

A B H A N D L U N G E N

Legal Problems in Connection with the Deep-Draught Rhine-Main-Danube Navigable Waterway after the Additional Protocol to the Act of Mannheim

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Introduction

The deep-draught Rhine-Main-Danube navigable waterway is divided into three separate sections, each of which has a different status under international law:

- a) the canalized Main from Mainz to Bamberg;
- b) the canal from the Main to the Danube, going from Bamberg to Kelheim;
- c) the canalized Danube from Kelheim to the German-Austrian boundary.

Since the deep-draught Rhine-Main-Danube navigable waterway is constructed with a view to bringing about the junction between the Rhine basin and the Danube basin, while the great majority of vessels on one river will make use of it to reach the other great river, their navigation regime assumes prime importance from the viewpoint of the new junction. The differences between the economic and social structures of the countries of the Rhine basin and those of the Danube basin, which exercise great influence on the shipping trade, will increase even further the scope of the legal regulation of the execution of transport on each of these rivers as well as the factual situation in this respect. The examination of the legal status of

Abbreviations: A.J.I.L. = American Journal of International Law; Annuaire = Annuaire de l'Institut de Droit international; Annual Digest = Annual Digest of Public International Law Cases; B.G.Bl. = Bundesgesetzblatt; C.C.R. = Central Commission for Rhine-Navigation; Conference on Navigable Waterways = League of Nations, Barcelona Conference, Verbatim Records and Texts relating to the Convention on the Regime of Navigable Waterways of International Concern, 1921; Dig. = Digesta Justiniani Augusti; Hague Recueil = Collected Courses of the Hague Academy of International Law; I.C.J. Reports = International Court of Justice, Reports of Judgments, Advisory Opinions, and Orders; I.L.A. = International Law Association; I.L.C. = International Law Commission; Martens, N.R. = Nouveau Recueil de Traités; Martens, N.R.G. = Nouveau Recueil Général de Traités; Martens, Rec. = Recueil des Traités; Martens, Supp. = Supplément au Recueil de Traités; P.C.I.J. Series A = Permanent Court of International Justice, Judgments 1922–1930; P.C.I.J. Series A/B = Permanent Court of International Justice, Advisory Opinions, Judgments, and Orders, 1931–1940; P.C.I.J. Series B = Permanent Court of International Justice, Advisory Opinions, 1922–1930; Report = Report of the Study Group of the Chambers of Commerce of Amsterdam and Rotterdam (Rijn-Main-Donau Verbindung), Multiplied 1974; Rev. de la nav. fluv. = Revue de la navigation fluviale européenne, ports et industries; Rhine Documents = Rheinurkunden – Rijndocumenten; Stb. = Staatsblad van het Koninkrijk der Nederlanden; Stc. = Nederlandse Staatscourant; Trb. = Tractatenblad van het Koninkrijk der Nederlanden; U.N.T.S. = United Nations Treaty Series; U.S. = United States Reporter (Supreme Court).

Where quotations from non-English language sources appear in translation, the translation has been made especially for the author's purposes.

the future Rhine-Main-Danube navigable waterway must be extended to the regime of the Danube and the regime of the Rhine. The preoccupation to prevent a ruinous competition which the merchant fleets of the Danubian countries with a collectivist economy might cause to the merchant fleets of the States with a market economy has brought about the radical modification of the Rhine regime, which was the last vestige of economic liberalism in international river law. In consequence of the new regulation of the Rhine navigation the problems arising at the time of the opening of the junction in connection with the appearance of the Eastern European merchant fleets on the Rhine basin now assume a different aspect. It is therefore also necessary to discuss the ideas and concepts that may serve to solve those problems of great present-day interest.

Section I. The Regime of the Danube from Passau to the Black Sea

§ 1. The characteristic features of the Belgrade Convention

After World War II, in connection with the preparation of the Peace Treaties with Bulgaria, Hungary, and Rumania, the Ministers of the United States and the United Kingdom in the Council of Foreign Ministers insisted on the insertion into the Peace Treaties of guarantees of the application of the regime of free navigation on the Danube and its tributaries to all nations. In the Soviet view, on the contrary, the question of Danubian navigation fell outside the scope of the Peace Treaties. The re-establishment of the international Danube regime would, moreover, jeopardize the sovereignty of the riparians and subordinate them to the capitalist countries. After many difficulties, agreement was reached on a compromise formula proposed by France¹.

In pursuance of this agreement, the Peace Treaties with Bulgaria, Hungary, and Rumania, signed in Paris on 10 February 1947², included identical clauses on freedom of navigation on the Danube: "Navigation on the Danube shall be free and open for the nationals, vessels of commerce, and goods of all States, on a footing of equality in regard to port and navigation charges and conditions of merchant shipping ..." (Art. 34 of the Peace

¹ For a survey of these negotiations, see S. Gorove, *Law and Politics of the Danube* (1964), pp. 80-95.

² 41 U.N.T.S., pp. 21 *et seq.*, and pp. 135 *et seq.*; 42 U.N.T.S., pp. 32 *et seq.*

Treaty with Bulgaria, Art. 38 of the Peace Treaty with Hungary, and Art. 36 of the Peace Treaty with Rumania).

The Council of Foreign Ministers, however, by the Resolution of 12 December 1946 decided to convene a conference for the settlement of questions relating to the navigation of the Danube, the commission to consist of the representatives of the four Great Powers and of the Danubian River States, viz. Bulgaria, Czechoslovakia, Hungary, Rumania, the Ukraine, and Yugoslavia. As for Austria, the resolution stated that she was to participate in the Conference once the State Treaty with Austria had been concluded³.

In respect of the new regime of the Danube the Soviet delegation maintained at the Conference that the principle of equal economic possibilities claimed by the Western delegations has not really been applied to any river of international importance. The Soviet delegation therefore took the point of view that "the new treaty must assure free navigation according to the interests and the sovereign rights of the Danubian States"⁴. According to that train of thought the Czechoslovak delegation considered "that every State has sovereignty over all the watercourses traversing its territory ... When a State renounces, in the interest of international cooperation ... a small part of the sovereignty it exercises over the section of the watercourse flowing through its country, it can only renounce its sovereignty in favour of those who can offer it a compensation. In other words, it acts on the basis of reciprocity". But in the Czechoslovak opinion "only the riparian

³ The structure of the Conference was contrary to Art. 42 of the Definitive Statute of the Danube, signed on 23 July 1921 (Martens, N.R.G. 3rd series, vol. 12, pp. 606 *et seq.*). Since Germany did not have a government at that time, it was not represented, while the representative of Austria only attended in the capacity of observer, because the State Treaty destined to regulate the questions connected with the restoration of the independence of that country had not yet been signed. K. Zemanek observes in this connection that the Western Powers (notably France and the United Kingdom, since the United States was not a Party to the 1921 Statute) eroded their own legal position by co-operating in the above-mentioned Resolution. *Die Schifffahrtfreiheit auf der Donau und das künftige Regime der Rhein-Main-Donau Grossschiffahrtsstrasse*, Österreichische Zeitschrift für öffentliches Recht 1976, Supplementum 4, p. 54. Contrary to this view, one might object that a *pactum de negotiando*, which, in its legal aspect, this decision is, does not have the effect of abrogating an international treaty in force on the same subject. The British delegate recalled at the Belgrade Conference that the provision of the Peace Treaties did not supersede the rules concerning the freedom of navigation on the Danube of the 1921 Statute. They simply reaffirmed the principle of freedom of navigation. When an important principle is at stake, reaffirmation is a current practice and without any prejudice. Danube Conference, Belgrade 1948, ed. by the Yugoslav Ministry of Foreign Affairs (1949), pp. 67–68.

⁴ Danube Conference, Belgrade 1948, pp. 120–121.

States can offer such reciprocal concessions". That is why "to offer similar rights to a non-riparian State would amount to recognizing its privileges, its domination"⁵.

The new Convention and the Additional Protocol which abrogated the 1921 Statute were signed on 18 August 1948⁶ by delegates of the Soviet Union and of those of the riparian States which were subject to Soviet influence. Austria acceded to the Belgrade Convention (but not to the Additional Protocol) in 1960⁷. Half of the States Parties to the 1921 Statute have refused up to the present to recognize the legal validity of the 1948 Convention expressly⁸. In any case the navigation regime established in the latter had been applied to the larger part of the Danube from Passau to its mouth in the Black Sea for more than thirty years. In any legal system a factual situation becomes legal after a certain lapse of time by the mere fact of its subsistence, and this tendency to legalize an existing situation that has proved to be stable is even more apparent in the international legal order. The principle of effectiveness prevails under general international law to a much greater extent than under national law⁹.

⁵ *Ibid.*, p. 137. This mental attitude means a curious reversion to the attitude of the members of the Committee on the free navigation of rivers of the Congress of Vienna, where the Clancarty amendment, which tended to assure the treatment of the flags of all nations on a footing of perfect equality, in all respects, of navigation on the international rivers, was dismissed because of lack of reciprocity, which can only be offered by the riparians to the same navigable watercourse. Rhine Documents, vol. I (1918), p. 124.

⁶ 33 U.N.T.S., pp. 181 *et seq.*

⁷ 351 U.N.T.S., p. 378.

⁸ At the time of the ratification debate in the French National Assembly on the Additional Protocols of 1979 to the Rhine Navigation Act of 1868 the Minister of Foreign Affairs affirmed, in reply to a question of a senator, that the French Government still considers the Statute of 1921 as the best guarantee of its rights to commercial navigation on the Danube. At the same time the Minister declared that the French Government, in agreement with the Government of the Federal Republic of Germany, does not intend to start negotiations in order to obtain respect for freedom of commercial international navigation on the Danube. *Rev. de la nav. fluv.* 1980, p. 555. This attitude creates the impression that this concerns the reservation of a principle to which no practical importance is attached any longer. Indeed, after the Additional Protocol No. 2 of 1979, which appreciably approximates the Rhine regime to that of the Convention of Belgrade, claiming the re-establishment of the regime of the 1921 Statute on the Danube would undoubtedly entail the demand of the Danubian countries with a collectivist economy to maintain the Rhine regime in force unchanged before the modification in the Additional Protocol, which would procure incomparably greater economic advantages for the merchant fleets of Eastern Europe than *vice versa*.

⁹ According to the judicious expositions of Ch. De Visscher (author's translation): "... the consequences of an originally illegal fact, when they themselves attain an incontestable level of effectiveness, may create a new legal situation. From this it results that the refusal to recognize a situation which has arisen from unlawful actions does not indefinitely

The Convention of Belgrade is characterized by a narrow conception of the freedom of navigation. This is manifest, on the one hand, from the unprecedented limitation of the extent of the river system subject to the international regime, which restricted the scope of the regime to navigable channels of the Danube and only to the Sulina arm as an outlet to the sea, and excluded even affluents separating or traversing two or more States. On the other hand, the text does not even contain sufficient safeguards for vessels of non-riparians to be treated, in the river shipping trade, on a footing of equality with those of riparian States. First of all the Convention does not include a prohibition on the establishment of exclusive privileges, of whatever kind, over any section of the Danube. In accordance with the basic position of States with a collectivist economy, Art. 1 of the Convention makes provision only for frontier-crossing traffic. According to para. 2 of this Article, freedom of merchant shipping does not apply to traffic between ports of a single State. The other provision of the Convention relating to this question is Art. 25, reading as follows: "Vessels flying foreign flags may not engage in local passenger and freight traffic between ports of the same Danubian State, save in accordance with the national regulations of that State". The rule laid down in Art. 1, which limits freedom of navigation to frontier-crossing traffic, has absolute validity only in respect of vessels flying the flags of non-riparian States. The wording of Art. 25 does indeed allow a Danubian State to depart from this rule and to authorize one or more co-riparians of the Danube, either on the basis of reciprocity or for any other reason, to carry on transport between ports situated within its territory. Therefore, the establishment by Danubian countries of river cartels, which was expressly excluded at the Barcelona Conference on rivers of major importance¹⁰, is permitted in the text. Art. 5

preserve its legal meaning. Too prolonged a tension between fact and law is bound to be fatally resolved, in the course of time, to the advantage of a new effectiveness. In this case the duration releases the mediatory function of the effectiveness by illuminating the relation between two frequently quoted maxims which are only apparently contradictory: *ex injuria jus non oritur* and *ex facto jus oritur*". *Théories et réalités en droit international public* (4th ed. 1970), pp. 319–320. In respect of derogations from the principle of unanimity in the revision of multilateral treaties this eminent international lawyer states "that doctrine and practice no longer hesitate to admit such derogations on the legal plane by bringing out the obstacles which the vigorous application of the principle of unanimity might raise against a revision which has become desirable in every respect. The immobilism which would result from it would run counter to the progress of international relations. Here we are faced with that aspect of effectiveness which constitutes the practicability of the legal rule" (author's translation). *Les effectivités du droit international public* (1967), p. 86.

¹⁰ For the contrary proposal of Winiański, see Conference on Navigable Waterways, pp. 206 and 214–215.

para. 2 of the Barcelona Statute on the regime of navigable waterways of international concern of 21 April 1921¹¹ makes it possible within narrow limits to establish river cartels where a naturally navigable waterway of international concern separates or traverses two States only. On the contrary, after a recent decision of the Danube Commission the traffic between two Danubian countries is reserved, as from 1980, to the flags of the countries in question¹². But freedom of frontier-crossing traffic is not sufficiently guaranteed in the Belgrade Convention either. Freedom of transit for vessels, passengers, and goods is not expressly stipulated. Art. 1, para. 1 ensures equality of treatment only in regard to port and navigation charges. Art. 26, para. 3 only provides for a general declaration to the effect that customs, sanitary, and police regulations shall be such as not to impede navigation. No charges shall be levied on vessels, rafts, passengers, and goods in respect of transit only (Art. 42). Customs formalities applicable to transit traffic, however, correspond to the usual provisions of navigation acts dealing with those matters (Art. 27). With regard to crucial questions, such as access to ports and use of their equipment, the Convention leaves the door open to discriminatory practices. It is true that under Art. 24 vessels navigating on the Danube enjoy the right to enter port, to load and unload, to refuel, and to take on supplies. Art. 41 entitles vessels to make use of loading and unloading machinery, equipment, warehouses, storage space, etc., but does not provide for equality of treatment in such uses. The use of Danube port installations is subject to contracts concluded to that effect between the river shipping companies concerned¹³. It implies, in fact, the condition of reciprocity which non-riparians are unable to fulfil.

§ 2. The factual situation of the navigation of the Danube

In addition to the legal inequality between riparians and non-riparians, there is a factual inequality in the river shipping trade to the detriment of shipping companies of riparian countries with a market economy, which

¹¹ Martens, N.R.G. 3rd series, vol. 18, pp. 711 *et seq.*

¹² Rev. de la nav. fluv. 1979, p. 427.

¹³ Against this provision, the representative of the United States, alluding to the monopoly position by which the State enterprises in the countries with a collectivist economy benefit, raised the objection that "it is clear that this real monopoly can be used in such a way as to place or not to place the essential equipment of the biggest Danubian ports at the disposal of the vessels of other nations, including the riparian nations". Danube Conference, Belgrade 1948, p. 145.

results from the differences between the economic systems of the various Danubian States. Since in countries with a collectivist economy it is the State organs which establish prices of goods and services, free competition does not enter into their trade and industry. On the Danube there operate certain downright monopolist State enterprises whose motivations are not the same as those of the shipping companies of the countries with a market economy. The pursuit of foreign currency or special considerations relating to external trade may dictate to those State enterprises a conduct which is not necessarily aimed at optimum rentability in the sense which is attributed to that notion in the market-economy countries. In those circumstances the acquisition of freight in the countries with a collectivist economy is not possible, or is difficult, for the merchant fleets of the West. Without having recourse to a downright prohibition, States with a planned economy have ample opportunity to make it indirectly impossible for shipping companies of market-economy countries to carry out transport on sections of the Danube which come under their sovereignty. Here, the fundamental problem of the *Oscar Chinn* Case presents itself in a hardly modified form.

