cannot be treated less favourably than the Bos-scheveld Lock" (submission 2° of the Counter-Memorial).

[203] Disregarding for the moment the last phrase "which cannot be treated less favourably", etc., it is clear that what Belgium is asking the Court to do is to give an interpretation of the Treaty on the point of law raised by submission I & of the Application. It is therefore evident that both Parties were agreed in asking the Court for this interpretation.

[204] Is this view controverted by the last sentence of the submission in which the Belgian Government brings the Bossche-veld Lock into consideration ? My answer is definitely in the negative ; I see nothing more in these words than an allusion to the Belgian contention of the

equality of the two States in regard to the Treaty of 1863, and consequently an argument in support of the interpretation which the Court is asked to give. For it is manifest that the Belgian Government could scarcely suppose that the Court, having reached the conclusion that the Treaty prohibits the feeding of canals situated below Maestricht by lock-water taken from the Meuse elsewhere than at the treaty feeder, would subsequently change its opinion and alter its interpretation in consequence of the existence of the Bosscheveld Lock. For either the Court would consider that this lock is justified by Article V, paragraph 2, as the Netherlands contend, so that its existence could in no way affect the Neerhaeren Lock ; or the Court would consider that Article V, paragraph 2, does not possess the meaning attributed to it by the Netherlands, and then it could only conclude that the Bosscheveld Lock is also contrary to the Treaty. [p49]

[205] No doubt the Belgian Government might have asked the Court, in case the latter should not accept its interpretation of the Treaty, to declare that the Bosscheveld Lock is itself contrary to the said Treaty; it would only have needed to present an alternative submission to submission 2° of the Counter-Memorial. But the Belgian Government did not present any such submission ; that is its own affair and the Court did not need to concern itself with the matter. It is none the less true that the Belgian Government asked for the interpretation of the Treaty with reference to the Neerhaeren Lock just in the same way as this had been requested by the Netherlands Government : this circumstance suffices in my opinion to oblige the Court to give a decision on submission I b of the Application and on submission 2° of the Counter-Memorial, without concerning itself in any way with the existence of the Bosscheveld Lock; I have already mentioned the grounds on which the Court should have admitted submission I b of the Application and rejected submission 2° of the Counter-Memorial.

[206] But there is another aspect of the question. Submission I b of the Application is not the only one which relates to the Neerhaeren Lock. In submission II b, the Netherlands asked the Court to condemn (condamner) Belgium "to discontinue any feeding held to be contrary to the said Treaty and to refrain from any further such feeding" ; there can be no doubt that this submission has primarily in view the functioning of the Neerhaeren Lock.

[207] In my opinion the word condemn ("condamner") is not entirely appropriate in international proceedings; in any case, it is employed in a sense which is only remotely connected with that of condemnation in national law. What the Netherlands ask in submission II b is, in fact, that the Court should declare that Belgium is bound to carry out the Treaty and to discontinue effecting certain supplies of water. While submission I b seeks for an interpretation of the Treaty, submission II b seeks for its execution.

[208] In its Rejoinder, the Belgian Government presented certain alternative submissions, the second of which is worded as follows : "To find that, by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent".

[209] This was an alternative submission "in case the Court should be unable on certain points to find in accordance with the submissions of the Respondent" ; in fact, it is a submission which only arises, so far as concerns the Neerhaeren Lock, in case the Court, in deciding on submission I b of the Application and on submission 2° of the Counter-Memorial, should [p50] reject the interpretation maintained by the Belgian Government. In my view, the Court should therefore have given a decision on the alternative submission.

[210] The admissibility of this submission depends on two conditions, namely, whether the legal rule on which it founds itself is applicable in relations between States, and whether the Netherlands, by constructing the Bosscheveld Lock, were failing to execute the obligation imposed on them by the Treaty.

[211] As regards the first point, I am convinced that the principle underlying this submission (inadimplenti non est adimplendum) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute.

[212] As regards the second point, I am also of opinion that the Belgian Government's objection is well founded. If it is true that the Netherlands, in virtue of Article V, paragraph 2, have the right, which Belgium does not possess, to "increase the volume of water taken from the Meuse", it is none the less true that this water has to be withdrawn through the treaty feeder : the text of this paragraph is perfectly clear and allows of no doubt on that point. It follows that the obligation imposed by Article I, the scope of which has been explained above, applies to the Netherlands as well as to Belgium: the feeding of the Zuid-Willemsvaart by the Bosscheveld Lock with water diverted from the Meuse elsewhere than at the treaty feeder is therefore contrary to the Treaty.

[213] To sum up my point of view, I consider that the Court should have proceeded as follows :

in passing upon submissions I & of the Application and 2° of the Counter-Memorial, the Court should have allowed the former and rejected the latter, and it should have adjudged and declared that the feeding of the canals referred to in Article I of the Treaty, through the Neerhaeren Lock, with water taken from the Meuse elsewhere than at the treaty feeder, is contrary to the Treaty;
in passing upon submission II b of the Application and on the alternative submission of the Rejoinder, the Court should have allowed the latter and rejected the former, in so far as either of the said submissions relates to the lock at Neerhaeren ; it should have adjudged and declared that, as a result of the construction of the Bosscheveld Lock, the Netherlands have placed themselves in a position which precludes them from invoking the Treaty to obtain a cessation of the feeding of the aforesaid canals through the Neerhaeren Lock. [p51]

[214] 4. – The interpretation of the Treaty of 1863 which leads me to conclude that the Neerhaeren and Bosscheveld Locks are contrary to the Treaty has led me to a like conclusion in regard to the Borgharen barrage.

[215] I have already said that the fundamental idea of the Treaty was to reconcile the satisfying of certain interests relating to the canals and irrigation works referred to in Article I with the interests of navigation on the Meuse ; I have also said that this reconciliation was effected, on the one hand, by fixing the quantity of water which might be taken from the Meuse, and, on the other hand, by laying down a programme of works calculated to conserve the navigability of the river, in spite of the reduction in its volume of water.

[216] It was precisely with this object that the quantity of water which might lawfully be taken from the Meuse was fixed in Article IV in relation to the depth of water in the river. The variations prescribed in that Article, according as the surface of the Meuse is above the low level of that river, or at the low level, or below it, and also according to the different months of the year, are consequently an essential part of the settlement agreed upon between the two States. A

structure which abolishes these variations as is done by the barrage at Borgharen is consequently, by reason of that very fact, contrary to the Treaty.

[217] Though it is true that the Netherlands are entitled to increase the quantity of water to be withdrawn by the treaty feeder in virtue of Article V, paragraph 2, and Article XI, it is equally true that this right is itself conditioned by the natural flow of the river: there is nothing in the Treaty which authorizes the Netherlands to modify that flow for their own benefit. Article XI provides for works "necessitating an increase in the volume of water to be withdrawn from the Meuse", not for works having as their purpose and effect an increase in the volume of water discharged through the treaty feeder. The works provided for in Article XI are, therefore, works relating to navigation canals or to irrigation works beyond Loozen. It has not been alleged, and it could not be contended, that the Netherlands made the Borgharen barrage with the object of increasing the quantity of water to be withdrawn through the treaty feeder ; the fact is that the volume of water has been increased, so that it stands at the maximum limit throughout the whole year, and the Meuse has been proportionately depleted, owing to the construction of this barrage by the Netherlands with a totally different object.

[218] As, in my opinion, the Borgharen barrage constitutes an infraction, in particular, of Article IV of the Treaty, the purpose of which was to establish a certain proportion between the volume of water allotted to the canals referred to in Article I [p52] and the volume of water which was to be left in the Meuse, I am unable to attribute importance to the argument that Belgium has suffered no injury by the construction of the barrage, but that she has rather benefited by it. The existence of an injury would be relevant if Belgium had made a claim for damages, but she has simply asked for the interpretation of the Treaty. Moreover, it is quite possible that the interests of navigation on the Meuse have altered considerably since 1863, and that the decrease in the quantity of water left in the river may now be of far less importance than it would have been in the past ; but it is none the less true that the Treaty says what it does say, and that one of the Parties to it is not entitled, without the consent of the other Party, to render certain of its provisions incapable of execution, in particular a provision so fundamental as Article IV.

[219] For these reasons, I consider that the Court should have accepted submission i° of the Counter-claim, should have rejected submission III (i) of the Reply, and should have adjudged and declared that the fact of making it impossible, by the construction of the Borgharen barrage, for the quantity of Meuse water discharged through the treaty feeder to vary according to the level of the Meuse, as provided in Article IV of the Treaty, and of constantly maintaining that quantity at its maximum amount, is an infraction of the Treaty.

(Signed) D. Anzilotti. [p53]

Separate Opinion by Jonkheer Van Eysinga.

[Translation]

[220] The Judgment does not entirely express my opinion; in these circumstances, I would subjoin to it a statement of my separate opinion on certain parts of the case.

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[221] In each of the two actions which have been brought before the Court in the present case–in

the main Netherlands action and in the Belgian counter-claim–the applicant Party alleges that certain hydraulic works are inconsistent with the Treaty of May I2th, 1863, concerning the regime for the diversion of water from the Meuse. Neither the Netherlands in the principal action, nor Belgium in the counter-claim, alleges that the hydraulic works in question are contrary to general international law. Such an assertion had been made inter alia by Belgium in regard to the feeding of the Juliana Canal with Meuse water, as appears from the Belgian note transmitted to the Netherlands Government on April 28th, 1921 (Belgian Counter-Memorial, p. 27). That note declared that this "regime would be in conflict with the general principles of international law governing the utilization of international rivers by the riparian States". But, in the present case, general international law, to which Belgium has alluded on several occasions, must be left on one side ; we are here only concerned with the Treaty of 1863.

[222] What the two States are asking the Court to give them is an interpretation of that Treaty with special reference to certain hydraulic works, the compatibility of which with the Treaty is a subject of dispute. It is therefore one of those cases which, according to Article 13 of the Covenant of the League of Nations, is primarily suitable for judicial settlement. Each of the Parties is entitled to ask the Court for an interpretation of the Treaty, and the Court is not entitled to refuse to give this interpretation.

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[223] It will be seen from the foregoing observations that the first thing to do is to ascertain the character, the scope and the interpretation of the Treaty of 1863.

[224] The Treaty of 1863 put an end, by means of a compromise, to a dispute which had existed between the two countries for several years. [p54]

[225] The Netherlands alleged that Belgium was wrongfully diverting (aftappen) Meuse water in order to feed her new system of canals in the Campine and her irrigation works in the Cam-pine ; this water, which was withdrawn from the Meuse, was to a considerable extent conveyed to the Scheldt. Liege, an ancient port on the Meuse, and the Belgian basin of the Meuse in general, had used the Meuse from the earliest times as a natural navigable waterway, terminating in Holland. However, after the dissolution of the Kingdom of 1815, which comprised Belgium, Luxemburg and the present territory of the Netherlands, Belgium endeavoured to direct the traffic of her Meuse basin towards Antwerp; she did this in particular with the help of her canals in the Campine which were designed to link the Zuid-Willemsvaart, and thereby the Meuse, to the great Belgian maritime port–as indeed is indicated by the name : Meuse-Scheldt Junction Canal. My reason for mentioning this fact is to show that the Netherlands Government did not, in the dispute which was regulated by the Treaty of 1863, any more than in the suit now under consideration, oppose the diversion of the traffic of the Belgian Meuse basin towards Antwerp. Neither in the dispute in the XIXth century, nor in that in the XXth century has there been any question of an objection to the diversion of traffic ; in both cases the disputes were solely concerned with objections to the withdrawal (aftapping) of Meuse water effected by Belgium.