Austria and the Federal Republic of Germany have made attempts to cope with the situation both by means of conventions concluded at the governmental level with the Comecon States and by means of agreements between their interested shipping companies – the D.D.S.G. in Austria and the Bayerischer Lloyd in the Federal Republic – and the State enterprises of the Comecon countries. From 1954 onwards the Austrian Government has concluded bilateral agreements with the Governments of each of the Danubian countries with a collectivist economy concerning the exercise of the shipping trade on the Danube, in which cargo-sharing has been provided for in the exchange traffic between the shipping companies of the two Parties¹⁴. Nevertheless, the agreements which stipulate equitable cargo-sharing in exchange traffic turn out, in practice, to be inadequate to change the very unfavourable competitive position of shipping companies of riparian countries with a market economy in respect of acquisition of transport commissions in countries with a collectivist economy as compared with the State enterprises of the latter. The utilization of foreign tonnage, which presupposes a certain degree of freedom of affreightment,

¹⁴ According to Art. 14 of the Convention concluded on 6 June 1957 between the Soviet Union and Austria (Bundesgesetzblatt der Republik Österreich 1958, no. 4) within the framework of the Austrian-Soviet exchange traffic the transport of goods on the Danube will be allocated between the shipping companies of the two parties in a fair way.

does not agree very well with the system of planned economy and with the rigorous exchange restrictions in force in the Comecon countries. The practical difficulties in the matter of acquisition of transport commissions which shipping companies of market-economy countries encounter in countries with a collectivist economy constitute the basic problem.

On the other hand, the D.D.S.G. and the Bayerischer Lloyd acceded in 1968 to the Bratislava Agreement, concluded in 1955 by the shipping enterprises of the Comecon countries on the general conditions of transport carried out on the Danube, and on uniform freight rates. However, this decision has not improved their competitive position. For a long time the low rates under the Agreement did not counterbalance the exploitation costs of the Austrian and Bavarian merchant fleets¹⁵. In July 1980, however, the representatives of the Danubian merchant fleets decided to increase the rates of freight in force on the Danube. This increase is dictated essentially by the rise of motor-fuel costs. Parallel to this linear increase of the freight rates, the companies considered to proceed to a reconstruction of the tariff system by taking into account the difference of fuel expenditure between the upstream and downstream traffic¹⁶.

The conclusion from the foregoing is that, *if freedom of the shipping trade is not conceived as a formal legal concept, but considered from the standpoint of the ultimate economic aim of merchant navigation as a business, it is not a present guarantee on the Danube.*

Section II. The Regime of the Danube Upstream of Passau

§ 1. The legal status of the German section in general

Since the Rhine-Main-Danube navigable waterway follows the course of that river from Kelheim, where the canal under construction will discharge into the Danube, the question of the regime to be applied to the German section arises. Art. 2 of the Belgrade Convention sets the upstream limit of the application of its regime – in accordance with Art. 331 of the Treaty of Versailles¹⁷ and Art. 2 of the Statute of 1921 – at Ulm. Although already on

¹⁵ For a long time the freight rates applied were those fixed in 1955. As late as 1977 the «Conférence des armements danubiens» decided on a 25% rise of the uniform rate. Rev. de la nav. fluv. 1978, p. 346.

¹⁶ *Ibid.* 1980, p. 446.

¹⁷ Martens, N.R.G. 3rd series, pp. 323 *et seq.*

15 May 1965 the Federal Government took a fundamental resolution on the subject of the accession of the Federal Republic of Germany to the Belgrade Convention¹⁸, this accession has not yet taken place¹⁹. Now, the regime of river navigation of the Belgrade Convention is not in force on the section of the Danube upstream of the Austrian-German boundary. However, one could hardly allege that the Federal Republic is obliged to apply the Statute of 1921 to the German section of the Danube. This regulation, which is based essentially on the equality of all flags in the exercise of the shipping trade, has been replaced on the greater part of the Danube by a new regime, which recognizes a privileged position for the riparian countries. Since the territorial scope of the Statute of 1921 originally extended to the whole navigable course of the Danube as well as to its affluents which served as a natural access to the sea for more than one State, one may assign to the fact that it has ceased to operate for practically the past forty years²⁰ the value of a fundamental change of circumstances which had occurred as compared with those existing at the time of the conclusion of the treaty and the effect of which is a radical transformation of the extent of the obligations still to be performed under the treaty, a change which is referred to in Art. 62, para. 1(b) of the Convention on the Law of Treaties, signed in Vienna on 23 May 1969²¹.

But this state of affairs implies by no means that the Federal Republic has complete freedom of action to refuse or to admit foreign flags to navigation on the German section of the Danube. Such a point of view would amount to an assimilation of that section of the Danube to the national navigable waterways the opening of which falls under the national competence of the territorial State. It should be recalled that the provisions

¹⁸ See *Verkehr. Internationale Fachzeitschrift für Verkehrswissenschaft* 1965, p. 96.

¹⁹ However, since 1957 a delegation of experts from the Federal Republic attends the meetings of the Danube Commission in the capacity of observers.

²⁰ The Arrangement of Sinaia of 18 August 1938 (Martens, N.R.G. 3rd series, vol. 37, part 3, pp. 741 *et seq.*) and the Arrangement of Bucharest of 1 March 1939 (*ibid.*, pp. 749 *et seq.*), owing to the weakening of the political influence of Great Britain and France, had fundamentally modified the system of administration of the maritime Danube in favour of Rumania and Germany, and thus contributed to the abrogation of the international river law introduced by the Peace Treaties of 1919/20. When in consequence of the war events of 1939/40 the Danubian countries had come within the German sphere of influence, Germany established, with the assistance of those States, a Provisional Agreement regarding the regime of the Danube, signed in Vienna on 12 September 1940 (*Zeitschrift für Binnenschifffahrt* 1940, pp. 180 *et seq.*). The Soviet Union acceded to this Convention on 20 February 1941 (Department of State, Documents and State Papers, vol. 1 [1948], p. 275).

²¹ 63 A.J.I.L. 1969, pp. 875 *et seq.*

of the Final Act of the Vienna Congress of 9 June 1815²² concerning the navigation of the rivers which, in their navigable course, separate or traverse different States were intended from the first to create a permanent legal status. It would not be possible to apply in international law the rule of civil law according to which the preliminary agreement is executed if the agreement whose future conclusion forms the subject of the obligation laid down in the preliminary agreement is entered into. Such a legal situation would very frequently not be in conformity with the real intentions of the Parties to the preliminary agreement if it seems probable that their wish was not only to lay down certain rules, but at the same time to create a new permanent legal status²³. The obligation of riparian States of international rivers of Europe, which consists in opening the section of the river flowing

²² Martens, N.R., vol. 2, pp. 379 *et seq.*

²³ The legal consequences of the provisions of the Act of Vienna concerning river navigation were emphasized in a highly revealing way at the London Conference, which was charged with settling the problems resulting from the separation of Belgium from Holland. The representatives of the "Pentarchy", the principal promoters of the Act of Vienna, on 4 January 1832 set forth the obligations ensuing therefrom as follows (author's translation): "General international law is subject to international treaty law and where a matter is governed by treaties, it is to be judged exclusively by such treaties. Now, since the re-establishment of peace, in 1814/15, the navigation of rivers has been a subject for special provisions between different States; thus there are not abstract principles, but principles established by treaties which constitute the present-day political Code of Europe ... These treaties have considerably altered the privileges which the law of nations conferred on Governments with regard to the navigation of rivers. Governments used to have the privilege of closing them, on their territories, to the commerce of other nations. That privilege was abandoned. They had the privilege of regulating their use arbitrarily, a privilege which was modified. The same fate befell the institutions of compulsory call and breaking bulk, as well as the right to levy customs duties. Some of them were abolished, others changed, and they were all subjected to the European maxim of free navigation" (Martens, N.R., vol. 12, pp. 312-313).

The question of the permanent character of these obligations had arisen in 1853, when Mecklenbourg-Schwerin, riparian of the Elbe, took the position that the obligations imposed upon the riparians by the Treaty of Vienna expired the moment the latter had entered into the common agreement provided for in Art. 108. The other riparians, headed by Austria and Prussia, maintained that the principles of Vienna represent a regulation of a superior and permanent nature. Cf. Carathéodory, *Das Stromgebietsrecht und die internationale Flussschifffahrt*, in: *Handbuch des Völkerrechts* (F. von Holtzendorff ed.), vol. 2 (1887), p. 318. Art. 15 of the Peace Treaty of Paris of 30 March 1856 (Martens, N.R.G., vol. 15, pp. 770 *et seq.*) provided that the principle of free navigation of rivers, laid down in the Act of Vienna, should thenceforward also apply to the Danube and its mouth. It was also declared that this provision thenceforth formed part of the public law of Europe, and that the Contracting Parties guaranteed it. Even the German note of 14 November 1936, which abrogated unilaterally the clauses of the Treaty of Versailles relating to international waterways and the navigation acts based on those provisions, declared that "... navigation

within their boundaries to the shipping of the other riparians, has been historically consolidated and has acquired the value of a regional customary rule. In this context the Permanent Court of International Justice speaks about "a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian State in relation to the others"²⁴. This obligation, which ensues directly from the Treaty of Vienna, continues to bind the riparians even in the absence of a special act of navigation in force for the time being. J. Vallotton d'Erlach considered the obligations recognized as a customary rule "as a minimum below which no one State could go without prejudicing the acquired rights of other States"²⁵. According to that train of thought G. Jaenicke arrives at the following conclusions with regard to the present legal status of the German section of the Danube (author's translation): "On the basis of the historical development of the regime of the Danube up till now, to which Germany contributed from the very first, the Federal Republic is obliged at least to recognize the 'international' character of the Danube and, consequently, it must be prepared to grant, on a basis of reciprocity – according to the fundamental principles of international river law –, freedom of navigation on the section of the Danube which is under her sovereignty to the vessels of the other riparian States of the Danube"²⁶.

§ 2. Legal effects of improvement works

When on 3 May 1978 the canalized section of the Danube from Regensburg to Kelheim was inaugurated, Mr. Haar, Secretary of State at the Federal Ministry of Communications, declared that the Federal Govern-

on waterways situated on German territory is open to the ships of all States which are at peace with the German Reich" (author's translation), on condition, of course, of reciprocity (Martens, N.R.G. 3rd series, vol. 36, part 3, pp. 800–802).

²⁴ *International Commission of the Oder*, P.C.I.J. Series A, no. 23, p. 27.

²⁵ Conference on Navigable Waterways, p. 81.

²⁶ Die neue Großschiffahrtsstraße Rhein-Main-Donau (1973), p. 45. P. Krzizanski also emphasizes that a regional European custom has been grafted on the Act of Vienna, the principles of which were reproduced in a great many navigation acts and in other multilateral treaties, and which provides, on pluriterritorial rivers, for equal freedom of merchant shipping for all riparians. It appears inconceivable to him that at present a State might refuse the enjoyment of such minimum rights to the other riparians. It stands to reason, in the author's view, that this customary rule is applied to the German section of the Danube. Die Rechtslage des Rhein-Main-Donau Verbindungsweges, Archiv des Völkerrechts 1969/70, p. 355.

ment bases itself on the principle that the deep-draught navigable waterway between the Danube and the Rhine has a national character on all its sections concerned, *i.e.* that it is subject to the exclusive sovereignty of the Federal Republic of Germany and that it will be used on the same conditions as those applying to the rest of the German internal waterways. He declared at the same time that navigation cannot take place gratuitously on the canalized section of the Danube: the dues shall be collected from the vessels making use of this section. The rates of those dues shall be uniform for vessels carrying the flag of the Federal Republic and for those flying the flag of a foreign State²⁷. As to this second question, it must be taken into account that there is one exception to the rule that no tax or due, whatever its name, may be levied on vessels navigating on international waterways or their cargoes for the sole fact of navigation in case of reimbursement of the costs of services rendered to navigation itself. On the basis of the provisions relating to charges on navigation on international waterways, beginning with Art. 16 of the Treaty of Paris of 1856, some general principles can be inferred which may be regarded as expressing established custom:

One or more riparian States may be allowed to levy dues, taxes, or charges to cover

a) the cost of hydraulic engineering works intended to create or improve the navigability of a waterway or that of a given section of it, as well as supplementary costs of maintenance entailed by such works, and the cost of operating the works in question;

b) the costs of execution of large-scale hydraulic engineering works found to be necessary for the maintenance of the navigability of the channel;

c) the technical and administrative expenses of port equipment and machinery.

Dues, taxes, or charges have in all cases the character of reimbursement. This proposition raises a twofold consideration. On the one hand dues, taxes, or charges intended to cover the cost of hydraulic engineering works can only be levied on vessels and cargoes which actually benefit by the facilities assured to navigation by the works in question. Consequently, vessels and cargoes which ply a river section where navigability has not been created, improved, or facilitated by hydraulic engineering works the cost of which may be reimbursed, or which are of such a low tonnage that they do not benefit in any way by such works, are under no obligation to contribute to their cost. As regards dues and charges intended to cover the

²⁷ Rev. de la nav. fluv. 1978, pp. 317–318.

cost of port equipment, these may exclusively be levied on the basis of their effective utilization. On the other hand, the tariffs of these dues, etc. must be calculated in relation to present or past expense in connection with the construction, maintenance, and management or administration of hydraulic engineering works, establishments, equipment, or other facilities for navigation. The other basis of the tariffs, in cases involving duties or taxes intended to cover the cost of hydraulic engineering works or establishments provided in the general interest of navigation, must be the tonnage of vessels benefiting by these facilities. In no case may dues, taxes, and charges burdening navigation on international waterways be used as public revenue; they must be a *quid pro quo* for services rendered. As regards the imposition of the dues, etc. mentioned above, flags and goods of all beneficiaries of the right of navigation on a given international waterway must be treated on a footing of perfect equality²⁸.

Since the navigability of the German section of the Danube shall be improved considerably thanks to large-scale works, including nine locks, the imposition of a charge in accordance with the conditions outlined above is obviously well-founded.

The other side of the German position, to wit that the Rhine-Main-Danube navigable waterway has a national character on all its sections here considered, gives rise to a rather knotty legal problem concerning the canalized section of the Danube. This means in particular that foreign vessels whose movement on German internal navigable waterways is not regulated within the framework of a bilateral agreement will be subjected to the acquisition of an individual authorization. As to vessels of the States Parties to the Mannheim Act and of the other Member States of the European Economic Community, they will be allowed to make use of the Regensburg-Kelheim section on the same conditions as those applying to the other German waterways.

²⁸ The Convention of Belgrade provides for three kinds of navigation charges for the financing of the necessary works:

a) Art. 35 speaks of charges levied on vessels using the Danube, the rate of which shall be fixed in relation to the cost of maintenance of the navigable channel in general;

b) Special taxes are to be levied, under Art. 36, on vessels passing through the section of the Danube between the mouth of the Sulina channel and Braila, as well as the Iron Gates, in order to defray the cost of the maintenance of navigability and of the works carried out in these parts of the river;

c) Thirdly, according to Art. 10, para. 2 the Commission of the Danube may establish special charges in order to defray the cost of executing special works for the maintenance or improvement of the navigability.

Assimilation of the said section of the Danube to the German internal navigable waterways appears unacceptable to us. As we have recalled above, *the international status of the Danube exists even in the absence of any confirmation in a treaty, and the obligations ensuing from this status must be observed by the Federal Republic independently of any treaty provision to that effect.*

The execution of hydrotechnical works to improve the navigability on a particular section of an international watercourse does not affect the legal status of the section concerned. The Committee on Navigable Waterways of the Barcelona Conference established a distinction between river sections which are navigable in their natural state, but which have been improved as a result of hydrotechnical works, and those not accessible to shipping in their natural state, but made navigable by engineering works. The Committee found it necessary, in order to remove all doubt, to insert the words "by reason of natural conditions" into the definition of navigability (Art. 1, para. 1(b)), one of the criteria of the river area subject to the regime of the Statute²⁹.

Indeed, the Bavarian Government has already asked the Federal Ministry of Communications to render the canalized section of the Danube free for the benefit of international traffic, in accordance with what ensues from the international character of that river³⁰.

Section III. The Regime of the Rhine

§ 1. The Rhine navigation regime in force at present

Art. 1 of the Revised Rhine Convention, signed at Mannheim on 17 October 1868³¹, declared the navigation on the Rhine from Basle³² to the open sea free to the ships of all nations for the transport of goods and

²⁹ By adding these words, the Commission "only intended to define them in such a way that in no case could rivers which are only rendered navigable by genuine improvements be considered as included in this definition". Conference on Navigable Waterways, p. 324.

³⁰ Rev. de la nav. fluv. 1979, p. 599.

³¹ Martens, N.R.G., vol. 20, pp. 355 *et seq.*

³² However, the Rhine is navigable beyond Basle upstream. In the Convention of 10 May 1879 between Switzerland and the Grand-Duchy of Baden (Martens, N.R.G. 2nd series, vol. 9, pp. 593 *et seq.*) the regime of free navigation is made to apply to the section between Neuhausen and the Alsatian frontier.

persons. But the other provisions of the Convention show that the Act of Mannheim established two distinct regimes for the navigation of the Rhine:

a) A Rhine regime properly so called, which applied only to vessels belonging to the Rhine navigation and to their cargoes. Under Art. 2, para. 3, vessels flying the flag of one of the riparian States fell within this category. Vessels of riparians enjoyed different privileges, the most important of which is the national treatment in all respects for these vessels and for their cargoes in the other riparian States.

b) A regime for vessels not belonging to the Rhine navigation, *i.e.* vessels flying the flag of a non-riparian State. These did not enjoy the privileges granted to the vessels of riparians³³.