[226] It is not superfluous to point out that when the Netherlands, in the dispute in the middle of the XIXth century, alleged that Belgium was arbitrarily withdrawing water from the Meuse, the objection in no way concerned the quantity of water necessary for navigation in the Zuid-Willemsvaart, or, later on, in the prolongation of that canal as far as Liege. There may be different opinions as to whether the Zuid-Willemsvaart is, or is not, a lateral canal of the

Meuse–the Belgian Counsel, M. Delmer, says that it is (Oral Pleadings, p. 86) ; the Belgian Counsel, Me. Marcq, says that it is not (Oral Pleadings, p. 189) ; but one thing is certain, namely that when King William I, as early as 1819, ordered an investigation of the problem, the initial step which led to the construction of the Zuid-Willemsvaart, the object in view was to provide the important industrial and mining districts of the present Belgian Meuse basin with a better navigable waterway. The results of the investigations carried out by the Waterstaat showed that a canal could be made which would be much shorter than the Meuse and would offer a navigable waterway, practically always available, unlike the Meuse which suffered at times from an insufficiency and at times from a superabundance of water, either of which conditions were an obstacle to navigation during considerable parts of the year. The Zuid-Willemsvaart was [p55] ready for use in 1826, and its prolongation as far as Liege was ready in 1850, or at the beginning of 1851. It was known beforehand that these canals would use a certain quantity of Meuse water, but that inevitable consequence of an improvement in the communications by water was all the more easy of acceptance because the quantity required was inconsiderable. It should be noted, in this connection, that Article V, paragraph i, of the Treaty of 1863 allots a volume of two cubic metres, or even as little as 1.50 cubic metre, per second to the Zuid-Willemsvaart below Loozen and to the canals branching off from this part of the Zuid-Willemsvaart, and to the Netherlands irrigation channels. And, in the case of the Liege-Maestricht Canal, neither the Convention of 1845, which provided for its construction, nor the Treaty of 1863 said anything on the subject of its lock-water, which was very natural because the volume of such water is extremely small, viz., one-tenth of a cubic metre per second, a quantity less than the margin of error which occurs in measuring the discharge through the feeder at Maestricht, as is pointed out on page 15 of the Belgian Rejoinder.

[227] In point of fact, the Netherlands never made any complaint in regard to the small quantities of water requisite to enable the Zuid-Willemsvaart and the canal prolonging it to Liege to be utilized as a waterway.

[228] But the situation was very different when Belgium began to use the two navigable canals to convey the large quantities of water which she found that she required for her system of canals in the Campine, then in course of construction, and for her projected irrigation works in the Campine. Belgium began to take the supplementary water required for her canals and irrigation works in the Campine at three different intakes. All of them were situated in Belgian territory.

[229] First, there was the intake at Hocht, quite close to the spot where the Zuid-Willemsvaart leaves Netherlands territory. A feeder drawing its water from the Meuse, which at that point runs close alongside the canal, was constructed in 1837 on the right bank of the canal.

[230] Secondly, as soon as the Liege-Maestricht Canal was completed, Belgium began to use it also as a feeder for the system of canals and irrigation channels in the Campine. For this purpose, large quantities of Meuse water were diverted at Liege into the lateral canal at Maestricht ; this process was facilitated, subsequently, by the construction of a barrage which raised the level of the Meuse at the place where the lateral canal branched off. In order not to hamper navigation unduly in the lateral canal, the large quantities of water were introduced into the canal during the night, with the result that [p56] on the following day, at a particular time, the level of the Meuse in Netherlands Limburg fell considerably, so that it was described there as being subject to a flux and reflux, like that of the sea, only more regular.

[231] In order that the Zuid-Willemsvaart should afford a rapid passage to the large quantities of

Meuse water diverted at Liege, it was necessary to increase the velocity of its current. This was done at the very time when the Liege-Maestricht Canal was taken into use, namely, about the beginning of 1851. For this purpose, a third intake, or rather a cascade, was constructed in Belgian territory to the left of the old lock 19, near Hocht, where "the lateral derivation" was deepened and enlarged.

[232] The statement pf reasons which was drawn up by M. Rogier, the Belgian Prime Minister, and is dated on the day after the signature of the Treaty (Netherlands Memorial, p. 21), makes repeated mention of the intakes at Liege and at Hocht ; and in his statement on May loth, the Belgian Counsel, M. Delmer, clearly described the situation of which the Netherlands Government had complained prior to 1863.

[233] In fact, Belgium, in order to feed her new system of Campine canals and her Campine irrigation works, took water wherever she could find it, and the three intakes on the Meuse were supplemented by water drawn off from several of the streams and water-courses which flowed towards Netherlands North Brabant ; at the same time, the water which had been used for irrigation was discharged, in part, into Netherlands territory, where it caused inundations, which were very mischievous, especially in the hay-making season.

[234] The withdrawal of water for the needs of the Campine caused the Netherlands to make repeated representations to the Cabinet at Brussels. Two international commissions studied the problem in 1856 and in 1858, but without success. In 1860, the Second Chamber of the States-General appointed a commission of enquiry, and in the following year a convention was signed at Brussels which maintained the situation as it was in the neighbourhood of Hocht ; this convention was rejected by the Second Chamber of the States-General. Further negotiations followed, in conjunction with the discussions concerning the redemption of the Scheldt tolls and commercial arrangements; until finally the Treaty of May 12th, 1863, reconciled the divergent standpoints and put an end to the dispute.

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[235] What are the provisions of the Treaty of 1863?

[236] The essential feature of the Treaty was that a considerable portion of the discharge of the international river was assigned [p57] to Belgium, even at periods of the year when the Meuse is very low. The Treaty, therefore, derogated from the normal state of affairs, according to which the discharge of an international river belongs to that river. The quantity of water to be withdrawn for Belgium, as laid down in Articles IV and V of the Treaty, is fixed, and is therefore both a maximum and a minimum quantity. The Netherlands have also to receive a certain quantity of water, which, however, is far less than that allotted to Belgium; on the other hand, it is liable to be increased, within certain limits and subject to certain conditions (Art. V, para. 2, and Art. XI).

[237] The considerable withdrawals of Meuse water for the canals and irrigation works of the Campine were rendered feasible by means of a variety of measures designed to neutralize the undesirable consequences of these diversions of water. The water was henceforward to be withdrawn solely at Maestricht (Art. I) ; the Zuid-Willemsvaart was to undergo certain alterations (Arts. II and III) ; measures were to be taken to prevent inundations in the Netherlands as a result of irrigation in Belgium (Art. VI) ; certain works were to be carried out on the Meuse between

Maestricht and Venlo (Art. IX). It should be 'added that Article VII prohibits the withdrawal of water, in the future, from certain water-courses flowing towards the Netherlands.

[238] It was the withdrawal of large quantities of water from the Meuse, on the one hand, and the measures to offset the undesirable consequences of that withdrawal, on the other hand, that constituted the compromise established by the Treaty, which, as its Preamble states, regulated, permanently and definitively, the regime of diversions of water from the Meuse. The withdrawal of water from the Meuse comes first, and the other provisions of the Treaty, though also important, are the effect of that withdrawal.

[239] For the supply of water to all the canals situated below Maestricht, and to the irrigation channels in the Campine and the Netherlands, Article I of the Treaty of 1863 substitutes a single .intake, which is to be established in Netherlands territory in place of the existing intakes, which were all in Belgian territory.

[240] Belgium has maintained that the monopoly accorded to the intake at Maestricht only applied in the sector of that river below Maestricht, as far down as Venlo. This contention, which implies that, above Maestricht, it would be lawful to divert water from the Meuse in order to feed canals situated below Maestricht, does not appear to me to be justified.

[241] It should be pointed out, in this connection, that Article I, which speaks of the establishment of the feeder for all the canals situated below Maestricht and for the irrigation works in the [p58] Campine and the Netherlands, is drawn up in entirely general terms, so far as concerns the places at which the obligation to refrain from installing a new intake on the Meuse applies. This obligation applies at every place where it would be possible to construct an intake for feeding any canal whatsoever situated below Maestricht, or for feeding irrigation works in the Campine and the Netherlands. As is known, the principal intake existing prior to 1863 was situated above Maestricht. This was the important intake which Belgium operated at Liege, and which is repeatedly mentioned in the statement of reasons by the Prime Minister, M. Rogier.

[242] The Belgian argument endeavours to interpret Article I of the Treaty by means of Article IX. In this way it brings the Maestricht-Venlo sector, which is mentioned in the latter Article, within the compass of Article I. But in so doing, it restricts, unjustifiably, the very general scope of Article I, and it forgets that the only link between the two Articles is that between cause (Art. I) and effect (Art. IX). I am well aware that the Belgian argument avers that the principal aim of the Treaty was the improvement of the Meuse, which would appear to justify the interpretation of Article I from the standpoint of Article IX. But it is clear from the Preamble of the Treaty, inter alia, that the aim of the Treaty is to regulate "the system of diversions of water from the Meuse" ; and the essential feature of the Treaty, as has already been pointed out, consists of the ten cubic metres per second that are to be taken from the Meuse, out of which amount eight cubic metres per second are assigned to Belgium [FN1]. The deterioration of the Meuse which results from this diversion of Meuse water constitutes, as is said in M. Rogier's statement of reasons, a disturbance of the equilibrium which must, in fairness, be re-established by the carrying out of certain works on the Meuse. Article IX is indeed an effect of Article I, and seeks to neutralize its consequences. Article IX should properly be interpreted in the light of Article I, whereas an interpretation in the inverse order runs directly counter to the very general import of Article I.

[FN1] Except in regard to the barrage of Borgharen, the present Opinion disregards, in general, the case in which the river is at or below the low level.

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[243] To the foregoing I would add a practical observation.