Art. 356 of the Treaty of Versailles provided for the complete assimilation of the vessels of States not riparian to the Rhine to vessels flying the flag of riparian States. Under para. 1: "Vessels of all nations and their cargoes shall have the same rights and privileges as those which are granted to vessels belonging to the Rhine navigation and to their cargoes". Para. 2 excludes the possibility of denying equal treatment to the vessels of all nations by invoking an earlier Convention³⁴. Art. 355 transformed the Central Commission for Rhine-Navigation.

The revision of the Act of Mannheim, provided for by Art. 354, para. 3 of the Treaty of Versailles, encountered difficulties. The Netherlands, in particular, expressly opposed the draft revised Act adopted by the majority

³³ During the preparations for the Convention the French delegate had observed that "these different provisions do not seem to be in harmony, and clarification should at least be obtained concerning the intentions of the Commission with regard to the participation of all nations in the free navigation of the Rhine". According to other delegates, however, "the provisions in question are not themselves ambiguous, nor can they be regarded as not being in harmony. It is perfectly clear and self-evident that the right of free navigation on the Rhine is entirely different from the special advantages which the riparian States reciprocally grant to navigation by their nationals, particularly in Art. 4 of the Act. With respect to vessels belonging to foreign nations, all that can be provided in the Act is a general right to free navigation on the Rhine, since for the drawing up of further-reaching provisions there is lacking both competence on the part of the Commission and the necessary condition of reciprocity" (author's translation). *Révision de l'Acte de navigation du Rhin de 1831* (publication of the C.C.R.) (1928), pp. 133–134.

³⁴ The modification of the Act of Mannheim envisaged in the Treaty of Versailles could not come into effect without the consent of the Netherlands, the only party to this Convention that was not a signatory of the Treaty. For this reason it was stipulated in the last paragraph of Art. 354 of the Treaty that the Allied and Associated Powers reserved to themselves the right to arrive at an understanding in this connection with the Netherlands. Agreement on the conditions for Dutch assent was reached, and laid down in two Protocols, signed in Paris on 21 January 1921 and 29 March 1923. Martens, N.R.G. 3rd series, vol. 12, pp. 603 *et seq.*

of the Central Commission in November 1932. The other States represented on the Central Commission on 4 May 1936 signed a *Modus vivendi* that was intended to render the greater part of the draft revised Convention, which was annexed to the *Modus vivendi*, applicable to their mutual relations as from 1 January 1937³⁵. Art. 4 of the revised draft Convention provided also that all persons, vessels, or goods shall be treated on a footing of perfect equality. However, Art. 3, para. 2 stipulated that any signatory could denounce the *Modus vivendi* on or before 15 November 1936. Germany, availing herself of this right, denounced the Agreement by her note of 14 November 1936, which also abrogated unilaterally the clauses of the Treaty of Versailles relating to international waterways. Nevertheless, at the same time the navigation on the German section of the Rhine was declared free to the ships of all States on the condition of reciprocity. France, Belgium, and Italy immediately also denounced the *Modus vivendi*, since in the circumstances they had no further interest in continuing this Agreement. In consequence, it entered into force only between Great Britain and Switzerland.

In the tripartite Agreement relating to certain questions regarding the regime applicable to the navigation on the Rhine, signed in Brussels on 3 April 1939³⁶, Belgium, France, and the Netherlands declared themselves in favour of the continued application to the Rhine of the regime established by the Act of Mannheim and modified by the Treaty of Versailles. They also undertook to unite their efforts to re-establish the community of Rhine River States, and not to agree to any modification of the Rhine navigation regime except by common consent. Thus, at the moment the war started, regulations concerning the Rhine navigation regime originating from three different sources were applicable.

After World War II the navigation of the Rhine was discussed in London in September 1945 between representatives of Belgium, France, Great Britain, the Netherlands, and the United States³⁷. On the basis of an agreement between these States, by exchange of notes on 5 November of that year, the Central Commission resumed its activities within the framework of the Act of Mannheim as amended³⁸. This Agreement, how-

³⁵ Martens, N.R.G. 3rd series, vol. 36, part 3, pp. 769 *et seq.*

³⁶ Martens, N.R.G. 3rd series, vol. 37, part 2, pp. 398 *et seq.*

³⁷ 2 European Yearbook 1956, p. 278.

³⁸ For the text of the notes, see *Les Actes du Rhin* (ed. by the C.C.R. [1957], pp. 22–23). Switzerland subsequently acceded to the Allied agreement. See also W. Müller, *Die Rechtsstellung der Schweiz in Bezug auf die revidierte Rheinschiffahrtsakte vom 17. Oktober 1868*, 15 *Schweizerisches Jahrbuch für internationales Recht* 1958, p. 166.

ever, had a temporary character; *the States Parties to it had reserved to themselves the future determination of the permanent regime of the Rhine navigation*. The Government of the Federal Republic of Germany undertook, in a statement made on 15 April 1950 – when its representative joined the Central Commission – strictly to observe and implement the Act of Mannheim as amended by subsequent international agreements³⁹. Art. 3 of the Convention of Strasbourg amending the Act of Mannheim, concluded on 20 November 1963 by the States represented on the Central Commission⁴⁰, abrogated the 1936 *Modus vivendi* in respect of those contracting States – the United Kingdom and Switzerland – that were still bound by it, and thereby re-established a uniform regime for the navigation of the Rhine. In the words of Art. 5 the provisions of the Act of Mannheim and those of its subsequent amendments, particularly in the Treaty of Versailles, in so far as they were in force on that date, henceforth form an integral part of the Convention.

§ 2. The repercussions of the construction of the Main-Danube canal on the Rhine navigation regime

The opening of the deep-draught Rhine-Main-Danube navigable waterway, anticipated for 1985⁴¹, has created serious solicitude for the Rhine merchant fleets. Their representatives have found that there is considerable disparity between the Rhine and the Danube as regards the conditions applying to the exercise of the shipping trade by the shipping companies of the non-riparian countries. Even if the formal restrictions on the freedom of navigation could be abolished on the Danube, the Western merchant fleets would not find themselves again on a footing of equality with the State enterprises of the countries with a collectivist economy because of the differences between the economic systems. A formal freedom of navigation would not enable the Western merchant fleets – as is evident from the experience of Austria and Bavaria – to realize the economic aim of the shipping trade, which presupposes free acquisition of freight. Conversely, however, the merchant fleets of the countries with a collectivist economy

³⁹ Trb. 1955, no. 161, pp. 154–155.

⁴⁰ Trb. 1964, no. 83.

⁴¹ The reduction by DM 18 000 000 in 1980 of the financial contribution of the Federal Government to the works for the Rhine-Main-Danube waterway, motivated by general budgetary restrictions owing to the unfavourable economic conjuncture, risks to result, if the operation is renewed, in delay of the works. Whilst up to the present the junction was expected to be achieved in 1985, it is now considered that it will not be completed until 1988.

would fully benefit by this freedom on the Rhine, and thanks to the low tariffs which they are able to offer they will endeavour to acquire a maximum of foreign currency.

Guided by the preoccupation to prevent a ruinous competition which the State shipping enterprises of the countries with a collectivist economy would in all probability cause to the shipping companies and the boatmen of the States with a market economy, on 17 October 1979 the plenipotentiaries of the States represented on the Central Commission for Rhine-Navigation and Parties to the Act of Mannheim signed the Additional Protocol No. 2 modifying the regime of the navigation of the Rhine⁴². This Protocol, which emphasized once again the notion of "vessel belonging to the navigation of the Rhine", which had become devoid of meaning owing to the Treaty of Versailles, signifies in substance the return to the original system of the Act of Mannheim. According to Art. II, para. 1, only vessels belonging to the navigation of the Rhine, *i.e.* those entitled to fly the flag of one of the Contracting States (it is to be noted that Art. I of the Protocol, by substituting for the term "riparian States" in Art. 2, para. 3 of the first text of 1868 the term "Contracting States", made allowance for the changes that had occurred since then in the composition of the Central Commission), are authorized to carry out transport between two ports falling within the area of application of the Act of Mannheim⁴³. On those navigable waterways the Contracting States reciprocally grant national treatment to the vessels belonging to the navigation of the Rhine and their cargoes (Art. II, para. 3). This provision does not concern the general freedom of navigation on the Rhine, stipulated in Art. 1 of the Act of Mannheim in favour of vessels of all nations. This reflects the freedom of transit, *i.e.* the right to carry out transit transport on the Rhine basin from a place situated

⁴² B.G.Bl. 1980 II, pp. 870 *et seq.* Trb. 1980, nos. 7 and 8. On the same day Protocol No. 3 was also signed. The latter concerns the amendment of Protocol No. 43 of the C.C.R. of 14 December 1922, and refers the determination of the categories of vessels exempt from the obligation to be provided with a licence certifying the technical suitability of the vessels for the transports for which they are destined to the competence of the C.C.R.; it also refers to the amendment of Art. 32 of the Act of Mannheim relating to the amount of the compensations for infringements of the provisions of the Act. France deposited the ratification instrument of the two Protocols on 4 March 1981, the Netherlands that of Protocol No. 3 on 1 September 1980. The German Act on the ratification of Protocol No. 2 was already promulgated on 20 July 1980. The ratification procedure has already been started in Switzerland as well.

⁴³ The territorial scope of the Act of Mannheim extends to the course of the Rhine as regarded geographically, to its tributaries included in the Rhine river system, and to the waterways connecting the Rhine on Dutch territory with the Scheldt and the open sea.

outside the domain of the Act of Mannheim to another place equally situated outside the Rhine basin or *vice versa*, traffic between ports situated on the Rhine basin being reserved to the vessels of the Contracting States.

This regulation is attenuated by the innovation (in comparison with the original system of 1868) which consists in authorizing the Central Commission to establish the conditions on which vessels of third States may carry out transport between two ports situated on the Rhine basin. As regards the participation of vessels not belonging to the Rhine navigation in transport between ports situated on the Rhine basin and ports situated in third States, the conditions of this will be laid down in the bilateral agreements which each of the States Parties to the Act of Mannheim may conclude with third States (Art. II, para. 2). The agreements referred to in this provision mainly concern bilateral exchange traffic between a State Party to the Act of Mannheim and another State. For this it was especially transport originating from and bound for Danubian countries when the Main-Danube canal shall be opened to navigation that was considered. It is laid down that before the conclusion of such bilateral agreements the Central Commission must be consulted, so as to avoid excessive disparities between the agreements that might be negotiated by each country. This precautionary measure, however, will not bar the future creation of a number of special regimes. Art. III stipulates the abrogation, at the moment the Protocol enters into force, of provisions of the Act of Mannheim and of its subsequent amendments now in force in so far as they are incompatible with the provisions of the Protocol. This refers especially to the amendment of the Act of Mannheim by Art. 356 of the Treaty of Versailles.

It stands to reason that the Protocol would not be able to achieve its object if the conditions for the authorization to fly the flag of one of the Contracting States left the door open to the acquisition of "flags of convenience", *i.e.* that a vessel belonging in fact to a third State navigates under cover of the flag of a Contracting State. The plenipotentiaries have agreed to that effect in the Protocol of signature that the document which justifies the right to fly the flag of one of the Contracting States can only be issued by the competent authority of a Contracting State "for a vessel for which there exists with that State a genuine link, the elements of which shall be determined on the basis of equality of treatment between Contracting States, which shall take the necessary measures for permitting their uniform adoption. When the conditions for the issue of that document are no longer fulfilled, it ceases to be valid and must therefore be withdrawn by the authority that issued it" (point 1).

This same Protocol of signature provides for the possibility of a contingent accession of the European Economic Community to the international statute of the Rhine (point 2). In anticipation of such an accession the treatment by which the vessels of the Contracting Parties benefit will be extended, as from the date of the entry into force of the Protocol, to vessels flying the flag of the other Member States of the Community (point 3). Owing to this, the instrument signed on 17 October 1979 corresponds with the principle of treatment on a footing of equality in the domain of transport laid down in Art. 74 of the Treaty of Rome of 25 March 1957 establishing the European Economic Community⁴⁴ and fulfils the obligation ensuing from Art. 76, having the effect of freezing the provisions governing the matter of transport in the relations between Member States of the Community at the most favourable level on the date of the entry into force of the Treaty.

Finally, the last sentence of point 3, which has to be read in correlation with the Swiss declaration made at the time of the signature of the Protocol, authorizes the Central Commission to grant the same treatment as that by which the vessels belonging to the navigation of the Rhine benefit to vessels flying the flag of another State whose economic system is identical with or equivalent to that of the Contracting States, and for that reason cannot prejudice the existing balance of economy of the Rhine market.

To sum up, the Rhine Navigation Act thus modified will recognize a number of navigation regimes by which different groups of States benefit.

a) The vessels of all nations benefit by the right of simple transit on the Rhine basin. This may be qualified as a general regime.

b) The vessels of the Contracting States – members of the Central Commission – to which are assimilated the vessels of the other Member States of the European Economic Community, benefit *ipso jure* by a preferential regime. This entails the right to carry out transport between different ports of the Rhine basin as well as between ports situated outside the Rhine basin and ports of this basin. The vessels of the States of that category and their cargoes enjoy national treatment on the whole Rhine basin.

c) The vessels of third States with an economic system analogous to that of the States beneficiaries of the regime described sub b) have the faculty to obtain, through negotiations and, in the given case, on the conditions laid down by the Central Commission, the same rights by which the vessels of the States enjoying the preferential regime benefit.

⁴⁴ 298 U.N.T.S., pp. 3 *et seq.*

d) The vessels of other third States may be authorized by the Central Commission to carry out transport between different ports of the Rhine basin on conditions to be laid down individually by each State. The authorizations may be limited to certain types of vessels, either as regards time or granted within the limits of a certain quota. Those authorizations give rise to special regimes.

e) The bilateral agreements which the States Parties to the Act of Mannheim may conclude with the States falling in the category mentioned sub d) in the matter of exchange traffic and the participation of vessels flying the flag of these States in the traffic between the Rhine basin and third countries will also give rise to special regimes.

The Additional Protocol No. 2 does not contain provisions concerning "cabotage", a notion by which is to be understood the transport of passengers and goods between ports of the same State (*i.e.* local transport). In our opinion the insertion of a provision about this would have been superfluous, since the legal situation appears to be clear enough. The Act of Mannheim does not recognize the reservation on local transport. This was amply discussed and elucidated at the Barcelona Conference in connection with the question of greater freedom of navigation established by a previous navigation act. In fact, under Art. 5, para. 1 of the Statute a riparian State has the right to reserve to its own flag the transport of passengers and goods between two ports which are under its sovereignty. In every case where greater freedom of navigation has already been established in an earlier navigation act this freedom shall not be reduced. With respect to the Rhine the French delegate stated that freedom of navigation on the Rhine, as defined in the Act of Mannheim, had not been restricted by a reservation in respect of local transport traffic. Consequently, the rule on maintaining greater freedom of navigation applied to the Rhine⁴⁵. The Belgian representative was not convinced by the assurance that the greater freedom of navigation established in the Act of Mannheim would not be reduced by the Statute of Barcelona. Belgium could not accept, he said, that a new Rhine Navigation Act, which was to supersede the Act of Mannheim, should be less liberal than the latter, on the ground that the Barcelona Statute was less liberal⁴⁶. The British and Dutch representatives agreed with this view.

Mr. Haas, the Secretary-General of the Conference, considered that by inserting into the Article in question the words "except when a greater

⁴⁵ Conference on Navigable Waterways, pp. 267–268.

⁴⁶ *Ibid.*, p. 267.

freedom of navigation may have already been established", which refer to rights and liberties existing in the Act of Mannheim, these rights and liberties would necessarily be introduced into the future Rhine Convention through the intermediary of the Statute of Barcelona⁴⁷. The Committee on Navigable Waterways, on which all the States participating in the Conference were represented, eventually inserted into its final report the following sentence in connection with Art. 5 of the Statute: "The reservation made in para. 1(2), with regard to greater freedom of navigation, already established in a previous act of navigation, refers in particular to the Mannheim Navigation Act"⁴⁸.

Curiously enough, this authentic interpretation of the Act of Mannheim on the part of all the States Parties to it has escaped the notice of international lawyers who thoroughly investigated the question of the reservation of local transport ("cabotage") on the Rhine⁴⁹. However, the freedom to carry out local transport between two ports situated on the territory of one and the same State shall henceforth act in favour of those States alone which benefit by the preferential regime, whilst the States in the categories c) and d) can, if desired, procure this right by means of negotiations and the procedures described above.

§ 3. The admissibility of the abrogation of the rule of equal freedom of all flags in the Rhine navigation

On this point the question arises whether the States represented on the Central Commission were competent under international law to abrogate the rule of equal freedom in all respects of all flags which originates from the Treaty of Versailles. The answer to this question depends on whether the obligation to apply the regime of navigation established on the Rhine by the Treaty of Versailles was, at the moment when the Additional Protocol was signed, opposable by third States, on any ground whatever, to the States represented on the Central Commission. In other words: did the States in question apply the principle of equal freedom of all flags in the

⁴⁷ *Ibid.*, p. 268.

⁴⁸ *Ibid.*, p. 326. The last sentence of Art. 20, under which the Statute does not prohibit the grant of greater facilities for the exercise of navigation in the future, was also intended to appease the Belgian delegation.

⁴⁹ See H. K r a u s, *Questions relatives à la navigation du Rhin* (1956); U. S c h e u n e r, *Questions relatives à la navigation du Rhin* (1956); H. v a n d e r H o e v e n, *Die Rheinschiff-fahrtsverträge und die Cabotage* (1957); G. L u p i, *La liberté de navigation sur le Rhin*, 85 *Journal du Droit international* 1958, pp. 320–371; J a e n i c k e, *op.cit.* in note 26, pp. 33–39.

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Rhine navigation in the conviction that they obeyed a legal necessity, *i.e.* that they acted in such a way that they fulfilled a duty imposed by international law, which bound them regardless of their will?

The survival in particular of certain clauses forming a whole and referring, within the framework of general treaties regulating a great diversity of matters, to a given, well-delimited subject, at the moment when the treaty of which they originally formed part was abrogated, had terminated, fallen into desuetude, briefly: expired, is a well-known phenomenon in international relations. Such clauses are mainly provisions under which rights and obligations are attached to a certain part of the territory. Such stipulations, which create an objective situation after their execution, become detached from their origin in a treaty, acquire a legal existence of their own, even when the treaty that has given rise to them has ceased to apply. As Lord McNair states: "... the treaties belonging in this category [*i.e.* of "dispositive" or "real" character] create, or transfer or recognize the existence of certain permanent rights, which thereupon acquire or retain an existence and validity independent of the treaties which created or transferred them"⁵⁰. However, the International Law Commission pointed out that in its work on the Law of Treaties it did not consider that treaties attaching obligations to navigation on a particular river for the benefit either of a group of States or all States generally "had the effect of establishing, by its own force alone, an objective regime binding upon the State's territorial sovereignty and conferring contractual rights on States not Parties to it. While recognizing that an objective regime may arise from such a treaty, it took the view that the objective regime resulted rather from the execution of the treaty and the grafting upon the treaty of an international custom"⁵¹.

Consequently it appears superfluous to us, from the viewpoint of our subject, to investigate thoroughly the highly complex general problem – which would exceed the scope of the present study – to find out to what extent the Treaty of Versailles could still be considered to be formally in force at present, and we therefore confine ourselves to the examination of the special problem: what effect could the application of the regime of navigation originating from the Treaty of Versailles produce in international law?

We start from the statement that the river navigation clauses of the Treaty of Versailles (Section II of Part XII, comprising Arts. 327–364)

⁵⁰ The Law of Treaties (1961), p. 256.

⁵¹ Report of the International Law Commission on the work of the second part of its seventeenth session (Doc. A/6309/Rev. 1), I.L.C. Yearbook, vol. 2 (1966), p. 231.

were by no means limited to the establishment of a new regime of Rhine navigation (see Section III § 1) and to the transformation of its administrative system (Arts. 354–356). In Art. 331 the following rivers were declared international: the Elbe from its confluence with the Moldau and the Moldau from Prague; the Oder from its confluence with the Oppa; the Niemen from Grodno; the Danube from Ulm, and all navigable parts of these river systems which naturally provide more than one State with access to the sea. The river systems declared to be international were placed under the administration of international commissions including also representatives of non-riparian States, vested with extensive powers (Arts. 340–341 and 346–347). The Peace Treaties contained detailed regulations concerning the regime of navigation on waterways falling within their scope and their international administration (Arts. 332–337 and 340–362 of the Treaty of Versailles, Arts. 292–298 and 301–308 of the Treaty of Saint-Germain, Arts. 220–226 and 229–235 of the Treaty of Neuilly, Arts. 276–282 and 285–291 of the Treaty of Trianon). These provisions were characterized by a broad conception of the freedom of merchant navigation; they abolished any discrimination between riparians and non-riparians in matters of the exercise of shipping trade on the above-mentioned river systems. In Art. 18 of the Treaty concluded between the Principal Allied and Associated Powers and Poland on 28 June 1919⁵² this regime of navigation was declared applicable to the Vistula, including the Bug and the Narew. Similarly, in Art. 16 of the Treaty concluded between these Powers and Rumania on 9 December 1919⁵³ the latter had undertaken the obligation to apply the regime of navigation defined in Arts. 332–337 of the Treaty of Versailles to the navigation of the Pruth.

Although the regime of navigation laid down in these Treaties involved the most essential part of the European river systems, it would be erroneous to regard the provisions in question as completing the organic process of development of international river law. With a few exceptions these provisions were concerned with river areas in the territory of States upon which the Principal Allied and Associated Powers could impose their will.

Other interested States were not prepared to accept this broad construction of the freedom of navigation on international rivers. In fact, Art. 338 of the Treaty of Versailles provided that the regime set forth in Arts. 332–337 shall be superseded by one to be laid down in a world-wide General Convention relating to international waterways (in this respect see

⁵² Martens, N.R.G. 3rd series, vol. 13, pp. 504 *et seq.*

⁵³ *Ibid.*, pp. 529 *et seq.*

also Arts. 343, 345, and 354, para. 2 of the Treaty of Versailles). The Conference on Communications and Transit which met in Barcelona in 1921, did not succeed in achieving its real purpose: the creation of a world-wide charter for river navigation⁵⁴. The majority rejected the view that the nationals, property, and flags of all nations should, within the scope of the General Convention, enjoy treatment on a footing of equality, and declared themselves in favour of a strict reciprocity of rights and obligations⁵⁵. Now the basic rule of the 1921 Barcelona Statute was not in conformity with the regime of navigation laid down in the Peace Treaties. On the other hand, the Conference, in order to safeguard the more favourable situation of the signatories and other beneficiaries of the Peace Treaties which they enjoyed under those Treaties, decided to insert an article to the effect that the Statute would not affect the application of the Peace Treaties (Art. 2 of the Convention of Barcelona). This procedure was not at bottom consistent with the provisions of the Peace Treaties, in which the abolition of the exceptional character of the navigation regime imposed by the Principal Allied and Associated Powers upon the States whose river area fell within the scope of those Treaties was provided for by the substitution for it of a universally applicable navigation regime, which was to extend to all navigable waterways with an international character. Contrary to these provisions, the Convention and the Statute of Barcelona have maintained in force the navigation regime introduced by the Peace Treaties, which meant a considerable restriction on the sovereignty of the riparian States with regard to the river systems referred to. In fact, Art. 1 of the 1921 Danube Statute, established on the basis of the Peace Treaties, declared navigation free and open to all flags on conditions of perfect equality. Arts. 12 and 13 of the Elbe Navigation Act of 22 February 1922⁵⁶ contained similar provisions. On the other hand, the Barcelona Statute imposed less extensive obligations on the States Parties to it (which for the rest were not very numerous, and which also included those whose territory is not traversed or bordered by navigable waterways falling within the scope of the Statute), whilst the competence over their river area of the States which did not become Parties to the Statute has remained unchanged.

⁵⁴ In spite of important concessions, made in order to obtain universal acceptance for the texts drawn up by the Conference, only 22 States (including only six countries outside Europe) were parties to the 1921 Barcelona Convention and Statute when the League of Nations was dissolved in 1946.

⁵⁵ Conference on Navigable Waterways, pp. 420–421.

⁵⁶ Martens, N.R.G. 3rd series, vol. 12, pp. 632 *et seq.*

In spite of the failure of the Conference of Barcelona to achieve its principal purpose, some distinguished international lawyers who were zealous protagonists of the widening of the sphere governed by international law, to the detriment of the national competence of the particular States, have supported the thesis that the principle of equal freedom for all flags to engage in carriage on the international waterways in Europe, in view of the repeated treaty provisions, in particular the regulations contained in the Peace Treaties, has given rise to a rule of customary law.

Thus, in the opinion of N. Politis (author's translation): "Today, for international rivers and partly even for national rivers there is a double principle which is binding upon riparians. It is that of freedom of navigation and of equality of treatment for all countries"⁵⁷. The same view is taken by J. Hostie (author's translation): "On the international waterways of Europe freedom of navigation is now conceived in principle as a right of all the States of the world"⁵⁸. In the words of W. van Eysinga:

"It would, in fact, be more correct to regard freedom of navigation on international rivers as a principle having an existence of its own, independently of what may or may not be said regarding freedom of trade by other treaty provisions binding the riparian States. The idea of the law of international rivers, as developed in a large number of conventions, is that, on certain waterways of importance for international trade, there should be freedom of navigation from the commercial standpoint also"⁵⁹.

J. Vallotton d'Erlach, in two reports presented in 1929 and 1932 respectively to the International Law Institute, defended the thesis that customary international law recognizes the existence of the principles of freedom of traffic in favour of all users of the international river as well as equality of treatment between the users of the same international river⁶⁰.

In the other view, which may be considered the prevailing one, it is dangerous to deduce from a great number of similar treaty provisions a rule of customary law to the same effect. In D. Anzilotti's opinion, for the establishment of the existence of a rule of customary international law it is not sufficient to demonstrate that States behave actually in a certain way; it must also be demonstrated that they are convinced they are obliged to behave in that way, and not otherwise. If, indeed, a great many interna-

⁵⁷ Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux, 6 Hague Recueil 1925, p. 27.

⁵⁸ Examen de quelques règles du droit international dans le domaine des communications et du transit, 40 Hague Recueil 1932, p. 427.

⁵⁹ Separate opinion in the *Oscar Chinn* Case (1934), P.C.I.J. Series A/B, no. 63, p. 145.

⁶⁰ 35 Annuaire 1929 I, p. 259; 37 Annuaire 1932, p. 68.

tional agreements stipulate freedom of navigation in favour of users in general, without making a distinction between riparians and other States, it does not follow that the States have adopted stipulations of this kind in the conviction that they could not do otherwise. On the contrary, in Anzilotti's view the great number of similar treaty provisions relating to freedom of navigation on pluriterritorial waterways proves that no such rule of customary law exists. If it existed, there would be no need for the rule to be repeatedly confirmed by treaty provisions⁶¹. B. Winiarski also emphasizes the role of the *opinio juris* in the creation of the customary rule. He stated that simple use is not sufficient for the formation of customary law. A series of identical facts, however long it may be, and uniform practice, even for many centuries, is incapable of proving the existence of a customary law if it is not accompanied by the conviction that by acting in this way the States obey a binding legal rule. *A fortiori*, the repetition of identical facts by itself is incapable of creating law, because States may act in this way for reasons of practical convenience or expediency, or simply out of habit; so long as they are conscious of not being bound, but on the contrary of acting in a given way and of being able to change their conduct when they think fit, there is no customary law. Examples of such resistance on the part of riparian States abound in the history of international river law⁶².

Without saying it explicitly, M. Siotto-Pintor also based his view on the absence of legal conviction on the part of riparian States. "If, by unilateral acts or by treaties concluded by riparian States with non-riparian States, universal freedom of navigation has been declared and actually practised in respect of a good many rivers, evidently one cannot regard this, from the legal point of view, as the recognition of a right, but solely as a freely granted concession, for ensuring certain economic and political advantages" (author's translation)⁶³.

The reserved attitude of those eminent writers was afterwards confirmed by the conclusion reached by the International Court of Justice in the *North Sea Continental Shelf Cases*. The Court does not lightly admit the existence of a custom formed on the basis of a treaty rule. On the contrary, it imposes strict requirements concerning the belief that State practice is rendered obligatory by the existence of a rule of law requiring it. "The need of such a belief, i.e. the existence of a subjective element, is implicit in

⁶¹ *Ibid.*, pp. 105–106.

⁶² *Principes généraux du droit fluvial international*, 45 Hague Recueil 1933, p. 159.

⁶³ *Le régime international de l'Escaut*, 21 Hague Recueil 1928, p. 315.

the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character, of the acts is not in itself enough"⁶⁴.

It seems that the navigation regime laid down in the Peace Treaties of 1919/20 and in the Navigation Acts established on the basis of those Peace Treaties, characterized by assimilation of non-riparians to riparians in matters of the exercise of merchant shipping on the majority of Europe's international waterways, has really never reflected the legal conviction of the interested European States to make it possible for them, by putting into force that perfect equality, to apply a recognized rule of regional international law. Not only Germany, but also other States forming part of the Allied and Associated Powers, such as Poland, Rumania, and Yugoslavia, from the first showed themselves opposed to the clauses on river navigation in question, which they considered to be troublesome restrictions of their sovereignty and contrary to the interests of their economy. The two procedures, introduced by Rumania⁶⁵ and Poland⁶⁶ respectively, were directed at restriction on a given part of their river area subject to the international regime and administration instituted by the Peace Treaties and to the re-establishment in those respects of the integrity of their sovereignty. Even the Netherlands resisted the attempts to extend the field of application of the new convention on the navigation of the Rhine to the quasi-totality of their river system⁶⁷.

Consequently, *it could not be alleged that the river navigation clauses of the Treaty of Versailles have acquired the force of customary international law.*

The disintegration of the political system of Versailles led to the cessation of the application of the navigation regime and the administrative system established by the Peace Treaties of 1919/20 on the whole range of the river area subject to their legal force. Even if, basing oneself on the principle *ex injuria jus non oritur*, one denies any legal effect to this process as the consequence of unlawful actions, one would not be able to deny that after the war the principal promoters of the Treaty of Versailles had not made an effort to restore the *status quo* in the river area which fell origi-

⁶⁴ I.C.J. Reports 1969, p. 44.

⁶⁵ *European Commission of the Danube* (1927), P.C.I.J. Series B, no. 14.

⁶⁶ *International Commission of the Oder* (1929), P.C.I.J. Series A, no. 23.

⁶⁷ See B. M. Telders, *Verzamelde Geschriften*, vol. 4 (1947): *Der Kampf um die neue Rheinschiffahrtsakte* (1934), pp. 1 *et seq.*

nally within the scope of that Treaty and that of the treaties concluded for their implementation. Their permissive attitude left the coast clear for the forces tending to curtail the freedom of navigation on the Danube (see Section I § 1, in particular note 3). But it is also true that in view of profound political changes which occurred in consequence of World War II the intention to apply the river navigation clauses of the Treaty of Versailles to the different river systems declared international in 1919 would *a priori* have been doomed to fail.

One could not even attribute to the resumption by the Central Commission for Rhine-Navigation of its pre-war functions, by means of an agreement between the States represented on the Commission, the meaning of a compliance with a duty imposed upon them by international law. Quite on the contrary, it was understood that *this decision would in no way prejudice the future determination of the permanent regime of the Rhine*. This proves that it was a voluntary decision, and it was the intention of the interested Powers to keep their freedom of action in this respect. More exactly, it was not contemplated to make effective again certain provisions of the Treaty of Versailles as such, but to incorporate them – explicitly by the Convention of 1963 – in the Rhine Navigation Act. Consequently, the provisions which originate from the Treaty of Versailles are completely assimilated to the other clauses of the Rhine Navigation Act, share henceforth from every point of view the legal fate of the latter, and are therefore subject to a modification, or even the abrogation, by common consent of the States Parties to the Navigation Act. To conclude: *the States represented on the Central Commission were not bound under international law to maintain in force on the Rhine a navigation regime which, as regards its origin, is the last remnant of the river navigation law which was created in 1919 and disappeared since then from the greatest part of its original field of application*.

The river navigation clauses of the Treaty of Versailles formed a coherent whole, imposing obligations on the riparians of most of the river systems of Europe. When the riparians of all the other river systems referred to in the Treaty, with the exception of those of the Rhine, have not for the past 40 years observed those obligations, the reason of the navigation regime established at Versailles, which was destined to have general validity, has ceased to exist; the river navigation clauses were therefore dropped automatically. For, as Grotius already said, the substance of an obligation cannot be considered in itself, but with respect to the reason of it⁶⁸.