[244] It has been suggested that Article I of the Treaty of 1863 only prohibits the establishment of intakes on the Meuse below Maestricht, as far down as Venlo. But is it realized that, if that were so, the practical men, the engineers, who according to the Belgian statements were responsible for framing the treaty, would have strayed very far from the sphere of realities ? I will explain. [p59]

[245] It has been pointed out that even the Hocht intake–which was however situated very close to the spot where the Zuid-Willemsvaart leaves Netherlands territory–did not always give satisfaction, for the reason that, even at Hocht, the surface of the Meuse sometimes fell to the level of the Zuid-Willemsvaart and even lower, so that the feeding of the Zuid-Willemsvaart from the Meuse became impracticable. Now, if it is realized, in the first place, that the level of the Zuid-Willemsvaart was raised in pursuance of Article III of the Treaty, and that the reach thus raised extends as far as lock 18–in other words, almost as far as the frontier of Netherlands North .Brabant– and that, in the second place, the Meuse between Hocht and Kessenich or Maasbracht–places which are almost in line with lock 18–has a fall of more than twenty metres, whereas the Zuid-Willemsvaart does not begin to fall rapidly before lock No. 12, which is in line with Venlo, it is manifest that the Meuse below Maastricht is descending a valley, whereas the Zuid-Willemsvaart, as far as lock 18, continues its course entirely on the western plateau, and only falls gradually till it reaches lock 12 in line with Venlo.

[246] That, it appears, suffices to show that the idea of supplying the Zuid-Willemsvaart below Maestricht with Meuse water would not be very practical, except in the immediate vicinity of the feeder.

[247] Belgium was henceforward to receive a very satisfactory allowance of Meuse water for her requirements in the Campine, through the new and only lawful intake at Maestricht–as was pointed out by M. Rogier in his statement of reasons. It has already been mentioned that the volume of water which the new feeder at Maestricht was to supply was normally ten cubic metres per second, of which eight cubic metres were the fixed quantity guaranteed to Belgium (Art. V).

[248] The specification of the precise amount of water to be taken from the Meuse–a provision which was in itself unusual–points to the conclusion that, when it was laid down that the intake at Maestricht was to be henceforward the only feeder for the supply of Meuse water to canals situated below that town, the granting of this monopoly to the new intake carried with it a prohibition of all feeding at other places, whether by conduits, by discharging culverts, by lock-water or by any other means by which Meuse water might be introduced into canals situated below Maestricht.

[249] This conclusion has been disputed in regard to a single method of introducing Meuse water into canals situated below Maestricht, namely the discharge of water by lockage. I consider that this exception should not be allowed. [p60]

[250] A justification of the exception has been sought in the fact, already mentioned, that the Treaty of 1863 makes no mention of the quantities of water entering the Zuid-Willemsvaart by the functioning of lock 19, which discharges into the Zuid-Willemsvaart a certain quantity of Meuse water that has been conveyed from Liege by the Liege-Maestricht Canal; it has been inferred from this fact that any quantity of water supplied to canals situated below Maestricht by lockage, for instance by the functioning of the Neerhaeren or Bosscheveld Locks, would consequently be consistent with the Treaty of 1863.

[251] I do not believe that this interpretation of the Treaty is correct. For the silence of the Treaty concerning the introduction of the very small quantity of Meuse water which finds its way into the canals below [p61] Maestricht by the functioning of lock 19 can be easily explained. As has been pointed out, the feeding of the Zuid-Willemsvaart itself with Meuse water had not occasioned any difficulty. Why should it have been otherwise when the canal was prolonged to Liege ? The silence of the texts concerning the small quantities of Meuse water required for navigation in the canal which linked Liege to the Meuse below Bois-le-Duc is therefore quite comprehensible, both in the case of the Treaty of 1845, concerning the prolongation of the Zuid-Willemsvaart to Liege, and in the case of the Treaty of 1863, which has restored the Liege-Maestricht Canal to its exclusive role as a navigable waterway.

[252] On the other hand, the immense quantities of Meuse water which now enter the canals below Maestricht through the modern locks at Neerhaeren and Bosscheveld, though the discharge of the river has not altered, disturb the system of the Treaty of 1863. That Treaty aimed at providing Belgium with eight cubic metres of Meuse water per second, neither more nor less. But by the functioning of the locks at Neerhaeren and Bosscheveld, Belgium receives a far larger quantity. Moreover, every cubic metre per second passing through the lock at Neerhaeren diminishes the quantity of supplementary water which the Netherlands have a right to introduce through the feeder at Maestricht, in virtue of Article V, paragraph 2, of the Treaty; that right is limited by the maximum velocity of the current specified in that Article, a velocity which is enhanced by the lock-water discharged at Neerhaeren. Nay, more : the Treaty of 1863 seeks to ensure that the Meuse water used for supplying canals situated below Maestricht shall be taken solely through the feeder at Maestricht, which is operated by the Netherlands Waterstaat. It is easy to verify the quantities of water diverted at a single intake, whereas it is difficult to make such measurements when the water is drawn off at different places, as used to happen before 1863. The introduction of great quantities of water into the canals below Maestricht by the functioning of large modern locks consequently destroys the system of the Treaty of 1863 in another sense also, for it puts an end to the monopoly of the intake at Maestricht, and makes it very difficult to check the amount of water diverted from the river by the Neerhaeren Lock, which is not under the same administration as the intake at Maestricht. It should be added that engineers agree in recognizing that the principal method of supplying water to canals is, precisely, by the functioning of the locks.

[253] The expression "canals situated below Maestricht" is clear. It refers, in addition to the Zuid-Willemsvaart and its branch canals in Netherlands territory, to the Meuse-Scheldt Junction Canal, which branches off at Bocholt on the Zuid-Willemsvaart and terminates at Antwerp, and to its branches, and also to the Turnhout Canal which runs via Saint Job to Antwerp. The statement of reasons submitted by the Prime Minister, M. Rogier, clearly alludes to this Campine system of canals when he says that "the [Belgian] State obtains, for its part, the possibility of feeding, not only the existing canals in the Campine, but also the canal, the construction of which has been decreed, from Turnhout via Saint Job to Antwerp".

[254] It does not follow from the monopoly accorded to the intake at Maestricht that the canals situated below that town and the irrigation works in the Campine and the Netherlands may not be fed from water-courses other than the Meuse. Such a means of supply–as, for instance, by the river Demer–is perfectly compatible with the Treaty, and the only exception, in this respect, is constituted by Article VII of the Treaty, which lays down that the Belgian Government will leave undisturbed, or will restore to their natural courses, the streams and water-courses which rise in Belgium and flow towards the Netherlands territory. The fact that these canals or sectors of canals are fed by other water-courses does not deprive them of their character as canals situated below Maestricht, within the meaning of Article I.

[255] The intakes on the Meuse which are to be replaced, in pursuance of Article I, by the feeder at Maestricht (statement of reasons by M. Rogier), are the three intakes which I have referred to above. The intake, or rather the cascade, to the left of lock 19 was, of course, to disappear with the disappearance of that lock, which was abolished by Article II of the Treaty. As regards the important intake at Liege, the Belgian Government made no difficulty on that point (Netherlands Reply, pp. 42 and 43), and once the new system had been instituted, only the quantities of water necessary to offset lockage, leakage and evaporation were diverted at Liege. The dismantling of the intake at Hocht, to the right of lock 19, was not accepted so easily by Belgium. On the contrary, the [p62] Belgian Government made a strong stand for the maintenance of this intake in Belgian territory below Maestricht, and it is quite comprehensible that, when it at last consented to its being put out of operation, this point should have been recorded in the Treaty. But the words "in consequence of the foregoing", at the beginning of the last paragraph of Article IV, show clearly that the elimination of the Hocht intake was also the logical consequence of the fact that, under Article I, the feeder at Maestricht was henceforward to be the only installation for supplying Meuse water to all the canals situated below Maestricht and to the irrigation works in the Campine and in the Netherlands.

[256] The new regime for the diversion of water from the Meuse necessitated certain changes in the Zuid-Willemsvaart, among others the transfer, as already mentioned, of lock 19 to a situation above the new feeder. These changes are set out in Articles II and III. Moreover, the maintenance of a constant depth in the Meuse, which had been disturbed by the considerable diversions of water at the Liege and Hocht intakes (see .statement of reasons by M. Rogier)–which intakes were now to be replaced by the feeder at Maestricht–made it necessary to undertake certain works in the Meuse; these works are indicated in Article IX and its Annexes. The replacement of the different intakes which Belgium had operated on the Meuse, by a single intake, namely, that of Maestricht, which was henceforward to be the only "tap", would have the great technical advantage, among others, of making it possible to measure, at a single place, the volume of Meuse water laid down in Article IV of the Treaty. That was an advantage to which the attention of Belgium had been drawn, inter alia, by the Minister of the Netherlands at Brussels in 1862 (Netherlands Memorial, p. 45).

[257] It is clear that the substitution of a single intake, in Netherlands territory, for the different intakes on the Meuse which were in Belgian territory constitutes a very real "de facto advantage" (see the oral statement of M. de Ruelle, the Belgian Agent, p. 134) for the Netherlands. For "the country in which the intake is situated enjoys, in practice, better opportunities of supervision than the other country" (Belgian Rejoinder, p. 6). That advantage is illustrated by the very strong resistance offered by Belgium to the dismantling of the intake–that of Hocht to the right of the old lock 19. This opposition is constantly referred to in the despatches addressed to The Hague in

October 1862 by the Netherlands Minister at Brussels (see Netherlands Memorial, pp. 43-48) ; and it is also apparent in the Belgian proposals of February 19th, 1863 (Netherlands Reply, pp. 42-43). [p63]

[258] The very tangible de facto advantage which the Netherlands gained by the substitution of a single intake in Netherlands territory for the different intakes on the Meuse in Belgian territory–a substitution which was effected in virtue of Article I of the Treaty of 1863–has been described by the Netherlands as a right of "ascertaining (controler) at any moment that the quantities of water taken from the Meuse do not exceed the quantities specified in the Treaty, so that the complaints and discussions of the past might be avoided" (Netherlands Memorial, p. 8).

[259] The question of control calls for the following observations.

[260] Every international convention, unless it expressly excludes it, implies a control by the contracting parties to see whether the convention is being strictly applied. This control may lead among other things to diplomatic representations and, if necessary, to legal proceedings.

[261] Thus, Belgium, when she thought that the Netherlands draft law submitted to the States-General on February 7th, 1921, and providing inter alia for the Borgharen barrage, involved consequences at variance with the Treaties of May I2th, 1863, and January nth, 1873, addressed a note on the matter to the Netherlands Government dated April 28th, 1921 (Belgian Counter-Memorial, p. 27). Belgium was by this means exercising her right of control over the Netherlands in regard to a projected hydraulic installation on Netherlands territory, a right of control which in the present case found concrete expression in proceedings instituted against the Netherlands before the Permanent Court of International Justice.

[262] The right of control is in principle mutual or, more strictly speaking, it is mutual wherever the convention is mutual. Thus Belgium may and, as explained to the Court, does effectively control the discharge by the Netherlands through the Maestricht feeder of the quantities of water prescribed by the 1863 Treaty. But the Netherlands cannot exercise the same control over Belgium, because the Treaty provides for no intake in Belgium.

[263] On the other hand, each country may control the other when it finds that the latter has constructed in its territory hydraulic works whereby the canals situated below Maestricht will receive more water than the Treaty prescribed. In this way, Belgium exercised control over the Borgharen barrage and the Netherlands over the lock at Neerhaeren.

[264] The Netherlands undoubtedly have the right of control regarding the culverts at the Neerhaeren Lock. The question whether such culverts are in accordance with a treaty which abolished [p64] all the intakes in Belgian territory existing in 1863 and replaced them by a single intake on Netherlands territory, is certainly worth the attention of the Netherlands Government, especially as hydraulic works of this kind are not built unless it is intended that they should be used.

[265] I consider, however, that the Netherlands argument goes too far when it claims that, while the construction by Belgium of works making it possible to feed a canal below Maestricht with water taken from the Meuse elsewhere than at that town is contrary to the 1863 Treaty, Belgium has no right to complain of the construction of such works by the Netherlands. I do not consider that the Netherlands Agent succeeded in proving that the Netherlands here possess a right not

possessed by Belgium. I would add that this is the only point respecting which the Netherlands have claimed a unilateral right of control.

[266] The fact that the Netherlands Agent stressed at length this special right of control by the Netherlands has not helped to clarify matters.

[267] Nor did it help towards a better understanding of the case when the Belgian defence ascribed to this Netherlands right of control an extent which the Netherlands did not claim for it.

[268] I notice in this connection that the Netherlands Government stated that, by the transfer of the intake to Netherlands territory, it was thenceforth in a position to satisfy itself (controler) at any moment that the volume of water diverted from the Meuse did not exceed the amounts prescribed in the Treaty, so that the complaints and discussions which took place in the past could be avoided (see above). It is therefore a question of check on the quantities of water, and nothing more. But the Belgian Government thinks that it involves a great deal more than that.

[269] Thus Belgium deduces from the indisputable fact that the negotiations concerning the diversion of water from the Meuse had been combined with those concerning the redemption of the Scheldt tolls, the following argument, which appears on page 6 of the Belgian Counter-Memorial: "The Netherlands possessed, in virtue of the Scheldt tolls, control of navigation on the maritime part of the Scheldt. It was an important prerogative; they were only willing to relinquish it– such is the argument–in return for the control of navigation on the canals which are now under discussion." That is not the correct way of stating the question. The Netherlands certainly do not claim that Article I of the Treaty of 1863 invested them with the control of navigation on the canals situated below Maestricht. What the Netherlands say that [p65] they acquired in virtue of Article I is simply the control over the volume of water. Furthermore, if the Scheldt tolls really conferred a right of control over navigation in the maritime part of the Scheldt, as the Belgian Government seems to believe, the navigation dues levied by Belgium on the Meuse (in the case of the Netherlands these dues were abolished in 1851) would constitute a Belgian right of control over navigation on the Meuse. Would that really be in line with the Belgian Government's ideas ?

[270] The Netherlands Government stated in its Application (p. 8) that "The equilibrium established by the Treaty of 1863 between the interests affected has been disturbed by the undertaking of these works, by the uses to which they are being put and by the uses for which they are intended." It is clear from the manner in which this statement is developed under (a), (b) and (c), that what was complained of was a disturbance of the equilibrium in regard to the distribution of the Meuse water as regulated once and for all in 1863. But the Belgian Government interprets this statement in the Netherlands Application, although it is quite clear, as if it referred to the economic equilibrium between Antwerp and Rotterdam (see Belgian Counter-Memorial, p. 7).
[271] I might quote other extracts from the Belgian documents and oral statements, but these two passages are sufficient to show that Belgium regarded the control over the volume of water as a control over navigation and traffic such as the Netherlands have not claimed.

[272] Before dealing with the Netherlands submission I a, I would repeat that this is the only submission which the Netherlands base upon this right of control and that, in particular, the Netherlands defence against the Belgian counter-claim is not founded upon this special right of control.

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[273] In this submission I a the Netherlands ask the Court to declare that the construction by Belgium of works enabling a canal situated below Maestricht to be supplied with water taken from the Meuse elsewhere than at that town is contrary to the Treaty of May 12th, 1863.

[274] What is envisaged in this submission are works which, though they do not at present feed a canal situated below Maestricht, nevertheless enable this supply to be effected. In order to confine our consideration to the kind of hydraulic works which come into question in the present case, we should note that what is envisaged is not longitudinal culverts in locks which it is admitted will be utilized in addition to locking operations [p66] (as is the case with the five locks of the Albert Canal between the first lock near Herstal (Liege) and the last lock at Wyneghem). Nor are we here envisaging locks which, as the Parties are also agreed, will be utilized and consequently will discharge lock-water.

[275] We are solely concerned with works which might supply feed water if they were utilized, as, for example, the longitudinal culverts in the lock at Neerhaeren.

[276] What attitude did Belgium adopt towards the Netherlands submission I a ?

[277] I should have understood it if Belgium, on the basis of her interpretation of the 1863 Treaty, had said that, since the Treaty does not apply above Maestricht, she was entitled to discharge Meuse water through the Neerhaeren culverts into the canals situated below Maestricht, and that she would make such use of that right as she thought necessary.

[278] That however was not her attitude. The culverts having been constructed, the Counter-Memorial on pages 10 and n denies their existence, and when the Netherlands had demonstrated that the Neerhaeren Lock was indeed provided with culverts, Belgium fell back on the assertion that the electric installations of the lock would only allow these culverts to be used for filling the lock chamber (Oral Pleadings, p. in). However, when the Netherlands Agent stated that this electrical installation could be altered in five minutes (Oral Pleadings, p. 171), that statement was not contradicted.

[279] The question arises whether such an attitude stops short of the line dividing what States may do from what they may not do if they wish to remain within the law. I cannot answer this question in the affirmative, and the submission under I a appears therefore to be justified.

[280] I would add that the Belgian Counsels ended by admitting that in certain eventualities the culverts at the Neerhaeren Lock would be used for some other purpose than lockage, which indeed is not surprising, since culverts are not built except to be used. It was rather a question of economic or military necessity which would compel Belgium to keep intact the water supply of the Zuid-Willemsvaart and of the inundation zones which might be created north of Neerhaeren (Oral Pleadings, pp. 91 and 210-211).

[281] In its submission under I b, the Netherlands Government asks the Court to declare that the feeding of the Belgian section of the Zuid-Willemsvaart, of the Campine Canal, of the Hasselt branch of that canal, and of the branch leading to Beverloo Camp, as also of the Turnhout Canal, through the [p67] Neerhaeren Lock, with water taken from the Meuse elsewhere than at Maestricht, is contrary to the 1863 Treaty.

[282] After what has already been said in the present note, not much need be added.

[283] It is common ground that the Treaty of 1863 defines and limits the quantity of Meuse water to be used for feeding the Belgian system of Campine canals, and it is also common ground that the feeder at Maestricht is to be the only feeder. The cubic metre per second which is added by the lockage at Neerhaeren is therefore contrary to the Treaty of 1863.

[284] As already mentioned above, there is another reason why the discharge of lock-water, which goes to feed the Zuid-Willemsvaart, is contrary to the Treaty of 1863. This discharge restricts the right reserved to the Netherlands by paragraph 2 of Article V to increase the volume of water drawn from the Meuse at Maestricht. The lockage at Neerhaeren diminishes the right to increase the two cubic metres per second allowed to the Netherlands under paragraph I of Article V, by about one cubic metre per second.

[285] In its submissions I c and I d, the Netherlands Government asks the Court to declare that Belgium's project of feeding a section of the Hasselt Canal with water taken from the Meuse elsewhere than at Maestricht is contrary to the Treaty of 1863, and that Belgium's project of feeding the section of the canal joining the Zuid-Willemsvaart and the Scheldt between Heren-thals (Viersel) and Antwerp with water taken from the Meuse elsewhere than at Maestricht, is also contrary to the said Treaty.

[286] These two submissions can be examined in conjunction, as they are very similar.

[287] The Netherlands do not allege that Belgium would not be entitled to enlarge the canals situated below Maestricht or to change their names. In point of fact, Belgium has considerably enlarged, not only the Zuid-Willemsvaart, but also parts of the system of the Belgian Campine canals, in particular the Meuse-Scheldt Junction Canal and the Hasselt branch. But, in enlarging these canals, Belgium is not entitled to exempt them from the rules governing their supply with Meuse water, which are laid down in the Treaty of 1863. It is common ground that the Treaty of 1863 lays down eight cubic metres per second as the volume to be taken through the feeder at Maestricht for this purpose. It is also agreed that the sector of the canal linking the Zuid-Willemsvaart with the Scheldt between Herenthals (Viersel) and Antwerp will also receive Meuse water through the Albert Canal, which, as far as lock No. I, stands at a level of 60 and then falls more than 50 metres by locks I to V before reaching Herenthals, and all these locks are provided with discharging culverts which, it is admitted, [p68] will be utilized for feeding the different reaches of the canal. It follows from the above that the feeding of this sector in the manner projected will be contrary to the Treaty of 1863.

[288] The same applies to the section of the Hasselt Canal which is now being enlarged and will also form part of the Albert Canal. The Netherlands do not contest Belgium's right to feed this section of the Hasselt Canal with water from the Demer. The question of fact on which the two Governments differ is whether this section, in addition to the water which it receives from the Demer, is also fed by Meuse water coming from the feeder at Maestricht and conveyed beyond Ouaedmechelen by the northern section of the Hasselt Canal. It appears that this question of fact can be left on one side. But it seems clear to me that this is a case of a canal situated below Maestricht, one of the already existing canals in the Campine mentioned in the statement of reasons drawn up by the Prime Minister, M. Rogier, and that in consequence this canal may only receive Meuse water derived through the feeder at Maestricht. It is also common ground that this

enlarged portion of the canals situated below Maestricht will henceforward receive Meuse water derived from Monsin ; hence the projected feeding of this section with water diverted from the Meuse elsewhere than at Maestricht will be contrary to the Treaty of 1863.

[289] The Belgian Agent said on page 14 of the Counter-Memorial that, if the Albert Canal from Pulle onwards, instead of being linked with the canal uniting the Meuse and the Scheldt, had been placed alongside it, separated from it by a dyke which prevented the waters from mixing, the charge made by the Netherlands would never have been brought. That is true, but it is true also that this hypothetical contingency did not arise and that, once the Albert Canal were completed, the canals situated below Maestricht, apart from the Neerhaeren Lock, will be fed with Meuse water not coming from the Maestricht feeder. I would add that the Netherlands Agent, replying to the above-mentioned remark of his Belgian colleague, said that if Belgium had constructed other works than she has, the Netherlands complaints would certainly have taken another form and been furnished with a very different legal basis (Netherlands Reply, p. 24).

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[290] With regard to the counter-claim, I need only make the following observations :

[291] It is clear from pages 26, 27 and 29 of the Netherlands Reply that, as regards both the Borgharen barrage and the Bossche-veld Lock and Juliana Canal, the Netherlands defence rests upon Article V, paragraph 2, of the 1863 Treaty. [p69]

[292] And the oral statement of the Netherlands Agent (Oral Pleadings, pp. 52-69) has the same foundation.