⁶⁸ De iure belli ac pacis, lib. II, cap. XVI, § XXIII.

The maintenance of such obligations in an isolated case would not be compatible with the rule according to which a treaty must be interpreted in the light of its general aim⁶⁹.

Consequently, the States represented on the Central Commission, as Parties to the Revised Rhine Navigation Convention, *have the right to regulate and modify at any time the conditions of admission of the vessels of third States to traffic on the Rhine basin.*

§ 4. The question of the nationality of inland craft

Conventions on river navigation have always considered the question from the point of view of inland navigation exercised by nationals of Contracting States on the waterways of other countries. Indeed, in the absence of an express agreement to the contrary, the right of navigation does not even extend to vessels exercising, in whatever capacity, the public authority of another State⁷⁰. In this way the conventions in question operate in favour of the nationals of Contracting States or, in other words, to the advantage of the vessels held by them; consequently they can be regarded as the beneficiaries of the right of navigation.

Quite frequently craft for the benefit of which the treaty provisions had been established are designated by the term "flag"⁷¹. The flag which a ship flies is the token of her nationality. As the Report of the Commission of Navigable Waterways of the Barcelona Conference states, the term "flag" must be understood to refer to the nationality of the vessels, even if the legislation of the interested countries does not recognize the legal existence of a flag for inland navigation vessels⁷².

Moreover, already the Committee on the free navigation of rivers of the Vienna Congress expressed its opinion that "every boatman shall carry the

⁶⁹ See Art. 19(a) of the Harvard Law School Draft on International Treaties. 29 A.J.I.L. 1935, Supplement to no. 4, pp. 937 *et seq.*; Art. 31, para. 1 of the Vienna Convention on the Law of Treaties.

⁷⁰ See the report of the Commission of Enquiry charged with the preparation of texts for the Barcelona Conference. League of Nations, Barcelona Conference, Verbatim Records and Texts relating to the Convention on Freedom of Transit 1921, p. 285. See also Art. 17 of the Statute of Barcelona of 1921, Art. 19 of the Resolution of the International Law Association on the uses of the waters of international rivers. I.L.A. Report of the 52nd Conference (1966), p. 510.

⁷¹ See Art. 2, para. 3 of the Act of Mannheim, Art. 332 of the Treaty of Versailles, Art. 4, para. 1 of the Statute of Barcelona.

⁷² Conference on Navigable Waterways, p. 331.

merchant flag of his own government"⁷³. In the words of Art. 4 of the Resolution of the International Law Institute: "Every vessel navigating on an international waterway must have a flag". Consequently, the allegation of R. Yakemtchouk that the provision of any navigation act providing for freedom of navigation on the river concerned, which cannot in respect of trade be denied to anyone, does not imply for nationals of non-riparian States the right to navigate under their own flag⁷⁴ proves to be erroneous.

Moreover, the idea of the Committee of the Congress of Vienna has not acquired the force of a rule inserted into the Act of the Congress; consequently, it was not applied afterwards in a consistent way to the river craft destined for frontier-crossing traffic. In order to get the flag, the vessel has to go through the administrative registration procedure. The duty to register inland craft and boats and the conditions for registration in inland craft registers are laid down in national rules. Every State has the right to enact regulations setting forth the conditions on which it will grant registration, and consequently its nationality to merchant vessels. But in most cases national laws regulate the matter of registration of inland craft in connection with establishment of the legal status of inland craft in civil law. A curious situation results from this: the benefit in particular of the right of navigation on waterways situated on the territory of other States, which accrues to the parties entitled to it on the basis of international conventions, *i.e.* by virtue of international law, is dependent on the procedures and the conditions which belong essentially to the sphere of civil law and that of administrative law. This situation owes its origin partly to the fact that the effect on the international plane of the registration, which confers the right to fly the flag, is of interest only to vessels carrying out frontier-crossing transport, whilst national regulations often do not make a distinction, from the viewpoint of the obligation of the registration and of the determination of its conditions, between vessels destined for frontier-crossing traffic and those carrying out transport exclusively within the borders of the country.

In Belgium the registration of river craft is optional. In the Federal Republic of Germany, according to § 10(2) of the Decree on Registration of Vessels of 26 May 1951⁷⁵ for reporting on inland craft, the owner is obliged to register it if the craft has a carrying capacity of more than 20

⁷³ Rhine Documents, vol. I (1918), p. 87.

⁷⁴ *Le régime international des voies d'eau africaines*, 5 *Revue belge de Droit international* 1969, p. 489.

⁷⁵ B.G.Bl. 1951 I, pp. 355 *et seq.*

tons. When an inland craft is registered, only technical data, as well as the name of the owner and the legal ground for the acquisition of the property have to be indicated (§ 12). German law derives the right of the flag solely from the place of registration. According to the present state of the law the craft entered in a German register of inland craft are only so-called "German" inland craft. In such a case neither the nationality of the owner nor the question what nationality the shareholders of the companies have is relevant⁷⁶.

According to Art. 62 of the Dutch Act on Transport of Merchandise by means of Inland Craft of 1 November 1951⁷⁷ craft belonging as to more than one half to Dutch nationals or to legal persons established under Dutch law whose statutory seat is situated within the Netherlands shall be considered Dutch inland craft. The (Dutch) nationality of the owner therefore determines the flag of the craft. All inland craft by means of which transport of goods on European waterways outside the boundaries of the Netherlands is carried out must be registered. A new legislation is envisaged which provides that all objects destined to float shall be registered either as inland craft or as sea-going vessels.

In France, the provisions concerning the registration of inland craft are contained in Arts. 78 to 88 of the Code of Navigable Waterways and of Inland Navigation of 13 October 1956⁷⁸. Every inland craft of more than twenty tons must be registered (Art. 78). Only craft belonging as to more than one half to French nationals or to French companies may be registered. Craft which usually navigate in France and whose owners have their customary residence or, in case of companies, the principal direction of their business in France, must be registered in that country. Consequently, either the ownership or the residence of the owner, one of the two criteria, may determine the flag of the inland craft.

The national regulations in force in the Rhine States and in Belgium show considerable differences from each other and do not prevent, even in States such as France and the Netherlands, whose legislation tends to restrict registration to inland craft the majority of whose property belongs to their nationals, the registration of craft which do not have a genuine link with the State of registration. Considering the complex interdependences and the subtle techniques of modern economy, the formal criteria, such as

⁷⁶ See also Erläuterung zu § 14 des Flaggenrechtsgesetzes vom 8. Februar 1951. B.G.Bl. 1951 I, pp. 79 *et seq.*

⁷⁷ Stb. 1951, no. 472.

⁷⁸ Journal officiel of 16 October 1956.

the place of registration or that of the statutory seat, do not present a sure basis for the verification of the actual nationality of the company.

It is therefore evident that the national regulations in force in the States Parties to the Act of Mannheim do not furnish a sufficient guarantee that there is a genuine link between the craft and the State whose authority has issued to it the document justifying the right to fly the flag of that State, by which the craft will enjoy the rights by which, in the words of Art. II, para. 1 of the Additional Protocol, craft belonging to the Rhine navigation benefit.

The German authorities, indeed, for sometime past have considered the German legislation in the matter of the right of the flag of inland craft to be insufficient. According to the draft amendment of the River Transport Act which was submitted to the *Bundestag*, the special rights of German inland craft may not be claimed by all craft entered in a German register of inland craft, but only by those craft which are owned by German nationals or companies with predominantly German capital⁷⁹.

The Geneva Convention on the registration of inland craft of 9 December 1930⁸⁰ represents the first attempt to regulate this matter on the international level. The Contracting States at first undertook to keep registers for the entry of inland craft (Art. 1). Those registers were exclusively destined to give evidence of the civil rights and obligations relating to inland craft (transfer of property, entry of mortgages, usufruct). The determination of the conditions which a craft must fulfil in order to be registered has been referred by the Convention to the national competence of the States (Art. 3, para. 3). If the craft fulfils the registration conditions laid down by the legislation of two or more States, the owner may choose in which country the craft shall be registered (Art. 4, para. 3). Thus, the decision as to the flag has been left to the owner. The Convention recognizes only one limitation: the same craft can only be registered in a single State.

A new Convention relating to the registration of inland craft was signed in Geneva on 25 January 1965⁸¹. Belgium, the Federal Republic of Germany, France, Luxembourg, the Netherlands, and Switzerland, *i.e.* all the States of the Rhine basin and the riparians of the Moselle, have signed the Convention, which, in the absence of a prescribed number of ratifications,

⁷⁹ Cf. J. Sengpiel, *Ost-West Binnenschifffahrtsfragen aus der Sicht der Bundesrepublik Deutschland*, *Zeitschrift für Binnenschifffahrt und Wasserstraßen* 1980, p. 44.

⁸⁰ Stb. 1939, no. 25.

⁸¹ Trb. 1966, no. 228.

has not yet entered into force. This Convention also provides for the establishment of registers for the registration of inland craft (Art. 2, para. 1). The determination of the conditions and the obligation of entry in its registers has remained within the competence of each State (Art. 2, para. 2). However, the Convention has imposed some limitations on this right of the State. If a craft is to be registered in a Contracting State, it has to fulfil at least one of the following conditions: a) the place from which the exploitation of the craft is managed is situated on the territory of the State where the registration is applied for; b) when the owner of the craft is a natural person, this person is a national of that State or has his customary residence on its territory; c) when the owner of the craft is a trading company, it has its statutory seat or the principal direction of its business on the territory of the said State. For a craft in joint ownership, one half of the property must belong to persons fulfilling these conditions (Art. 3, para. 1).

It is evident that the Convention closely follows the French system and endeavours to subordinate the registration of the inland craft to the existence of a genuine link between its ownership and the country of registration. However, the nationals of third States other than Parties to the Rhine community and the European Economic Community will not find it very difficult to fulfill the condition sub a) or to have a trading company registered in one of the riparian States of the Rhine.

The difficulty consists in establishing the nationality of the legal person in such a way as to prevent the navigation, under cover of the flag of a State Party to the Act of Mannheim, of a craft belonging to a trading company founded and registered in the Contracting State in question and having its statutory seat on the territory of the latter, which derives its financial resources from third States. Indeed, the notion of the "nationality" of legal persons does not have the same meaning as that of natural persons. If one enquires into the nationality of those whose investments constitute the capital of a trading company, it may occur that the interested parties or the majority of them have another nationality than the company itself has on the basis of the criterion of the statutory seat or that of registration. The necessity to enquire into the economic reality which often veils and dissimulates the nationality of a legal person was felt in particular during World War I, when it was necessary for the belligerent States to establish those trading companies which fell under the seizure of enemy goods. When judging the nationality of the company, the decision was taken not according to its status under private law, but according to the nationality of the majority of interested natural persons (stockholders or other investors)

who have preponderant influence on its affairs. This is what is called the theory of control, which was applied in the Peace Treaties concluded after World War I to establish the legal persons belonging to the defeated States, property of which was confiscated⁸², and also in the practice pursued after World War II by the Allied Powers^{82a}. In the opinion of the Permanent Court of International Justice the conception of control is an essentially economic one and "it contemplates a preponderant influence on the general policy" of the company under consideration⁸³.

However, in the *Barcelona Traction* Case the Court refused to apply the criterion of control for the establishment of the nationality of a joint stock company. According to the Court: "The provisions of the peace treaties had a very special function: to protect allied property and to seize and pool enemy property with a view to covering reparation claims. Such provisions are basically different in their rationale from those normally applicable". "Also distinct are the various arrangements made in respect of compensation for the nationalization of foreign property. Their rationale, too, derived as it is from structural changes in a State's economy, differs from that of any normally applicable provisions". From those statements the Court reaches the following conclusion: "To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as *lex specialis* and hence to court error"⁸⁴. In order to

⁸² Art. 297(b) of the Treaty of Versailles, Art. 260(b) of the Treaty of Saint-Germain, Art. 177(b) of the Treaty of Neuilly, Art. 232(b) of the Treaty of Trianon.

^{82a} According to the Protocol to the Potsdam Conference of 2 August 1945 (Part III, Reparations) the reparation claims of the Soviet Union will be satisfied, *inter alia*, by appropriations on the German zone occupied by the Soviet Union and by all German assets situated in Bulgaria, Finland, Hungary, Rumania, and Eastern Austria. The defeated States recognized that the Soviet Union is entitled to all German assets in their respective territories, and had undertaken to take all necessary measures to facilitate the transfer of the German rights, properties, and interests to the Soviet Union (Art. 25, para. 5 of the Peace Treaty in Paris on 10 February 1947 with Bulgaria, 41 U.N.T.S., pp. 21 *et seq.*; Art. 26 of the Peace Treaty with Finland, 48 U.N.T.S., pp. 203 *et seq.*; Art. 28 of the Peace Treaty with Hungary, 41 U.N.T.S., pp. 135 *et seq.*; Art. 26 of the Peace Treaty with Rumania, 42 U.N.T.S., pp. 32 *et seq.* See also Art. 22 of the State Treaty with Austria, signed in Vienna on 15 May 1955, 217 U.N.T.S., pp. 233 *et seq.*).

Furthermore the defeated States recognized the right of the victorious States to liquidate the Bulgarian, Hungarian, Rumanian, and Italian property on their territories (Art. 25, para. 5 of the Peace Treaty with Bulgaria, Art. 29, para. 5 of the Peace Treaty with Hungary, Art. 27, para. 5 of the Peace Treaty with Rumania, Art. 79, para. 1 of the Peace Treaty with Italy, 49 U.N.T.S., pp. 3 *et seq.*). The Peace Treaty concluded with Finland did not contain any such provisions.

⁸³ *German Interests in Polish Upper Silesia*, Merits, P.C.I.J. Series A, no. 7, pp. 68–69.

⁸⁴ I.C.J. Reports 1970, pp. 39–40.

appreciate the import of the Court's pronouncement, it should be recalled that it had opposed the application, by the method of analogy, of a practice which originates from extraordinary circumstances and finds its motives in special necessities. Since the analogy is based on the idea that legal relations which show the same essential character must be subjected to the same rule, it would appear justified that the Court has taken the position that there did not exist any fundamental resemblance between the situations regulated by the application of the control theory and that which occurred in the dispute concerned. Besides, the Court, far from disapproving of the control theory as such, was of the opinion that the process of "lifting the corporate veil" or "disregarding the legal entity", although being an exceptional one, may be justified and equitable in certain circumstances or for certain purposes, and as such is admissible on the international plane.

Point 1 of the Protocol of Signature to the Additional Protocol, by obliging the competent authorities of the Contracting States to ascertain, before issuing the document authorizing the vessel to fly the flag of one of the Contracting States, that there exists a genuine link with the State concerned, has created the international basis for the application of the control principle. Art. I of the Additional Protocol, substituted for Art. 2, para. 3 of the Act of Mannheim, will henceforth be provided with conditions of application which will be established as uniformly as possible in the States of the Rhine community (for example: the necessity that the owner has the nationality of the State concerned, or, for a company, that a majority, to be defined, of the shares is in the possession of a national of the State). For that matter, the precept that there must be a genuine link with the State whose flag the vessel flies has long been known and applied with regard to sea-going vessels⁸⁵. From the provision that "the elements of the genuine link shall be determined on the basis of equality of treatment between Contracting States" it follows that the possession even of the majority of

⁸⁵ According to the German Act concerning the right of flag of 8 February 1951 the Federal flag may be flown by sea-going vessels whose owners are German nationals as well as legal persons if German nationals form the majority on the board of directors or on the managing board (Arts. 1 and 2). According to Art. 5 of the Convention on the High Seas, signed in Geneva on 29 April 1958 (450 U.N.T.S., pp. 82 *et seq.*): "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular the State must effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag". It results from this that the registration which determines the status of the vessel under private law has been dissociated from the right to fly the flag of a State which determines the status of the vessel under international law.

the shares of a trading company by nationals of other Contracting States will not affect the nationality of the company. The position is the same if the majority of the shares belongs to nationals of the other Member States of the European Economic Community, since they have been assimilated to the nationals of the Contracting States.