[293] The Netherlands defence begins on page 52 with the following sentence : "The points at issue in the case submitted to the Court through the Belgian counter-claim are three in number ; but they have a common basis, or rather our defence is based upon a single point of law. I want first to discuss this common point of law : it is the question of the distribution of water and of Article V, paragraph 2, of the Treaty." Pages 52-62 are almost entirely devoted to the interpretation of Article V, paragraph 2, and pages 62-69 then apply this interpretation to the three hydraulic installations impugned in the counter-claim. On pages 62 and 67 the Netherlands Agent again says that his defence against the counter-claim rests upon Article V, paragraph 2, of the Treaty of 1863.

[294] One would search the Netherlands defence against the counterclaim in vain to find any allusion to the right of control, which, as already mentioned above, serves as the basis of the Netherlands submission I a only.

[295] The Netherlands interpretation of paragraph 2 of Article V of the 1863 Treaty may, I think, be summarized as follows.

[296] This provision allows, or rather it presupposes, that the Netherlands are free to withdraw water from the Meuse below Maestricht. Any interpretation which restricted this freedom would be vexatious and therefore inadmissible. Article V, paragraph 2, deals only with the case in which the Netherlands should decide to divert quantities of water from the Meuse into the Maestricht feeder in addition to the quantity laid down in Article IV and Article V, paragraph I : only in this case is the additional water to pass into the Netherlands through lock No. 17 at Loozen.

[297] The mere right to divert additional water into the Zuid-Willemsvaart allows the Netherlands to put the Meuse constantly out of use for an average of more than a hundred days in the year. This implies that Belgium, by accepting the Treaty of 1863, left the navigability of the frontier section of the Meuse to the discretion of the Netherlands, Belgium, so to speak, abandoning the interests of navigation over that part of the Meuse to the care of the Netherlands.

[298] The freedom enjoyed by the Netherlands of taking water from the Meuse below Maestricht, a right which Belgium admitted when she disclaimed interest in navigation over the frontier section of the Meuse through her acceptance of Article V, paragraph 2, allows the Netherlands, on the one hand, to feed the Juliana Canal with Meuse water and, on the other, to make a present to Belgium of certain quantities of water from the Meuse, [p70] which they do through the operation both of the Borgharen barrage and of the Bosscheveld Lock.

[299] It follows from the above that the feeding of the Zuid-Willemsvaart as the result of the Borgharen barrage and the functioning of the Bosscheveld Lock, and also the feeding of the Juliana Canal with water from the Meuse, are, according to the Netherlands case, permissible under Article V, paragraph 2, of the Treaty of 1863.

[300] I am of opinion that Article V, paragraph 2, does not possess the very wide scope given to it by the Netherlands case, and that some of the consequences which that argument seeks to deduce therefrom are not justified.

[301] The Treaty of 1863 confines itself to regulating the supply with Meuse water of the canals situated below Maestricht and of the irrigation channels of the Campine and the Netherlands (Art. I). The waterways in question are therefore the Zuid-Willemsvaart and the canals and irrigation channels branching from it. Though, under Article V, paragraph 2, the Netherlands are entitled to increase the volume of water assigned to them by the first paragraph of Article V, that additional water must be necessary for canals situated below Maestricht or for irrigation in the Netherlands. The water must also pass through the Maestricht feeder, the exclusive use of which is incumbent both upon Belgium and upon the Netherlands, although, as mentioned above, its practical value below Maestricht is limited to the immediate neighbourhood of that town ; the very general wording of Article I is clear on this point. The last phrase in paragraph 2 of Article V imposes upon Belgium the duty of delivering to the Netherlands the additional water taken at Maestricht in virtue of the first phrase in that paragraph.

[302] Applying my interpretation to the points at issue in the counter-claim, I reach the following result.

[303] The feeding of the Zuid-Willemsvaart with water from the working of the Bosscheveld Lock remains within the limits fixed by paragraph 2 of Article V, so far as concerns the speed of the current in the Zuid-Willemsvaart. There is however a departure from the Treaty in the fact that the additional water, lawful in itself, if needed for the Netherlands canals below Maestricht or for Netherlands irrigation, does not pass through the treaty feeder. The departure is certainly of smaller extent than between the Treaty and the use of the lock-water at Neerhaeren, which, unlawful in itself, diminishes the right possessed by the Netherlands under paragraph 2 of Article V, while the measurement of the volume of water withdrawn from the Meuse is rendered difficult since it cannot be effected by the same administration. [p71]

[304] As we know, the lock-water discharged by the Bosscheveld Lock is not the subject of a submission in the Belgian counterclaim.

[305] The additional water which at certain seasons of the year passes through the Maestricht feeder as the result of the raising of the level of the Meuse–itself the consequence of the Borgharen barrage–has nothing to do with Article V, paragraph 2, of the Treaty.

[306] This water is part of the quantities laid down in Article IV and secures for the Zuid-Willemsvaart a permanent flow of ten cubic metres per second, which the Belgian Minister for Foreign Affairs, in his note of January 22nd, 1912 (Netherlands Reply, p. 72), thought indispensable to feed the canals from Liege to Antwerp. I do not see why this state of affairs should have made it impossible to apply the Treaty regularly, as Belgium .asserts it has, all the less so because, even in 1863, the Meuse regime was characterized by a number of barrages with locks, constructed both by France and by Belgium in the absence of any international agreement. Had it been intended to deny to the Netherlands a right which the other riparian States of the Meuse claimed to possess, the Treaty of 1863 would have made it clear. For my part, I hold that the Borgharen barrage was not constructed contrary to the terms of this Treaty.

[307] As stated above, the Treaty of 1863 confines itself to regulating the supply of the Zuid-Willemsvaart and of a number of navigation and irrigation channels, all of which are situated on the left bank of the river. The Juliana Canal, on the right bank of the Meuse, below the Maestricht feeder, the working of which it cannot affect, accordingly lies outside the sphere of the Treaty of 1863. That Treaty cannot therefore either allow the Juliana Canal to be fed with Meuse water, as maintained by the Netherlands, or forbid it so to be fed, as maintained by Belgium. The question of the feeding of the Juliana Canal with water from the Meuse is thus not touched upon by the Treaty of 1863.

[308] Lastly, the Netherlands seek to deduce from paragraph 2 of Article V that Belgium by that Article disclaimed all interest in navigation over the frontier section of the Meuse, this navigation being left to the discretion of the Netherlands. This deduction is not I think justified.

[309] It is true that, when the flow of the river is at its minimum, the joint section of the Meuse may almost run dry for the reason that the Maestricht feeder must function at all times. But if there were no intakes on the Meuse, the river, even if it were not completely dry, would for considerable periods have so little water that navigation would then too be out of [p72] the question. Nevertheless, Belgian interest in that navigation would remain the same. That interest is the direct result of the fact that Belgium is a riparian State, and it is not limited to the joint section of the Meuse only, but extends to the whole river.

[310] The fact that Belgium is a riparian State furnishes a much stronger ground for Belgium's interest in navigation over the whole Meuse than does Article IX of the Treaty, quite apart from the fact that this Article is limited to the part of the river between Maestricht and Venlo. Under Article IX, Belgium undertook to pay two-thirds of the cost of regularizing the Meuse between Maestricht and Venlo, since this work was necessary to counteract the mischievous consequences to river navigation of withdrawing large quantities of water for Belgium. It is compensation which Belgium would have had to pay even if she had really disclaimed all interest in Meuse navigation below Maestricht. The Counter-Memorial describes the situation very well when it says on page 5 that Belgium to a certain extent purchased the water taken at Maestricht for the canals of the Campine. Article IX of the 1863 Treaty does not prove the interest of

Belgium in navigation on the joint section of the Meuse. That interest, whether great or small, exists by the mere fact that Belgium is a riparian State.

(Signed) V. Eysinga. [p73]

Individual Opinion by Mr. Hudson.

[311] While I concur in the judgment of the Court, I should prefer a fuller statement of the reasons for the result reached in regard to one point in this case, and it seems incumbent upon me to add the following observations.

[312] The Netherlands Government has asked the Court to say that the alimentation of certain canals by the Neerhaeren Lock with water taken from the Meuse elsewhere than at Maestricht is contrary to the Treaty of 1863, and to order that Belgium should discontinue that alimentation. On the other hand, the Belgian Government has asked the Court to say that the alimentation of these canals has not become contrary to the Treaty of 1863 by reason of the fact that lock-water discharged by the bona fide operation for the passage of boats of the Neerhaeren Lock, which cannot be treated more unfavourably than the Bosscheveld Lock, is confused with water of the Meuse taken by the prise d'eau at Maestricht. In its submissions the Belgian Government does not ask the Court to say that the operation of the Bosscheveld Lock results in an alimentation of the canals which constitutes a violation of the Treaty; but the Belgian Agent contends (Counter-Memorial, p. 17) that if the Court should decide that the functioning of the Belgian lock at Neerhaeren is in opposition to the Treaty of 1863, it ought to admit a fortiori that the functioning of the Netherlands lock of Bosscheveld is not more regular (n'est pas non plus regulier). A further submission of the Belgian Government, offered alternatively (tres subsidiairement), asks the Court to say that by the construction of works contrary to the provisions of the Treaty the Netherlands has lost the right to invoke the Treaty against Belgium.

[313] On this presentation of the case, the Court must consider the functioning of the Bosscheveld Lock in connection with that of the Neerhaeren Lock. The first question is, therefore, whether the two locks are to be placed on the same footing.

[314] The Bosscheveld Lock is situated in a short canal which may be referred to as the Bosscheveld canal. This canal leads from the Meuse, at a point below Maestricht and one hundred metres below the prise d'eau constructed in execution of Article I of the Treaty of 1863, into the Zuid-Willemsvaart Canal. It is entirely in Netherlands territory. It was opened for the passage of boats in 1931, without any previous agreement with the Belgian Government. As the level of the Zuid-Willemsvaart is lower than that of the Meuse, the Bosscheveld Canal contains [p74] a lock which is used for the passage of boats. There are no lateral aqueducts beside this lock, however, and the canal supplies water to the Zuid-Willemsvaart only as a result of the operation of the lock for the passage of boats. With each operation of the Bosscheveld Lock, a considerable quantity of water is discharged from the upper to the lower reach of the canal and thence into the Zuid-Willemsvaart. Many of the boats which would formerly have passed through lock No. 19 at Maestricht in entering the Zuid-Willemsvaart now avoid the use of that lock and pass through the Bosscheveld Canal, thus using the Bosscheveld Lock.

[315] The Neerhaeren Lock is situated in a canal which connects the new Albert Canal with the Zuid-Willemsvaart at Neerhaeren, in what may be referred to as the Briegden-Neerhaeren branch of the Albert Canal. This branch, which is entirely in Belgian territory, was opened to service in

1934. It is supplied with water taken from the Meuse at Monsin in Belgian territory, some twenty-four kilometres above Maestricht. The level of the branch canal being higher than that of the Zuid-Willemsvaart, a lock at Neerhaeren must serve for the passage of boats. This lock is equipped with lateral aqueducts, but they have not been and are not being employed for the supply of water to the Zuid-Willemsvaart apart from the operation of the lock for the passage of boats. While the lock at Neerhaeren is of smaller dimensions than the lock at Bosscheveld, its operation results in the discharge of a considerable quantity of water into the Zuid-Willemsvaart. As the Briegden-Neerhaeren canal serves for the passage of boats going from Liege into the Zuid-Willemsvaart, it may reduce the number of boats using the Bosscheveld Canal.