However, since in the words of the Protocol the validity of the document authorizing the vessel to fly the flag of a Contracting Party ceases at the moment when the conditions of issue are no longer fulfilled, so that it must be withdrawn by the authority which has issued it, the application of the control principle will give rise to special difficulties. For the seizure or the confiscation of goods qualified as enemy goods, or for the authorization of compensation for nationalized alien property, it was sufficient to verify the nationality of the trading companies on the basis of the nationality of the natural persons who exercised a preponderant influence at a given date (declaration of war, coming into force of the Peace Treaty, promulgation of the Decree on the nationalization of property) on the management of the business. But the implementation of the provision in question imposes upon the authorities the duty to see to it constantly that the control of the company has not passed into the hands of nationals of third States of the Rhine community.

At the time of the ratification of the Additional Protocol No. 2 in June 1980 the *Bundestag* asked the Federal Government to use its best efforts towards the definition at the earliest opportunity of the notion of "flag of one of the Contracting States". This in order to avoid the risk that the provisions introduced by the Additional Protocol should be construed to prevent any unfair competition on the part of the fleets of the Comecon countries⁸⁶. Nevertheless, in Art. 1 of the German-Austrian draft treaty initialled on 18 September 1980 the old criterion of registration was still used for the definition of German inland craft.

§ 5. Transports carried out by sea-going vessels on
waterways falling within the territorial scope of the
Act of Mannheim

According to the declaration, made by the States Parties to the Revised Rhine Navigation Convention at the time of the signature of the Protocol, the provision of Art. II, para. 2 of the Additional Protocol No. 2, under which vessels not belonging to the Rhine navigation may carry out trans-

⁸⁶ Rev. de la nav. fluv. 1980, p. 349.

ports between ports situated on the Rhine basin and ports situated in third States only on the basis of bilateral agreements with the Rhine basin State concerned, does not apply to sea-going vessels which, coming from or going to the open sea, make use of the mouths of the Rhine to carry out direct and uninterrupted transports towards or from points situated on waterways which fall within the territorial scope of the Revised Rhine Navigation Convention.

However, after deliberations within the Central Commission for Rhine-Navigation this position may be reconsidered for sea-going vessels other than those

a) flying the maritime flag of a State Party to the Revised Rhine Navigation Convention or vessels flying the maritime flag of the other Member States of the European Economic Community;

b) belonging to a national (natural or legal person) of one of the States Parties to the Rhine Navigation Convention or of another Member State of the European Economic Community, and which are exploited on behalf of a national (natural or legal person) of those States.

Since the declaration concerns transports carried out by vessels coming from or going to the open sea on waterways which fall within the territorial scope of the Act of Mannheim, for its evaluation a brief examination of the field of application of the regime of river navigation as compared with that of maritime navigation would seem to be necessary.

In approaching this question we start from the idea that the regime of maritime navigation applies not only to calls at ports situated on the seaboard itself, as is generally the case with the ports of the Mediterranean, but also to access to ports situated on the mouths of rivers, like most of the ports of the Atlantic Ocean and the North Sea. According to the explanation of R. L a u n (author's translation): "The seaport is therefore essentially characterized, not by the fact that it is situated on the sea, but by the fact that it is accessible for sea-going vessels. The important thing is not to know whether a port is or is not situated on the seaboard"⁸⁷. J. V a l l o t t o n d' E r l a c h has formulated this thesis in the following way (author's translation): "Every State . . . recognizes and respects, even in the absence of any treaty, the principle of free access of all flags to all its seaports . . . ; this free access is even granted if such ports are situated on a watercourse which is navigable exclusively within the frontiers of the said State . . ."⁸⁸. G. G i d e l likewise maintains that on all rivers, international or national,

⁸⁷ *Le régime international des ports*, 15 Hague Recueil 1926, p. 7.

⁸⁸ 35 *Annuaire* 1929 I, p. 378.

the vessels of all nations have access to the last seaport when coming from the sea⁸⁹.

The situation is quite different when vessels coming from the high seas call at ports situated on the territory of a State other than that in whose territory the mouth of the river falls. The State within whose territory the mouth and the lower course of the river fall never took much interest in the application of perfect freedom of maritime navigation for voyages which merchant vessels of other nations undertake from the high seas to the ports of the upstream States, or for voyages of the latter's merchant vessels involving sea transports. According to the provisions of the navigation acts, navigation exercised between the high seas and the ports situated along an international river falls within the scope of river navigation, and consequently under the regime of that navigation. The same applies if vessels coming from the high seas, before arriving at the first big port situated on the mouth of the river, have to traverse on the river the territory of a State other than the one under whose jurisdiction the port falls. Owing to this, the regime of river navigation applies to calls at the port of Antwerp by sea-going vessels, although, from the geographical point of view and as regards its economic role, the latter can be qualified as an inland seaport.

Nevertheless, as Ch. De Visscher states (author's translation): "Since the Barcelona Conference a trend is taking shape, with growing force, in favour of a distinction between river navigation properly so called and maritime navigation, navigation which, being carried out by sea-going vessels on a river, no matter whether it is national or international by its geographical features, is only a complement of navigation on the sea"⁹⁰.

Indeed, the French delegation at the Barcelona Conference pointed out that there are large rivers which are accessible to sea-going vessels up to a certain distance from their mouth, and on which there are inland seaports. These inland ports have a double character: they are at the same time seaports and river-ports. The Statute on the regime of navigable waterways should regulate river transport and not maritime transport; those ports should therefore be dealt with in this Statute, except in so far as they are river-ports. The navigation to be regulated in the Statute is not maritime navigation downstream of those ports, but river navigation⁹¹.

⁸⁹ Le régime des fleuves internationaux. Course of instruction at the Institute for Advanced International Studies, Paris, in the academic year 1947/48. Multiplied, p. 27.

⁹⁰ Théories et réalités . . . , *op.cit.* in note 9, p. 236.

⁹¹ Conference on Navigable Waterways, pp. 346–347.

Some international lawyers have embraced this view. In the opinion of Ch. Dupuis (author's translation): "It is in the interest of maritime navigation that the sea-going vessels of all flags shall be able to use the international river as far as the ports of the riparian State having no seaboard which are accessible to them"⁹². In D. Anzilotti's view, too, (author's translation) "... vessels coming from or going to the sea have the right of inoffensive passage on the river and are admitted to the ports situated on the river on the same conditions as if it were a port situated on the sea"⁹³.

The regime of maritime navigation must therefore apply – according to this view – not only to access to ports situated on or near the mouths of rivers, but in all cases where a sea-going vessel makes use of an international or national watercourse. This would imply first of all the reduction of the field of application of the regime of river navigation to transports carried out by river craft between river-ports. Moreover, if this view were put into practice, it would have as its consequence the parallel application on large river sections of two regimes of navigation, one for transport operations of sea-going vessels and the other for such operations of river-craft. Such a system would involve certain drawbacks.

The reasonings in question cannot rely on the conventional practice of States. It is true that in the few navigation acts of the nineteenth century the regime of vessels engaged in distant voyages, *i.e.* those which carry out transports from the open sea to the ports of an international river and *vice versa*, was regulated in another way than the regime that is applicable to purely river carriage⁹⁴. However, those conventions were not concerned with the application of the regime of maritime navigation. Although the riparians had laid down different rules for vessels coming from the sea to the river or going from the river to the sea on the one hand and for craft navigating exclusively between different river-ports on the other hand (the declaration of the Parties to the Act of Mannheim, made at the time of the signature of the Additional Protocol No. 2 signifies essentially the same thing), all those activities were nevertheless considered and regulated as different categories of river navigation.

With a view to distinguishing the sphere of river navigation from that of maritime navigation, Art. 36 of the 1922 Elbe Navigation Act stipulates

⁹² 35 Annuaire 1929 I, p. 418.

⁹³ 37 Annuaire 1932, p. 104.

⁹⁴ See the Additional Elbe Act of 13 April 1844 (Martens, N.R.G., vol. 6, pp. 386 *et seq.*); the Danube Navigation Act of 7 November 1857 (Martens, N.R.G., vol. 16, part 2, pp. 75 *et seq.*).

that the provisions on the control of the quality of the vessels navigating on the Elbe are not applicable to ships coming from the sea and navigating on the maritime Elbe, which are subject to the regime of maritime navigation.

Vallotton d'Erlach, on the basis of a study of the practice of States, arrived at the conclusion that the application of the regime of maritime navigation is generally localized on the river sections downstream of river-ports at which these vessels regularly call⁹⁵.

It seems that the way in which inland seaports are regarded is decisive for the delimitation of the respective fields of application of the regime of maritime navigation and that of river navigation. Art. 1 of the Statute of Geneva on the International Regime of Maritime Ports of 9 December 1923⁹⁶ is conclusive for the definition of a maritime port: "All ports which are normally frequented by sea-going vessels and used for foreign trade shall be deemed to be maritime ports". The scientific authority of the International Law Institute has confirmed the value of this definition by inserting it literally into its Resolution on the regime of sea-going vessels and their crews in foreign ports in peace-time, adopted in 1928⁹⁷. It is beyond doubt that this definition refers to vessels engaged in distant voyages, and that ports situated along a river that is not deep enough to be accessible to sea-going vessels of that kind do not fall within the scope of the definition.

Ports to be considered as seaports situated on a river in the sense referred to above are Rotterdam and Amsterdam on the Rhine basin⁹⁸. As far as those ports the regime of maritime navigation, characterized by equal right of navigation for all nations, applies to vessels coming from or going to the open sea. Upstream of those ports the regime of Rhine navigation applies to low-tonnage vessels which are able to terminate or begin their voyage in river-ports situated upstream of these points. The States represented on the Central Commission, as Parties to the Revised Rhine Navigation Convention, as stated above (see Section III § 3), have the right – subject to limitations resulting from the Treaty of Rome establishing the European Economic Community – to regulate and modify at any time the conditions of admission of the vessels of third States to traffic on the Rhine basin. It is self-evident that this right also includes the capacity to fix the conditions of

⁹⁵ *Op.cit.* in note 92, pp. 275–276.

⁹⁶ Martens, N.R.G. 3rd series, vol. 19, pp. 250 *et seq.*

⁹⁷ 34 *Annuaire* 1928, pp. 736–739.

⁹⁸ The waterways connecting the Rhine with the Amsterdam harbour system also fall within the territorial scope of the Revised Rhine Navigation Convention. See note 43.

participation in this traffic of vessels flying the flag of third countries, even if they come from the high seas, or excludes them – in accordance with Art. II, para. 2 of the Additional Protocol No. 2 – from transports to be carried out between a port (a seaport or a river-port) situated outside the Rhine basin and ports of the Rhine basin.

Accordingly, the second part of the declaration of the Contracting Parties concerning transport operations of vessels coming from or going to the open sea, in which the States represented on the Central Commission reserve to themselves, in the given case, the right to revise their position and to apply the provisions of the Additional Protocol No. 2 to those transport operations as well, is merely the express enunciation of a right which they have even in the absence of any explicit manifestation of their will in this respect.

Section IV. The Regime of the Canalized Main from Mainz to Bamberg

§ 1. The legal status of the Main according to the Act of Mannheim

The provisions of the Act of Mannheim refer expressly to the Main only in two respects. According to Art. 3 no dues based solely on the fact of navigation can be levied on vessels or their cargoes or on rafts navigating on the tributaries of the Rhine in so far as they are situated on the territories of the Contracting Parties. Art. 4 provides that national treatment in all respects shall be accorded on the same tributaries (in so far as they are situated within the territories of the Contracting Parties) to vessels flying the flag of one of the riparian States and their cargoes. In the view of Jaenicke, considering that the wording of Art. 1, in which the principle of free navigation on the Rhine is set forth, does not allude to the tributaries, this freedom does not extend to the latter. The provisions contained in Arts. 3 and 4 therefore only favour foreign vessels authorized by the Federal Republic to navigate on the Main⁹⁹.

Against this view, which signifies essentially an assimilation of the Main to German internal waterways, Annexe XVI C of the Final Act of the Vienna Congress may be recalled. In the words of Art. 1 of this Annexe the freedom of navigation as determined for the Rhine extends to certain

⁹⁹ *Op.cit.* in note 26, pp. 27–29.

tributaries of the Rhine, among others to the Main. According to Art. 2 the navigation of these tributaries shall be free in the same way as this freedom has been established on the Rhine. It appears from these provisions that the authors of the Act of Vienna intended to establish a close and permanent relation between the navigation regime of the Rhine and that of some of its affluents. A complete assimilation of the regime of the tributaries to that of the Rhine cannot be deduced from Annexe XVI C. The relation established by Annexe XVI C implies no more than application of the principle of freedom of navigation to affluents in the same sense as it is applied to the Rhine, which does not exclude differences concerning special provisions justified by the local conditions of the various affluents. The fact that Art. 3 of the Act of Mannheim expressly mentions the tributaries of the Rhine can be accounted for by the fact that the gratuitous use of waterways, stipulated in that article, has introduced a new element into the navigation regime of the Rhine¹⁰⁰. It had therefore to be stipulated that this innovation also produces its effect on the tributaries of the Rhine.

Art. 4 only states that vessels belonging to the navigation of the Rhine benefit, on the tributaries, by national treatment; from this it follows that all other vessels do not enjoy such treatment. Protocol no. 1 of the Commission for the revision of the Rhine Navigation Act of 13 August 1868 elucidates the intention of the Contracting Parties. During the preparation of the text, the French plenipotentiary, in connection with the provision concerning the treatment on a footing of perfect equality of vessels belonging to the Rhine navigation, wished to add the following: "They [*i.e.* vessels belonging to the Rhine navigation] shall enjoy in any of the riparian States complete freedom of movement on the waterways which communicate with the Rhine, subject to national legislation applicable to national vessels and their cargoes" (original French). The plenipotentiaries of the German riparian States were of the opinion that such a provision would go far beyond the scope of the Rhine Navigation Act and would, in fact, be aimed at the whole of Germany's internal navigation, since nearly all German rivers were connected with each other by canals. It seemed inadmissible to them to insert a general provision of this type into the Navigation Act. For these reasons they rejected this initiative¹⁰¹. It follows from this

¹⁰⁰ Art. 111 of the Act of Vienna as well as Art. 14 of the Act of Mainz on Rhine navigation of 31 March 1831 (Martens, N.R., vol. 9, pp. 252 *et seq.*) yet allowed riparians to levy dues on vessels navigating on the Rhine and its tributaries and on their cargoes for the sole fact of navigation.

¹⁰¹ Révision de l'Acte de navigation du Rhin de 1831, p. 105.

that there was no doubt that the rules of free navigation of vessels belonging to the navigation of the Rhine are also applied to the navigable waterways mentioned in the first paragraph of Art. 3; the German States had only refused the extension of those rules to the whole of the internal navigable waterways communicating with the Rhine. The thesis of Jaenicke therefore appears to be untenable.

Art. 356, para. 2 of the Treaty of Versailles provides that none of the provisions of the Act of Mannheim "shall impede the free navigation of vessels and crews of all nations, on the Rhine and on waterways to which such conventions apply", *i.e.* it refers, as regards the field of application of the international regime, to the Act of Mannheim. The recent modification also regards the navigable waterways referred to in the Act of Mannheim as a whole. The Commission of the European Communities understands by international navigation the navigation taking place on the Rhine and its tributaries as well as the other navigable waterways referred to in the Act of Mannheim¹⁰². Consequently, the differentiation between the navigation regimes according to the categories of their beneficiaries is also applied on the Main.

§ 2. Has the Main become a German internal watercourse?

In view of the treaty status of the Main, the point of view according to which the deep-draught Rhine-Main-Danube waterway has a national character on all its sections considered (see Section II § 2) requires a thorough examination where the Main is concerned. One might support the thesis held by the Federal Government with arguments derived from two different classes of considerations.

The first of these are based on the argument derived from the geographical (or political) criterion of the international character of watercourses: their division between two or more States. This is the starting-point of Mr. Hübener, Counsellor at the Federal Ministry of Communications, who recalls that at the time of the Congress of Vienna, and also at that of the Act of Mannheim, the Main traversed different sovereign German States. At present this river flows through the territory of a single State. The regulations based on its international character have therefore become void¹⁰³.

¹⁰² Proposal submitted to the Council on 23 January 1980 on the subject of the Community regime in the matter of the Value Added Tax. *Rev. de la nav. fluv.* 1980, p. 120.

¹⁰³ *La liberté de navigation sur les voies intérieures allemandes*, *Rev. de la nav. fluv.* 1973, p. 155.