[316] The Bosscheveld Lock and the Neerhaeren Lock are thus alike, in that the operation of each of them results in supplying to the Zuid-Willemsvaart a considerable quantity of lock-water taken from the Meuse but not by the conventional prise d'eau. On the facts, there is no basis for a distinction between them, so long as the lateral aqueducts in the Neerhaeren Lock are used only in connection with the functioning of the lock for the passage of boats.

[317] Is any distinction to be made between the legal positions of the two locks ? The action of the Netherlands Government in establishing the Bosscheveld Lock is defended only on the basis of the provision in paragraph 2 of Article V of the Treaty of 1863, which authorizes the Netherlands to increase the amount of water taken from the Meuse at Maestricht. Even if the taking of water into the Bosscheveld Canal can be said to be a taking at Maestricht, it is in no sense an increase [p75] of the amount of water taken by the conventional prise d'eau at Maestricht. The words a puiser a la Meuse a Maastricht in paragraph 2 of Article V are the equivalent of the words puise a la Meuse a Maastricht and pulse d Maastricht in paragraph i of the same Article, and of the words d puiser d la Meuse in paragraph I of Article IV. Hence, paragraph 2 of Article V authorizes the taking of water in excess of the fixed quantity only if the water is taken by the conventional prise d'eau. Since the lock-water discharged by the Bosscheveld Lock is not thus taken, paragraph 2 of Article V does not apply, and it affords no reason for distinguishing the legal basis of the Bosscheveld Lock from that of the Neerhaeren Lock.

[318] It must be concluded that, in law as well as in fact, the Bosscheveld Lock and the Neerhaeren Lock are in the same position. The latter cannot be treated more unfavourably than the former. If the discharge of lock-water into the Zuid-Wil-lemsvaart by one of these locks is in accordance with the Treaty, it is equally so with respect to the other lock ; if such discharge is a violation of the Treaty as to one lock, it is a violation also as to the other lock.

[319] The question arises, therefore, whether in this case the Court must pronounce upon the legality or the illegality of the alimentation which results from the operation of either the Neerhaeren Lock or the Bosscheveld Lock. If the operation of both locks were thought to be in conformity with the Treaty of 1863, the submissions of the Netherlands Government as to the Neerhaeren Lock would of course be rejected. It remains to be considered whether that result would be reached if the operation of both locks were thought to be in violation of the Treaty of 1863.

[320] There can be no question here as to the good faith of either Party. Each Party has proceeded on its own view of the Treaty of 1863. Each has taken action which has led to the same result, in fact and in law. If the Court were called upon to give judgment on the action of

both of the Parties, it could do so with due regard to the equal positions of the Parties ; but here it is asked by one Party to condemn the action taken by the other. Aside from the fact that the moving Party is the one whose action preceded that of the other, that the Bosscheveld Lock was put into service in 1931 and the Neerhaeren Lock only in 1934, is this a case in which affirmative relief should be given by the Court ? Or should it be said, in the terms of the alternative Belgian submission, that the Netherlands has in some measure perdu le droit d'invoquer the Treaty against Belgium ? [p76]

[321] What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals. Merignhac, Traite theorique et pratique de l'Arbitrage internanational (1895), p. 295 ; Ralston, Law and Procedure of International Tribunals (new ed., 1926), pp. 53-57. A sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence ; even in some national legal systems, there has been a strong tendency towards the fusion of law and equity. Some international tribunals are expressly directed by the compromis which control them to apply "law and equity". See the Cayuga Indians Case, Nielsen's Report of the United States– British Claims Arbitration (1926), p. 307. Of such a provision, a special tribunal of the Permanent Court of Arbitration said in 1922 that "the majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular systems of jurisprudence". Proceedings of the United States–Norwegian Tribunal (1922), p. 141. Numerous arbitration treaties have been concluded in recent years which apply to differences "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity". Whether the reference in an arbitration treaty is to the application of "law and equity" or to justiciability dependent on the possibility of applying "law or equity", it would seem to envisage equity as a part of law.

[322] The Court has not been expressly authorized by its Statute to apply equity as distinguished from law. Nor, indeed, does the Statute expressly direct its application of international law, though as has been said on several occasions the Court is "a tribunal of international law". Series A, No. 7, p. 19 ; Series A, Nos. 20/21, p. 124. Article 38 of the Statute expressly directs the application of "general principles of law recognized by civilized nations", and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it "to decide a case ex cequo et bono, if the parties agree thereto". Anzilotti, Corso di Diritto internazionale (3rd ed., 1928), p. 108 ; Habicht, Power of the International Judge to give a Decision ex sequo et bono (1935), pp. 61 et sqq.; Lauterpacht, Private Law Sources and Analogies of International Law (1927), pp. 63 et sqq. Cf., Monskheli, "L'equite en droit international moderne", 40 Revue generate de Droit international public (1933), p. 347; [p77] Strupp, "Le droit du juge international de statuer selon 1'equite", 33 Recueil des Cours (1930), pp. 357 et sqq. It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.

[323] It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the

development of the Anglo-American law. Some of these maxims are, "Equality is equity" ; "He who seeks equity must do equity". It is in line with such maxims that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper". 13 Halsbury's Laws of England (2nd ed., 1934), p. 87. A very similar principle was received into Roman Law. The obligations of a vendor and a vendee being concurrent, "neither could compel the other to perform unless he had done, or tendered, his own part". Buckland, Text Book of Roman Law (2nd ed., 1932), p. 493. The exceptio non adimpleti contractus required a claimant to prove that he had performed or offered to perform his obligation. Girard, Droit romain (8th ed., 1929), p. 567 ; Saleilles, in 6 Annales de Droit commercial, (1892), p. 287, and 7 id. (1893), pp. 24, 97 and 175. This conception was the basis of Articles 320 and 322 of the German Civil Code, and even where a code is silent on the point Planiol states the general principle that "dans tout rapport synallagmatique, chacune des deux parties ne peut exiger la prestation qui lui est due que si elle offre elle-meme d'executer son obligation". Planiol, Droit civil, Vol. 2 (6th ed., 1912), p. 320.

[324] The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness. [p78]

[325] On the assumption that the alimentation of canals by the functioning of the Neerhaeren Lock and the Bosscheveld Lock is contrary to the Treaty of 1863, is this a case in which the Court ought to apply the principle referred to ? Here the Parties are not before the Court under a special agreement in which they have mutually agreed to seek the Court's interpretation of the Treaty of 1863. This proceeding was instituted by the Netherlands. The jurisdiction of the Court rests on the declarations made by the Parties under paragraph 2 of Article 36 of the Statute. It is the Court's obligatory jurisdiction which is invoked, without challenge by Belgium. If it is important that this jurisdiction should not be attenuated by the action of the Court itself, it is no less important that it be exercised within the limitations which equity imposes. As the moving Party, the Netherlands asks that the Belgian action with respect to the operation of the Neerhaeren Lock be declared contrary to the Treaty of 1863, and that Belgium be ordered to discontinue that action. Yet, in its operation of the Bosscheveld Lock, the Netherlands itself is now engaged in taking precisely similar action, similar in fact and similar in law. This seems to call for an application of the principle of equity stated above.

[326] One result of applying the principle will be that even if the Court should be of the opinion that the Belgian action with regard to the functioning of the Neerhaeren Lock is contrary to the Treaty of 1863, it should nevertheless refuse in this case to order Belgium to discontinue that action. In equity, the Netherlands is not in a position to have such relief decreed to her. Belgium cannot be ordered to discontinue the operation of the Neerhaeren Lock when the Netherlands is left free to continue the operation of the Bosscheveld Lock. The general principle is a sound one that reparation is "the corollary of the violation of the obligations resulting from an engagement between States" ; and "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation". Series A, No. 17, pp. 27, 29. Yet, in a particular case in which it is asked to enforce the obligation to make reparation, a court of international law cannot ignore special circumstances which may call for the consideration of equitable principles. Here the Netherlands asks, not for reparation for a past

violation of the Treaty of 1863, but for protection against a continuance of that violation in the future. The Court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant itself is not performing. It must clearly refuse to do so. [p79]

[327] Is the principle of equity less applicable to the Netherlands' request that the Court declare that the Belgian action is contrary to the Treaty of 1863, when that request is divorced from the prayer for an injunction ? There can be no doubt as to the competence of the Court to render declaratory judgments. Series A, No. 7, p. 19 ; Series A, No. 13, pp. 20, 21. In this respect, it possesses a power analogous to recently-developed powers of national tribunals. In some countries the conditions under which declaratory judgments will be given are carefully formulated. Borchard, Declaratory Judgments (1934), ch. 6. The Statute does not prescribe any analogous conditions for the declaratory judgments of the Court.

[328] In some systems of national jurisprudence where the process of sanction is highly developed, a line might be drawn between requests for injunctions and requests for declaratory judgments, the principle of equity being applied to the former but not to the latter. Cf., Lodge v. National Union Investment Company, Limited [1907] I Ch. 300 ; Chapman v. Michaelson [1909] i Ch. 238. In international jurisprudence, however, sanctions are of a different nature and they play a different role, with the result that a declaratory judgment will frequently have the same compulsive force as a mandatory judgment; States are disposed to respect the one not less than the other. Hence, as a general rule, it would seem that a principle of equity applicable to a request for an injunction should be applied also to a request for a declaratory judgment. Neither request should be granted where the circumstances are such that the judgment would disturb that equality which is equity. In the circumstances of this case, on the assumption that the operation of both the Neerhaeren Lock and the Bosscheveld Lock is contrary to the Treaty of 1863, the Netherlands would not be entitled to a declaratory judgment for the same reasons that it is not entitled to a mandatory judgment.

[329] Less hesitance need be felt in reaching this result because of facts of which the Court has been apprized in the course of this proceeding. By their action over a period of years, the Parties to the Treaty of 1863 have indicated that they are not satisfied with the situation as it exists under that Treaty. So many changes have taken place–not merely in the regions served by the Meuse and its dependent canals and in the technology for the control of that service, but also as a result of the recent construction of new canals–that the essentially technical arrangement concluded seventy-four years ago seems to have been recognized to be no longer an adequate protection for the Parties' mutual interests. Repeated efforts have been [p80] made by the Parties to negotiate a treaty to replace that of 1863, and according to statements made to the Court, hopes of such a result have not been abandoned. The judgment in this case may better serve to facilitate their future negotiations if it preserves the equality between the Parties.