For the evaluation of this argument one must know that the legal literature is indeed divided on the point whether an international regime of navigation should also apply to the watercourse after it has become national. Some publicists do not wish the area governed by international law to be reduced. They think that the regime of a watercourse, once it has become established in international law, cannot be affected by later changes in the territory of States. Such was the opinion of Carathéodory¹⁰⁴. And according to Vallotton d'Erlach the vested rights of third States to the free navigation of a waterway do not cease to exist after territorial changes¹⁰⁵. In a more recent monograph R. R. Baxter takes a similar view¹⁰⁶. Other publicists, however, consider that a legal status is abrogated when the conditions required for it cease to exist. Thus, P. Orban maintains that, if a watercourse which formerly traversed or separated the territory of more than one country subsequently flows, owing to a change in the political map, through the territory of only one State, the old navigation treaties should be considered null and void, for the Act of Vienna, in implementation of which they have been concluded, is only concerned with rivers traversing or bordering on different States¹⁰⁷. According to G. Sauser-Hall it would be an untenable fiction to suggest that an international river should preserve this designation for ever, while the social facts which determined its international character have undergone a fundamental alteration, and its course no longer borders on or traverses various States¹⁰⁸. Nor does State practice give any reliable guidance on this point. The Mississippi became a national American river after the cession to the United States of Louisiana in 1803 and that of Florida in 1819. From the American point of view the river then lost its international character and is no longer open to foreign flags¹⁰⁹. On the Po, although the Peace Treaties of Zurich (1859) and Vienna (1866) made it an internal Italian river, freedom of navigation for all flags has been maintained¹¹⁰.

Nevertheless, it would seem that the present state of international river law does not provide a sufficient basis on which to presume survival, as

¹⁰⁴ *Op.cit.* in note 23, p. 303.

¹⁰⁵ Conference on Navigable Waterways, p. 81.

¹⁰⁶ The Law of International Waterways with Particular Regard to Interoceanic Canals (1964), p. 112.

¹⁰⁷ *Etude de droit international fluvial* (1895), p. 145.

¹⁰⁸ *L'utilisation industrielle des fleuves internationaux*, 83 Hague Recueil 1953, p. 477.

¹⁰⁹ Cf. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, vol. I (2nd ed. 1951), p. 257.

¹¹⁰ See the declaration made by the Italian delegate at the Conference of Barcelona. Conference on Navigable Waterways, p. 75.

vested rights, of navigation rights of third States on a watercourse that has lost its international character as a result of territorial changes. But in our opinion the status of the Main is a different matter. The international regulations, and in particular the Act of Mannheim, regard the Main as an integral part of the Rhine basin. In the matter of the tributaries in question of the Rhine the geographical – or political – condition of the application of the international regime has assumed the specific form “in so far as they are situated on the territory of the High Contracting Parties”. Since it is stated in the Prussian Memorandum of September 1867 with reference to the revision of the Act of Mainz¹¹¹: “the Act – to wit: the one to be established – must remain perpetually in force”, it seems that the idea of the Contracting Parties was to conceive the Rhine basin falling within the field of application of the Navigation Act as being a permanent entity¹¹².

According to another train of thought it may be advanced in favour of the national character of the Main that it has been made accessible up to Bamberg for vessels of 1500 metric tons thanks only to considerable engineering works. This argument too does not seem convincing. The section in question of the Main was navigable in its natural state before the completion of the works in question¹¹³. The Statute of Barcelona defines the notion “naturally navigable” as an element of the concept of “navigable waterways of international concern”, as follows: “Any natural waterway or part of a natural waterway is termed ‘naturally navigable’ if now used for ordinary commercial navigation, or capable by reason of its natural conditions of being so used; by ‘ordinary commercial navigation’ is to be understood navigation which, in view of the economic condition of the riparian countries, is commercial and normally practicable” (Art. 1, para. 1(b)). Art. 12, para. 2 of the Resolution of the International Law Association on the uses of the waters of international rivers (Helsinki Rules), adopted in 1966¹¹⁴, although it is based upon the definition of the Barcelona Statute, shows a tendency to reduce, from the point of view of the application of an international regime of navigation, the difference between natural navigability and artificial navigability: “Rivers or lakes are ‘navigable’ if in their

¹¹¹ Révision de l'Acte de navigation du Rhin de 1831, p. 92.

¹¹² After World War I, A. Lederle regarded the Neckar and the Main as having international character, *Das Recht der internationalen Gewässer* (1920), pp. 145–147.

¹¹³ Jaenicke reports that a regular traffic of steamers already took place on this river before the time of the Act of Mannheim. The advent of steam navigation necessitated already in 1843 the promulgation of a regulation on the shipping police on the Main. *Op.cit.* in note 26, p. 25.

¹¹⁴ I.L.A. Report of the 52nd Conference (1966), p. 505.

natural or canalized state they are currently used for commercial navigation, or are capable by reason of their natural condition of being so used". The first part of this definition applies to waterways on which commercial shipping is already taking place. In that case this learned society does not attach any importance to the question whether the waterway is navigable by reason of its natural condition or has been made navigable by engineering works. The second part of the definition refers to waterways on which navigation is not yet being exercised in circumstances such as those mentioned above, but which are capable, in their natural condition, of being used in that way.

The question of legal effect of improvement works on the international status of a watercourse arose last in connection with the navigability of the Moselle. Before the completion of the works provided for in the French-German-Luxembourg Convention of 27 October 1956¹¹⁵, which were designed to make the Moselle accessible up to Thionville for vessels of 1500 metric tons, navigation on this river, which passes through an economically highly developed area, could be exercised only by small vessels. Thus, the Moselle, in view of the natural conditions of the river and the economic situation of its riparian States, could not carry on a regular, commercially rewarding shipping trade; in the view of some, therefore, it could not be regarded as a navigable waterway of international concern within the meaning of Art. 1 of the Statute of Barcelona¹¹⁶. In the opinion of others, the supporters of this view overlook the fact that the freedom of navigation as established on the Rhine is to apply, as stipulated in Annexe XVI C of the Act of Vienna, to the Moselle as well¹¹⁷. It is quite true that the rule in the Statute of Barcelona which defines the navigability of waterways has a subsidiary character: it operates only in the absence of special treaty provisions granting wider facilities to the shipping trade (see Arts. 13 and 20). Under Art. 28 of the 1956 Treaty the freedom of navigation on a footing of perfect equality is for the moment recognized for all flags on the Moselle from Koblenz to Metz. Nevertheless, Art. 30 provides that, in the event of modification of the Rhine navigation regime, the Contracting States will meet for consultation about extension to the Moselle of the new Rhine regime with such adjustments as may be appropriate. In connection with the new Additional Protocol modifying the Rhine regime this question will

¹¹⁵ B.G.Bl. 1956 II, pp. 1863 *et seq.*

¹¹⁶ Cf. D. Ruzié, *Le régime juridique de la Moselle*, 10 *Annuaire Français de Droit international* 1964, pp. 796–797.

¹¹⁷ Cf. Poitrait, *La canalisation de la Moselle*, 49 *Strom und See* 1954, p. 458.

become of timely interest. It follows from the foregoing that execution of hydrotechnical works intended to improve the navigability of the Main within the scope of the construction of the deep-draught Rhine-Danube navigable waterway cannot affect the international status of the Main, as laid down in fundamental treaties.

Levying of taxes on vessels and their cargoes which ply the canalized Main is another question. Art. 3, para. 1 of the Act of Mannheim abolished only dues based on the sole fact of navigation. According to the Final Protocol it has unanimously been recognized that these stipulations did not apply to the duties to be levied for the use of engineering works, such as sluices, etc. (no. 2 A). The Federal Government is therefore entitled under international law to levy dues and taxes – in conformity with rules and usages which have developed in this matter in State practice – on vessels and cargoes which actually benefit by the facilities ensured to navigation by the hydraulic engineering works in question.

Section V. The Legal Status of the Canal between Bamberg and Kelheim

§ 1. Navigation on canals in the light of international treaties

The idea of free navigation was originally conceived only with regard to naturally navigable waterways. The reasoning of the writers on the law of nature started from the fiction that at the time of the first human beings all things were the common and undivided property of all men, because they had a common heritage¹¹⁸. The dominion of the peoples over their territory, of which rivers constitute a part, was introduced with the reservation that these rivers ought to be open to those who, for legitimate reasons, are in need of passage on them¹¹⁹. In this way the sovereignty of riparians over their rivers is subject to an important restriction, which confers on rivers, as means of communication, the legal status of a kind of common property of all nations.

This thesis could not be applied essentially to artificial waterways, built by the hand of man. On the other hand, it is also true that the canals which existed already at the time of the Vienna Congress were to be found – but for a few exceptions – on the territory of a single State, which assimilated

¹¹⁸ Grotius, *op.cit.* in note 68, lib. II, cap. II, § II, 1.

¹¹⁹ Grotius, *op. cit.*, lib. II, cap. II, § XIII, 1.

them to the national watercourses. This is why the treaty provisions on the navigation of certain canals were associated for a long time with territorial changes: the new frontier line cut across canals, which necessitated the regulation of their navigation¹²⁰. Later, many bilateral agreements – often within the framework of treaties of commerce and navigation – which stipulate the opening on the basis of reciprocity of internal navigable waterways in general, or of some of them, to the vessels of the other Contracting Party, extended their field of application to artificial navigable waterways as well¹²¹. In this context we are referring to the agreement concluded on 26 May 1972 between the Federal Republic of Germany and the German Democratic Republic¹²², which provides for the admission of vessels of the other Contracting Party to navigation on the natural and artificial internal navigable waterways, for carrying out exchange traffic between the two countries and transit to third countries.

The Treaty of 13 May 1963 between Belgium and the Netherlands concerning the connection between the Scheldt and the Rhine¹²³ concerns a different situation. Art. 2 provides for the establishment of a navigable

¹²⁰ See Art. II of the Peace Treaty of Campo-Formio of 17 October 1797 between France and Austria (Martens, Rec., vol. 7, pp. 208 *et seq.*); Art. 17 of the Peace Treaty of Tilsit of 9 July 1807 between France and Prussia (Martens, Supp., vol. 4, pp. 444 *et seq.*); Art. 22 of the Russian-Austrian Treaty and Art. 24 of the Russian-Prussian Treaty, concluded on 3 May 1815 on the subject of the fourth partition of Poland (Martens, N.R., vol. 2, pp. 225 *et seq.*, pp. 236 *et seq.*). In the words of Art. 10 of the Separation Treaty of 19 April 1839 between Belgium and Holland (Martens, N.R., vol. 16, part 2, pp. 773 *et seq.*) the use of canals which pass through both countries (this mainly referred to the canal from Ghent to the Scheldt) continued to be free and common to the inhabitants of both States.

¹²¹ Among them may be cited Art. 15 of the Treaty of 2 December 1851 between Austria and Bavaria concerning the navigation of the Danube (Martens, N.R.G., vol. 16, pp. 63 *et seq.*) as well as Art. 10 of the Treaty of Commerce and Navigation, concluded on 31 December 1851 between the Netherlands and the German Customs Union (Zollverein) (Martens, N.R.G., vol. 12, part 2, pp. 216 *et seq.*). The Treaty of 8 May 1871 between the United States and Great Britain – for Canada – on the regime of the boundary waters (Martens, N.R.G., vol. 20, pp. 698 *et seq.*) is significant from this point of view. Since the navigation of the St. Lawrence between Lake Ontario and Lake Erie, as well as between Lake Huron and Lake Superior, is not very profitable without the use of the canals by which they are linked (upstream of Lake Erie the canals are situated on American territory, whilst the Welland Canal, linking Lake Erie to Lake Ontario, lies entirely on Canadian territory), the freedom of navigation of vessels belonging to the two riparians was extended to the canals as well. Art. 1 of the Treaty of 11 January 1909 concerning the use of waters forming the boundary (Martens, N.R.G. 3rd series, vol. 4, pp. 208 *et seq.*) provided for free navigation in favour of American and Canadian vessels on all the canals linking boundary waters which existed at that time and those which should be constructed in the future.

¹²² B.G.Bl. 1972 II, pp. 1449 *et seq.*

¹²³ 540 U.N.T.S., pp. 3 *et seq.*

waterway connecting the Waal (the name of the main branch of the Rhine on Dutch territory) with the Antwerp harbour system. In Art. 32 the Contracting Parties declare that freedom of navigation and the right to enjoy national treatment in transport matters as guaranteed by treaties relating to the "intermediary waters" which connect the Rhine with the Western Scheldt, in force at the time of signature, shall apply to this waterway. The new waterway, situated almost entirely on Dutch territory, was opened to the traffic in 1975.

On the doctrinal level only the commentaries on Art. XII of the Helsinki Rules of the International Law Association are intended to integrate the canals into the notion of the international river¹²⁴. But since Art. XII adopted again the two traditional criteria of the international watercourse, it is evident that the canals which fall within the scope of this definition must also combine those criteria. The commentaries therefore refer solely to the canals the different parts of which are situated on the territory of the different States.

The application of the navigation regime of a river to lateral canals, constructed for the special purpose of remedying imperfections or non-navigability on certain sections, is quite a different matter¹²⁵. According to Art. 331, para. 1 of the Treaty of Versailles the internationalized river systems include "lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river"¹²⁶. Arts. 331, para. 2 and 353 provide that the Rhine-Danube Canal, should such a deep-draught navigable waterway be constructed, would also be governed by the navigation regime established by the Treaty¹²⁷. However,

¹²⁴ "Although the ... definition [i.e. of the international rivers] set forth in this Article makes no reference to canals, they are nevertheless not excluded if navigable". Report of the 52nd Conference (1966), p. 506.

¹²⁵ In this context it may be observed that "imperfection" and "non-navigability" represent two different notions. "Imperfection" indicates an obstacle barring navigation on a certain section; such a section could, however, be made navigable by means of engineering works, or by the construction of a lateral canal, but the "non-navigability" of certain sections could be remedied only by means of lateral canals which joined two naturally navigable sections separated by a non-navigable section.

¹²⁶ This text is reproduced in Art. 291 of the Treaty of Saint-Germain, in Art. 219 of the Treaty of Neuilly, and in Art. 275 of the Treaty of Trianon.

¹²⁷ It is to be noted that, according to Art. 361 of the Treaty of Versailles, if a deep-draught Rhine-Meuse navigable waterway should be constructed, this shall be placed under the same *administrative* regime (but not under the same *navigation* regime) as the Rhine itself.

these provisions, according to which this regime was to apply to a canal ensuring a junction between two river systems which were completely separated from each other, form an exception to the above-mentioned definition of artificial waterways within the scope of the Peace Treaty.

Shortly after, at the Conference of Barcelona, it became clear that the wide conception of the Peace Treaties, as far as the navigation of artificial waterways was concerned, could not apply entirely, though the Commission of Enquiry did retain the idea of assimilating lateral canals constructed to remedy imperfections in naturally navigable waterways to such waterways. On the contrary, the idea to extend the regime governing the navigation of an international river to lateral canals which are destined to connect two naturally navigable sections of this river was rejected by the Commission.

As against this, in spite of a proposition to this effect made by the British delegation, the Commission decided not to place under the international regime, at all events by means of a clause of a general nature, "lateral" canals constructed in order to connect the upper part of an international watercourse with its lower part, which is also naturally navigable, but separated from the upper part by a non-navigable river section. There was reason to fear in such a case that a State under whose sovereignty this non-navigable part was situated would not proceed to carry out works of which not only would the exclusive benefits not accrue to it, but which might also result in immediately and automatically placing the entire upper part of the river under the international regime in virtue of the definition¹²⁸.

The Conference was agreed on "lateral canals constructed in order to remedy the defects of a waterway of international concern being assimilated thereto" (Art. 3, para. 1(d)). The provisions of the Peace Treaties, which allowed for the assimilation of a larger number of artificial waterways to naturally navigable ones than did the Statute, continued in force – in accordance with Art. 2 of the Convention of Barcelona – with regard to the river systems referred to in the Peace Treaties. Thus, the internationalized Danube system included, as stated in Art. 2 of the 1921 Danube Statute, any lateral canals or channels constructed "to connect two naturally navigable sections" of these waterways. The International Law Institute, in its Resolution of 1934, kept within the limits established by the Statute of Barcelona¹²⁹. Under Art. 2 of the 1948 Convention of Bel-

¹²⁸ Conference on Navigable Waterways, p. 424.

¹²⁹ 38 *Annuaire* 1934, pp. 713–719.

grade the international regime of the Danube applied only to the navigable part of the river itself.

On the basis of Art. 358 of the Treaty of Versailles, which entitled France to take water from the Rhine to feed navigation and irrigation canals, this country proceeded to construct the Great Canal of Alsace. This is a lateral canal of the Rhine on French territory, destined to duplicate the navigability of the river on the section between Strasbourg and Basle. In accordance with the provisions of the above-mentioned article the Central Commission for Rhine-Navigation, by its Resolutions of 16 December 1921 and of 29 April 1925, with the consent of France, declared the Rhine navigation regime applicable to the Great Canal of Alsace¹³⁰.