(Signed) Manley O. Hudson. [p81]

Annexe I

TRAITÉ DU 12 MAI 1863 PORTANT RÈGLEMENT
DU RÉGIME DES PRISES D'EAU A LA MEUSE

Sa Majesté le Roi des Pays-Bas, Grand-Duc de Luxembourg
et

Sa Majesté le Roi des Belges,

Désirant régler d'une manière stable et définitive le régime des prises d'eau à la Meuse pour l'alimentation des canaux de naviga¬tion et d'irrigation, ont résolu de conclure un Traité dans ce but, et ont nommé pour Leurs Plénipotentiaries:

Sa Majesté le Roi des Pays-Bas,

Messire Paul van der Maesen de Sombreff, Chevalier Grand'Croix de l'Ordre du Nichan Iftihar de Tunis, Son Ministre des Affaires Étranères,
le Sieur Jean Rudolphe Thorbecke, Chevalier Grand'Croix de l'Ordre du Lion Néerlandais, Grand'Croix de l'Ordre Léopold de Belgique et de plusieurs autres Ordres, Son Ministre de l'Intérieur, et le Sieur Gérard Henri Betz, Son Ministre des Finances,

et Sa Majesté le Roi des Beiges,

le Sieur Aldephonse Alexandre Félix Baron Dujardin, Commandeur de l'Ordre Léopold, décoré de la Croix de Fer, Commandeur du Lion Néerlandais, Chevalier Grand'Croix de la Couronne de Ch?ene, Grand'Croix et Commandeur de plusieurs autres Ordres, Son Envoyé Extraordinaire et Ministre Plénipotentiaire près Sa Majeste le Roi des Pays-Bas,

lesquels, après avoir échangé leurs pleins pouvoirs trouvés en bonne et due forme, ont arr?eté les articles suivants:

Article I. — Il sera construit sous Maastricht au pied du glacis de la forteresse une nouvelle prise d'eau à la Meuse, qui constituera la rigole d'alimehtation pour tous les canaux situés en aval de cette ville, ainsi que pour les irrigations de la Campine et des Pays-Bas.

Article II. — L'écluse n° 19 à Hocht sera supprimée et rem-placée par une nouvelle écluse à établir dans le Zuid-Willemsvaart en amont de la rigole stipulée à l'article I.
La partie du canal comprise entre l'écluse de Hocht et la nouvelle écluse sera élargie et approfondie, de manière à offrir la même capacité et le même tirant d'eau que la partie du bief comprise entre l'écluse n° 19 à Hocht, et l'écluse n° 18 à Bocholt.

Article III. — Le niveau de flottaison de la partie du canal entre Maastricht et l'écluse n° 18 à Bocholt sera élevé, de manière à ce que l'écoulement des quantités d'eau désignées dans les art. IV et V du présent traité, puisse avoir lieu sans que la vitesse moyenne du courant, mesurée dans l'axe du canal, dépasse un maximum de 25 à 27 centimètres par seconde. [p82]

Article IV. — La quantité d'eau à puiser à la Meuse est fixée comme suit:

A. Lorsque la hauteur des eaux de la Meuse se trouve au-dessus de l'étiage de cette rivière, dix (10) mètres cubes par seconde.
B. Lorsque ces eaux sont à l'étiage ou au-dessous, sept et demi ?(7 1/2) mètres cubes par seconde du quinze (15) Octobre au vingt (20) Juin, et six (6) mètres cubes du vingt et un (21) Juin au quatorze (14) Octobre.

La hauteur de l'étiage variant actuellement entre les cotes de 30 et 40 centimètres au-dessus du zéro de l'échelle du pont de Maastricht, correspond à un minimum de tirant d'eau entre

Maastricht et Venlo de soixante-dix (70) centimètres.
Dans le courant de l'année, après la ratification du présent traité, il sera placé à l'embouchure de la nouvelle prise d'eau à construire près de Maastricht du côte de la Meuse, une échelle où sera marquée, de commun accord, une cote correspondant à la hauteur de l'eau à l'échelle du dit pont indiquant alors l'étiage.
En conséquence de ce qui précède, il ne sera pas fait usage de la prise d'eau à la Meuse à Hocht, à partir de l'achèvement de la rigole mentionnée à l'art. I.

Article V. — Sur le volume de dix (10) mètres cubes d'eau, puisé a la Meuse à Maastricht, il sera attribué aux canaux et aux irriga¬tions des Pays-Bas, deux (2) mètres cubes par seconde à déverser par l'ecluse n° 17 à Loozen. Cette quantité de deux (2) mètres cubes sera réduite à un et demi (1,50) mètre cube aussitôt que le volume d'eau puisé à Maastricht sera diminué conformément à ce qui est stipulé à l'article précédent.
Il sera loisible au Gouvernement des Pays-Bas d'augmenter le volume d'eau à puiser à la Meuse à Maastricht, sans que toutefois par là la vitesse du courant dans le canal puisse excéder les limites fixées à l'art. III. Ce surplus sera également déversé par l'écluse n° 17 à Loozen.

Article VI. — Le Gouvernement Beige s'engage à rejeter dans les canaux de navigation, du quinze (15) Mai au.quinze (15) Juillet au moins, les eaux provenant des irrigations effectuées en Belgique, soit au moyen de machines, soit par un canal colateur ou par tout autre moyen propre à atteindre le but indiqué.
Toutefois, si la construction d'un canal colateur ou de tout autre ouvrage sur le territoire Néerlandais était jugé nécessaire, le Gouverne¬ment des Pays-Bas se réserve l'approbation des plans et la surveillance de 1'exécution et de l'entretien qui seront à la charge du trésor Belge.
Les ruisseaux ou courants d'eau, qui seront traversés par ces ouvrages, conserveront leur cours naturel. Si dans la suite, le Gou¬vernement des Pays-Bas désirait faire usage du colateur, soit pour l'alimentation de canaux, soit comme voie de navigation, cette question fera l'objet de négotiations ultérieures.

Article VII. — Le Gouvernement Beige laissera ou rendra à leur cours naturel les ruisseaux et courants d'eau qui, ayant leur source en Belgique, se dirigent vers le territoire Neerlandais. [p83]

Article VIII. — Les hautes parties contractantes prendront les mesures nécessaires pour prévenir, autant que possible, les ch?omages des canaux de Liège à l'écluse n° 17 à Loozen.
Aucun abaissement des niveaux de flottaison ordinaires de ces canaux ne pourra avoir lieu qu'après entente préalable entre les deux Gouvernements.

Article IX. — Dans le but d'améliorer la navigabilité de la Meuse entre Maastricht et Venlo, les hautes parties contractantes feront exécuter dans cette partie de la rivière, pendant neuf années consé-cutives, commençant en 1864, les travaux indiqués dans le tableau et la note explicative joints au présent traité jusqu'à concurrence d'une somme de 100.000 florins par an.
Un tiers de cette somme sera payé par les Pays-Bas et deux tiers par la Belgique.
Les projets définitifs de ces travaux à exécuter annuellement seront dressés, de commun accord, par les fonctionnaires désignés à cet effet, et soumis a l'approbation des deux Gouvernements.
Les travaux projetés et arrêtés conformément à ce qui précède, seront exécutés par les soins des agents du Gouvernement sur le territoire duquel ils seront situés. L'entretien de ces travaux, après leur achèvement, sera à la charge du Gouvernement sur le territoire duquel ils sont établis.

Article X. — La construction de la nouvelle prise d'eau à Maastricht mentionnée dans l'art. I,

ainsi que l'exécution des travaux nécessaires pour satisfaire aux stipulations de l'art. II, auront lieu à frais communs.
Les projets de ces travaux seront arr?etés et exécutés de la manière indiquée dans l'art. IX pour les travaux de la Meuse.
Toutefois il est. entendu que le total des dépenses à la charge du Gouvernement Beige, d'après les stipulations des art. IX et X, n'excèdera pas la somme de 900.000 florins.

Article XI. — Si dans la suite le Gouvernement des Pays-Bas jugeait utile d'exécuter ou de laisser exécuter des travaux rendant nécessaire l'augmentation du volume d'eau à puiser à la Meuse à Maastricht, tel qu'il est fixé dans le présent traité, le concours du Gouvernement Beige aux mesures nécessaires pour assurer 1'écoule-ment des eaux par le Zuid-Willemsvaart, sera réglé entre les deux Gouvernements.

Article XII. — Par extension des dispositions de l'article 10me de la Convention du 8 Ao?ut 1843, aucun ouvrage qui serait de nature à modifier le courant et par là à nuire à la rive opposée, ne pourra ?etre construit à une distance de moins de 150 mètres du Thalweg de la Meuse, là où elle forme limite, que de commun accord entre les deux hautes parties contractantes.

Article XIII. — Les hautes parties contractantes s'engagent a faire exécuter les ouvrages indiqués aux art. I, II et VI avant le premier janvier 1866, ou plustôt si faire se peut.
Immédiatement après l'achèvement de ces ouvrages, il sera donné suite aux stipulations des art. Ill, IV, V, VI et VII. [p84]
Jusqu'à cet achèvement l'alimentation des canaux et des irriga¬tions aura lieu, conformément à ce qui s'est fait pendant les deux dernières années.

Article XIV. — Le présent traité sera ratifié et les ratifications en seront échangées à La Haye dans le délai de quatre mois ou plust?ot si faire se peut.
En foi de quoi les Plénipotentiaires susdits l'ont signé et y ont apposé leur cachet.

Fait à La Haye, le douze Mai mil huit cent soixante trois.
(Signé) P. VAN DER MAESEN DE SOMBREFF.
(Signé) BON DU JARDIN.
(Signé) THORBECKE.
(Signé) G. H. BETZ.

Pour copie conforme à l'original:

(Signé) B. M. TELDERS,
Agent du Gouvernement des Pays-Bas. [p85]

ANNEX II.

I.—DOCUMENTS FILED IN THE COURSE OF THE WRITTEN PROCEEDINGS

A.—On behalf of the Netherlands Government:

1. Treaty of May 12th, 1863, regulating the diversion of water from the River Meuse.
2. Map (scale 1: 400,000) of the canals situated below Maestricht existing in 1863 and of sections of the Albert Canal and its branches, in operation, projected or in course of construction.

3. Letter from the Belgian Minister at The Hague to the Netherlands Minis¬ter for For. Aff. (Feb. 19th, 1863).
4. Exposé des motifs by the Belgian Government to the Chamber of Representatives concerning the Treaty concluded between the Netherlands and Belgium on May 12th, 1863, to regulate the régime for the diversion of water from the Meuse.

5. Letter from the Permanent Deputation of the Provincial States of Nether¬lands Limburg to the Second Chamber of the States-General (Jan. 22nd, 1861).

6. Extracts from the report of M. van Diesen, Engineer, to.the Netherlands Minister of the Interior (Aug. 24th, 1862)1.
7. Extracts from the report of M. van der Kun, Chief Inspector to the Waterstaat, to the Netherlands Minister of the Interior (Sept. 2nd, 1862) 1.
8. Extracts from the report of M. van Opstall, Engineer, to the Netherlands Minister of the Interior (June 8th, 1863) 1.
9. Extracts from the report of M. Kűmmer, Chief Engineer, to the Belgian Minister of the Interior (Dec. 26th, 1849) 1.
10. Letter from the Netherlands Minister at Brussels to the Minister for For. Aff. at The Hague (Oct. 3rd, 1862).
11. Letter from the Netherlands Minister at Brussels to the Minister for For. Aff. at The Hague (Oct. 7th, 1862).
12. Letter from the Netherlands Minister at Brussels to the Minister for For. Aff. at The Hague (Oct. 10th, 1862).
13. Extract from the Exposé des motifs by the Netherlands Government to the Second Chamber of the States-General, accompanying the draft law approving certain clauses in the Treaty concluded between the Netherlands and Belgium on May 12th, 1863, to regulate the ?regime for the diversion of water from the Meuse 1.
14. Extract from the provisional report of the Second Chamber of the States-General on the draft law approving certain clauses in the Treaty concluded between the Netherlands and Belgium on May 12th, 1863, to regulate the regime for the diversion of water from the Meuse1.
15. Extract from the memorandum by which the Netherlands Government replied to the provisional report of the Second Chamber of the States-General concerning the draft law approving certain clauses in the Treaty concluded between the Netherlands and Belgium on May 12th, 1863, to regulate the régime for the diversion of water from the Meuse 1.
16. History of the Hocht intake, with the following maps:
(a) Plan of ground between Maestricht and Neerhaeren relating to the scheme for extending the navigable feeder of the large northern canal as far as the town of Maestricht (1819). [p86]
(b) Plan of the Meuse below Smeermaes : commune of Lanaeke, Province of Limburg (1820).
(c) Situation of the Zuid-Willemsvaart and of the feed-canal (intake) above chamber-lock No. 19 at Hocht, as recorded in March 1859.

17. Convention (not ratified) concluded on September 21st, 1861, between the Netherlands and Belgium, establishing the rules concerning diversions of water from the Meuse.
18. Extract from the report of M. van der Kun, Chief Inspector to the Waterstaat, to the Netherlands Minister for the Interior (Sept. 2nd, 1862).
19. Belgian proposals annexed to the letter from the Belgian Minister at The Hague to the Netherlands Minister for For. Aff. (Feb. 19th, 1863, Annex I, facsimile).
20. Text of Articles IV and XIV of the last preliminary draft of the Treaty of 1863, initialled by M. Vanderstichelen, Belgian Minister for Public Works, and by M. van der Maesen de Sombreff,

Netherlands Minister for For. Aff. (facsimile).
21. Extract from the Exposé des motifs by the Netherlands Government to the Second Chamber of the States-General accompanying the draft law approving certain clauses in the Treaty concluded between the Nether¬lands and Belgium on May 12th, 1863, to regulate the régime for the diversion of water from the Meuse.
22. Extract from the provisional report of the Second Chamber of the States-General on the draft law approving certain clauses in the Treaty concluded between the Netherlands and Belgium on May 12th, 1863, to regulate the ?regime for the diversion of water from the Meuse.
23. Extracts from the Minutes of the meetings of June 26th and 27th, 1863, of the Second Chamber of the States-General.
24. Extract from the memorandum by the Netherlands Government replying to the provisional report of the Second Chamber of the States-General, concerning the draft law approving certain clauses in the Treaty concluded between the Netherlands and Belgium on May 12th, 1863, to regulate the régime for the diversion of water from the Meuse.
25. Extracts from the Minutes of the meetings of June 26th and 27th, 1863, of the Second hamber of the States-General, and of the meeting of July 4th, 1863, of the First ChambCer of the States-General.
26. Extracts from certain technical manuals showing that water called "lock-water" is included in the quantities of water necessary for the supply of a canal.
27. Time-table of the Neerhaeren Lock.
28. Certain observations in reply to the note of the Belgian Administration on the flow of the Meuse.
29. Letter from the Belgian Minister for For. Aff. to the Netherlands Minister at Brussels (Jan. 22nd, 1912).
30. Letter from the Netherlands Minister at Brussels to the Belgian Minister for For. Aff. (Feb. 19th, 1912).
31. Letter from the Belgian Minister for For. Aff. to the Netherlands Minister at Brussels (Feb. 16th, 1914).
32. Bijblad 1 &2 Kamer tot de Nederl.. St. Courant — Handelingen van de Staten-Generaal, 1862-1863, containing the full text of Nos. 23 and 25 above.
33. Photostatic reproduction of an extract of the copy of the proposals of Baron Dujardin, Belgian Minister at The Hague, with marginal notes by M. van der Maesen de Sombreff, the Netherlands Minister for For. Aff.

34. Reports on the work of the Navigation Office for the years 1934 and 1935, published by the Belgian Ministry for Public Works.

35. (For information.) Work entitled : Les Votes navigables en Belgique (ed. of 1842 and 1880). [p87]
36. (For information.) Work entitled : A Treatise on Rivers and Canals (Oxford, 1882), Vol. I, by L. F. Vernon-Harcourt.

B.—On behalf of the Belgian Government:

1. History of the Hocht intake (note).
2. Text of the Convention and Declaration of January 11th, 1873.
3. Note by the Belgian Administration on the flow of the Meuse.
4. Note delivered by the Belgian Minister at The Hague to the Netherlands Minister for For. Aff. (April 28th, 1921).

5. Note transmitted on July 29th, 1921, to the Belgian Minister at The Hague by the Netherlands Minister for For. Aff.
6. Instructions sent on March 6th, 1922, by the Belgian Minister for For. Aff. to the Belgian Minister at The Hague.
7. Letter from the Netherlands Minister for For. Aff. to the Belgian Minister at The Hague (March 13th, 1923).
8. Letter from the Belgian Minister for For. Aff. to the Belgian Minister at The Hague (Sept. 12th, 1923).
9. Letter from the Secretary-General of the Belgian Ministry for For. Aff. to the Netherlands Minister at Brussels (July 30th, 1935).
10. Letter from the Netherlands Minister at Brussels to the Belgian Minister for For. Aff. (Feb. 12th, 1906).

Maps and plans:

A. Plan of Maestricht and of the waterways directly below.
B. Map of the Hasselt Canal (its supply by the Demer).
C. Longitudinal and cross sections of the last part 01 the Albert Canal.

II.—DOCUMENTS FILED IN THE COURSE OF THE ORAL PROCEEDINGS :

A.—On behalf of the Netherlands Government:

1. Photograph of the Albert Canal at Viersel.
2. "Collection of Treaties and Conventions concluded by the Kingdom of the Netherlands with foreign Powers from 1813 until our own day", by E. G. Lagemans, Vols. II, III and V, containing inter alia:
(a) Table and explanatory note annexed to the Treaty of May 12th, 1863, regulating the régime for the diversion of water from the Meuse (mentioned in Article IX of the said Treaty).
(б) Treaty of November 5th, 1842 (cited on p. 10 of the Rejoinder).
(c) Frontier Convention between the Netherlands and Belgium (cited on p. 4 of the Memorial and p. 22 of the Rejoinder).
(d) Treaty of Separation of April 19th, 1839 (cited on p. 6 of the Memorial) .
(e) Conventions of 1845 and 1850 relating to the Liége-Maestricht lateral canal.

3. "Annals of Public Works of Belgium", 1928 and 1933.
4. "Bulletin of the Belgian Association of Engineers and Industrialists", 1930, 1931 and 1933.
5. Revue universelle des Mines, de la Métallurgie, des Travaux publics, des Sciences et des Arts appliqués à l'Industrie. Year Book of the Association of Engineers qualified at the College at Liege, 1930.
6. Work entitled : Le problème de la Meuse, by L. Ardent, 1931.
7. Note by the Directorate of the Waterstaat on the supply of the Juliana Canal (May 16th, 1937). (Text in Dutch, with French transl.) [p88]

B.—On behalf of the Belgian Government:

1. "Belgian Grey Book". Diplomatic document concerning the revision of the Treaties of 1839, published at Brussels in 1929. (Document containing on pp. 11 et sqq. the text of the Belgo-Netherlands Treaties of April 3rd, 1925, and May 22nd, 1926.)

2. Report of the official Netherlands Commission appointed by Royal decree of May 30th, 1921, No. 96, for the purpose of collecting documentation concerning the national supply of electricity (Verslag der Staatscommissie ingesteld bij Koninklijk Besluit van 30 Mei 1921, No. 96. Om van Voorlichting te dienen omtrent de Electriciteits-Voorziening van het Land.— 's-Gravenhage, Algemeene Landsdrukkerij, 1925).
3. Netherlands Aide-mémoire filed on March 29th, 1934, with the Ministry for For. Aff. at Brussels.
4. Cuttings from the following newspapers, with French translations :
(1) Limburger Koerier, of Maastricht (Dec. 5th, 1934)-
(2) Algemeen Handelsblad, of Amsterdam (Dec. 18th, 1934).
(3) Algemeen Handelsblad, of Amsterdam (Dec. 19th, 1934).
(4) Nieuwe Rotterdamsche Courant (June 8th, 1935 ; two articles).
(5) Algemeen Handelsblad, of Amsterdam (June 12th, 1935).
5. Summary of conversation of December 17th, 1934, between the Belgian Minister for For. Aff. and the Netherlands Minister at Brussels.
6. Work entitled : "Belgo-Netherlands Commission appointed to study the canalization of the frontier section of the Meuse" (Nederlandsch-Belgische Commissie ingesteld tot onderzoek van de kanalisatie van de Gemeenschappe-lijke Maas) :
1st Part : Minutes of meetings.
2nd „ : Report of work of the Commission.
7. Text of statements made in the Belgian Senate at the meeting of Tuesday, March 16th, 1937, by M. Merlot, Minister for Public Works and for Reduction of Unemployment, in reply to the speech by M. Nothomb, Senator.
81. (a) Regulations of May 20th, 1843, for the execution of Article 9 of the Treaty of April 19th, 1839, concerning the navigation of the Meuse.
(b) Convention of May 8th, 1851, between Belgium and the Netherlands for the abolition of tolls on navigation of the frontier section of the Meuse.
(c) Convention of April 23rd, 1852, between Belgium and the Netherlands to regulate the supervision of osier plantations on the banks of the frontier section of the Meuse.
(d) Convention of December nth, 1860, regulating police and steam navigation on the part of the Meuse forming the frontier between Belgium and the Netherlands.
(e) Convention of October 31st, 1885, between Belgium and the Netherlands regulating police and navigation for the part of the Meuse situated on Belgian territory, and amending the International Regulations of May 20th, 1843, concerning the navigation of the Meuse.
9. Royal decree of October 15th, 1935.
10. Work entitled : De kanalisatie der Maas, by J. Schaepkens van Riempst.
11. (For information.) Work entitled : Voies navigables de la Belgique, published in 1880. [p89]

C.—Documents collected by the Registry on instructions from the Court:

1. Treaty of May 12th, 1863, between Belgium and the Netherlands concern¬ing the redemption of the Scheldt tolls. (Text taken from de Martens' Nouveau Recueil général de Traités, Vol. XVII : 2, p. 230.)
2. Treaty of commerce and navigation between the Netherlands and Belgium, signed at The Hague on May 12th, 1863. (Id., ibid., p. 249.)