It may be noted that, under Art. 8 of the Convention relating to the River Senegal of 7 February 1964¹³¹, lateral canals such as may be constructed for the special purpose of avoiding the non-navigable portions of the river or of improving certain sections of the river, its affluents, branches, and outlets must be considered as an integral part of the river, likewise open to international traffic. Art. 14 of the Agreement of 25 November 1964 concerning the Niger River Commission, and navigation and transport on the River Niger¹³², contains similar provisions.

It is seen from all that precedes that the admission of the foreign flag to the navigation of artificial waterways always takes place on the basis of treaty provisions. In the absence of a special provision the observance of a single rule is indicated, which seems to be customary in international law: the navigation regime of an international river extends to lateral canals and channels constructed either to improve or to duplicate naturally navigable sections of the river. *Thus, from customary international law there does not result any obligation for a State concerning the navigation regime of an artificial waterway which, though forming a junction between two international watercourses, is situated exclusively on the territory of a single State. Such a canal is in fact and in law a new artificial waterway, totally independent of the river systems which it joins. Consequently, in the absence of express treaty provisions, it cannot be included within the scope of the international regime of navigation which applies to one or the other of the connected river systems.*

¹³⁰ See *Les Actes du Rhin*, ed. by the C.C.R., pp. 34 and 36.

¹³¹ See André, *L'évolution du statut des fleuves internationaux d'Afrique noire*, *Revue juridique et politique, indépendance et coopération* 1965, pp. 285 *et seq.*

¹³² 587 U.N.T.S., pp. 19 *et seq.*

As regards the existence of a special treaty provision, the provisions of the Treaty of Versailles cited above have of course provided for the application of the navigation regime established by that Treaty on the navigable Rhine-Danube waterway, should such a deep-draught waterway be constructed. But the river navigation clauses of the Treaty of Versailles have not become customary international law (see Section III § 3). Therefore, even if the canal had been constructed at the time when those river navigation clauses were still incontestably in force, it could not be alleged that there is an "objective status" – which may arise from a treaty attaching obligations to a territory, river, canal, etc. which afterwards become detached, owing to the fact that they have acquired the force of a customary rule, from their treaty origin, and bind the territorial State independently of the force of the treaty that gave rise to them – by virtue of which the application of the international regime would be obligatory.

§ 2. Examination of the arguments advanced in favour of internationalization

Tentative suggestions were made in the interest of internationalization of the canal on the part of the States with a collectivist economy. The news agency of the Embassy of the Soviet Union in the Federal Republic of Germany, »Die Sowjetunion heute« of 1 February 1977, published an article on the subject. It emphasized the great importance of the canal for many European States, *inter alia* for the Soviet Union. "This navigable waterway from Rotterdam to the Black Sea will have to be opened to the commercial navigation of all countries on a basis of equality and non-discrimination, according to the generally recognized principles of freedom of international navigation" (original German), the author of the article concluded.

A little later two Soviet lawyers made an attempt to support this claim with legal arguments. The two authors recall that the Federal Republic will take from the Danube non-negligible quantities of water which will serve not only to feed the connecting canal, but also to supply the needs of the region traversed by the canal. This unilateral decision, according to Mr. Baskine and Mr. Tarassov, constitutes an infringement of international river law and is also incompatible with the international rules on the protection of the natural environment. Digging a canal is a decision which falls under the sovereignty of the Federal Republic, but the same is not true for putting it into use as soon as it will be necessary to take water from the Danube, an international river. For that purpose the Federal Republic

must conclude an international agreement with the other riparian States of the Danube. It would be no more than a just compensation to grant to those States the right to navigate freely on the canal as a satisfaction for the prejudice sustained as a result of the withdrawal of water from the Danube by the Federal Republic. Since the Rhine-Main-Danube junction connects two maritime basins, on the model of the Suez Canal and the Panama Canal, the authors deem that it would be fair to apply the same navigation regime to it¹³³.

Schelzel of the University of Rostock (German Democratic Republic) has come to their assistance in support of the thesis of internationalization of the canal. Schelzel holds that it has an international character, although it is situated entirely on the territory of the Federal Republic. This character results from the fact that it connects two rivers on which the navigation is regulated by international agreements. The introduction on that canal of measures such as the fixing of transport quotas or the subordination of transit to an authorization would be only an impediment to the free movement of the vessels of the socialist countries¹³⁴.

On the Western part the »Arbeitsgemeinschaft der Rheinschiffahrt« proposed, in a resolution dating from 1974, to investigate whether the field of application of the Act of Mannheim could be extended to the canal. This proposal also tends to introduce an international regime. It is true that this representative organ intended to subordinate the application of the Act of Mannheim to the navigation of the canal to the restriction of the beneficiaries of the right of navigation on the Rhine to the States Parties to the Act of Mannheim¹³⁵.

Some of the arguments advanced in support of internationalization are found at once to be erroneous. It is known that freedom of navigation and equal treatment of all flags on interoceanic canals does not result from general international law. Baxter therefore justly states: "If a State has no obligation to construct an interoceanic canal in the first place, there is no reason in principle or in policy why it should be required, once the waterway is in existence, to make it available to all"¹³⁶.

The status of such canals has been established in special treaties, more particularly in the Treaty of Constantinople of 28 October 1888¹³⁷ for the Suez Canal and in the Convention of 18 November 1901 between the

¹³³ Kanal Rajn-Majn-Dunaj, Sovetskoe Gosudarstvo i Pravo 1977, no. 5, pp. 118–122.

¹³⁴ Verkehr (East German Review of Communications) 1977, p. 373.

¹³⁵ See Report, Annexe III.

¹³⁶ *Op.cit.* in note 106, p. 185.

¹³⁷ Martens, N.R.G. 2nd series, vol. 15, pp. 557 *et seq.*

United States and Great Britain¹³⁸ for the Panama Canal. On the other hand, neither the *Canal du Midi* connecting the Mediterranean with the Atlantic on French territory nor the canal dug in 1933, which connects the White Sea with the Baltic on Soviet territory, was placed under an international regime. The argumentation of the East German professor is also devoid of legal foundation. We have already shown (see Section V § 1) that there does not exist a rule of customary international law by virtue of which a State was obliged to open a canal, constructed on its territory to ensure a junction between two international watercourses, to foreign flags¹³⁹.

On the other hand, we have to consider the other arguments advanced by Baskine and Tarassov. At present it is generally recognized that the right of the riparians to dispose of the section of watercourses situated on its territory is limited in so far as such a disposal might have the effect of causing damage to another State¹⁴⁰. Different judgments of national and international courts confirm the validity of the theses first elaborated on the doctrinal level. The German *Reichsgericht*, in its judgment pronounced in the *Donauversinkung* Case (1927), considered that the exercise of sovereign rights by every State in regard to international rivers traversing its territory is limited by the duty not to injure the interests of other members of the international community. States through whose territories there flows an international river must duly consider each other's interests. No State may take measures on its own territory, concerning an international watercourse, which affect the flow of water in the territory of another State to the detriment of the latter¹⁴¹. The Arbitral Tribunal to which the French and the Spanish Government submitted the dispute known as the *Lac Lanoux* Case, admitted (1957) "that there exists a princi-

¹³⁸ U.S. Treaty Series No. 401.

¹³⁹ Cf. Zemanek, *op.cit.* in note 3, p. 54; Krzizanowski, *op.cit.* in note 26, p. 344.

¹⁴⁰ It was Vattel who transposed the rules of Roman law governing the civil relations of neighbourship between riparian estates to the domain of the law of nations. He applied the rule of the Digests (Dig., lib. XLIII, tit. XIII, §§ I, III, and IX), prohibiting the production of any changes in the bed or banks of public rivers resulting in the prejudicial modification for the downstream areas of the natural flow of the waters, to the relations between States. *Le droit des gens*, liv. I, chap. XXII, § 271. In this respect, see Fauchille, *Traité de droit international public*, t. I. 2 (1925), pp. 449 and 451; H. A. Smith, *The Economic Uses of International Rivers* (1931), pp. 151 *et seq.*; J. Andrassy, *Le droit international de voisinage*, 79 *Hague Recueil* 1951, p. 114; Sauser-Hall, *op.cit.* in note 108, p. 517; Berber, *Rivers in International Law* (1959), p. 155; Delbez, *Les principes généraux de droit international public* (3rd ed. 1963), pp. 231–232; C.-A. Colliard, *Evolution et aspects actuels du régime juridique des fleuves internationaux*, 125 *Hague Recueil* 1968, p. 380.

¹⁴¹ Annual Digest 1927/28, Case No. 86. See also Judgment of the United States Supreme Court in the *Laramie River* Case, which confronted the State of Wyoming with the State of

ple prohibiting the upstream State from changing the waters of a river in their natural conditions to the serious injury of a downstream State”¹⁴².

On the other hand, this principle cannot be interpreted in the sense of a general obligation of the upstream State to refrain from any use of the watercourse which may affect the volume of the water. In practice such an interpretation would amount to unilateral favouring of the lower riparian(s). As the United States Supreme Court formulated it: “As between States from one of which a stream flows to the other, the lower State is not entitled to have the stream flow as it would be in nature regardless of need or use”¹⁴³.

At present the rule of *equitable utilization* seems to dominate the doctrine and the practice. Already in 1945 the United States Supreme Court based its decision on the following idea: “In determining whether one State is using or threatening to use more than its equitable share of the benefits of a stream, all the factors which create equities in favour of one State or the other must be weighed as of the date when the controversy is mooted”¹⁴⁴.

Later, F. L. Brierly set forth this theory in a very lucid way. In his view:

“Each State has in principle an equal right to make the maximum use of the water within its territory, but in exercising this right must respect the corresponding right of another State. Where one State’s exercise of its right conflicts with the water interests of another, the principle to be applied is that each is entitled to the equitable apportionment of the benefits of the river system in proportion to its needs and in the light of all circumstances of the particular river system. A State is in principle precluded from making any change in the river system which would cause substantial damage to another State’s right of enjoyment without that State’s consent. It is relieved from obtaining that consent, however, if it offers the other State a proportionate share of the benefits to be derived from the change or other adequate compensation for the damage to the other State’s enjoyment of the water. A State whose own enjoyment of the water is not substantially damaged by a development in the use of a river beneficial to another State is not entitled to oppose that development”¹⁴⁵.

Colorado (1922), 259 U.S. 419, 42, S.Ct. 552; Judgment of the Italian Court of Cassation in the Case of *Société énergie électrique du littoral méditerranéen v. Compagnia imprese elettriche Liguri* (1939), Annual Digest 1938–40, Case No. 47.

¹⁴² U.N. Reports on International Arbitral Awards, vol. 12, p. 304.

¹⁴³ *Colorado v. Kansas* (1944), 320 U.S. 383, 64 S.Ct. 176.

¹⁴⁴ *Nebraska v. Wyoming* (1946), 325 U.S. 589, 65 S.Ct. 1328.

¹⁴⁵ The Law of Nations (5th ed. by Sir Humphrey Waldock 1963), pp. 231–232. See also M. Wolfrom, *L’utilisation à des fins autres que la navigation des eaux des fleuves, lacs et canaux internationaux* (1964), p. 143.

The most important factor seems to be the degree to which the needs of a riparian State may be satisfied, without causing substantial injury to a co-riparian State. In our opinion the meaning attached to the notion of "*substantial injury*" is decisive for the way in which the theory of equitable utilization is put into practice. As to the definition of this notion, we refer to the Sevette Report to the United Nations Committee of Electric Power, according to which a State has the right to carry out unilaterally works for water-power installations on the part of a watercourse traversing it or bordering on it in so far as such works are likely to cause on the territory of another State only a limited damage, a minimum inconvenience, within the framework implied by good neighbourship. In the view of the rapporteur: If one allows for a minimum prejudice, this amounts to saying that States are entitled to refuse, for a trifling reason, their consent to works necessary for the generation of water-power. The measure of the tolerable prejudice depends on the goodwill of States, on their wish to negotiate and on their good relations¹⁴⁶. The Comment on the Resolution of the International Law Association also states: "Not every injury is substantial. Generally, an injury is considered 'substantial' if it materially interferes with or prevents a reasonable use of the water. On the other hand, to be substantial, an injury in the territory of a State need not be connected with that State's use of the waters"¹⁴⁷. This amounts to saying that not only a use of a pluriteritorial watercourse by an upstream State which has the effect of appreciably impeding or hindering the adequate utilization of the waters by the co-riparians, but also a use which causes, on the territory of the latter, deteriorations, damage, or prejudice not connected at all with the exploitation of the water for economic purposes comes under the category of "substantial injury". On the other hand, a riparian may not, on the pretext that he will suffer a trifling damage or a minor inconvenience, impede the planned utilization or claim an indemnity. It seems that in such cases the solution consists in weighing the value of conflicting interests of opposing States according to the effect (benefit or detriment) upon each of the contested uses of waters. Recourse to proportionality is a method which is well known and is applied in different matters regulated by international law.

Putting into operation the Bamberg-Kelheim canal will no doubt result in the withdrawal of a large quantity of water from the Danube. When taking the decision to order the digging of the canal, the German

¹⁴⁶ 1952 U.N. Doc. E/ECE/136, p. 176.

¹⁴⁷ I.L.A. Report of the 52nd Conference (1966), p. 500.

authorities calculated the advantages involved in those withdrawals of water for the production of hydraulic energy and for the establishment of new industries. Thus, the establishment of chemical industries at Nuremberg, at a distance of more than 100 km from the Danube, has been anticipated; these industries will be fed by water taken from the Danube¹⁴⁸. Besides, as Mr. Goppel, president of the Bavarian Council, recalled in 1978, the works in question permit the construction of hydro-electric power stations, a low-cost source of energy¹⁴⁹.

The Soviet lawyers did not specify what the alleged prejudice to be caused to the other riparian States by the withdrawal of water from the Danube will consist in. Since, on the Danube, among different uses of water, navigation is of the greatest importance and has priority over industrial and agricultural uses, it would be logical to suppose that they had in mind a possible prejudice to the interests of navigation¹⁵⁰. Indeed, considering the purpose indicated in Art. 113 of the Act of Vienna, the

¹⁴⁸ Cf. Report, p. 22.

¹⁴⁹ Rev. de la nav. fluv. 1978, p. 317. Those who defend the international character of the canal by urging that its construction procures for Germany considerable advantages in the domain of the production of hydraulic energy overlook the fact that the revenue from the hydro-electric power stations plays an important part in the financing of the works. The construction work is carried out by the Rhine-Main-Danube Company, already founded for that purpose in 1921. A series of contracts were concluded between the German Empire, Bavaria, and Baden, on the one hand, and the Company on the other in 1921, 1922, and 1925 on the subject of the financing of the works. After the war those relations were regulated on new bases between Bavaria and the Company in 1949. The Federal Government and Bavaria concluded agreements in the matter of the financial contribution to the works in 1966 (see Rhein-Main-Donau Verträge, Publication of the Rhine-Main-Danube Company). About one-third of the investments were financed from public money, two-thirds from the resources of the Company, one half of which originated from the exploitation of the hydro-electric power stations. In 1979 the Company invested DM 25 million in the construction of hydro-electric power stations, because they are a source of revenue which is re-invested in the works to be carried out. For 1980, DM 40 million were destined for this. The resources of the power stations exploited by the Company are expected to permit the latter to refund from 1980 to the year 2000 the loans contracted for carrying out the works. Up to the year 2000, which will mark the termination of the concession granted to the Company, the latter will have refunded some DM 2 milliard to the Federal Republic and to Bavaria, which will leave a balance of debt of DM 500 million. Then, according to the agreements concluded, the Company will deliver to the Federal Republic all the installations that it will have realized.

¹⁵⁰ According to the Digests any withdrawal of water causing the water level to fall, any widening or damming of the bed of the river which reduced its depth, any narrowing of the bed which increased the speed of the current, and any other activities impeding navigation were prohibited. In all cases in which works executed in the bed or on the banks of the river were detrimental to navigability or made it more difficult for barges to moor, the praetor ordered restoration to the previous condition. Dig., lib. XLIII, tit. XII, §§ XV and XIX.

obligation to execute the necessary works in the bed of the river "in order that no obstacles may be experienced by navigation" also implies a negative obligation: riparians must refrain from activities and uses in the bed and on the banks of the river which may physically impede the movement of vessels. This is tantamount to recognizing the priority of the interests of navigation over any other utilization of the water of rivers covered by the Act of Vienna. This principle is elaborated in various navigation acts. Art. 337 of the Treaty of Versailles makes the execution of "any works of a nature to impede navigation in the international section" of river systems mentioned in the Treaty subject to "suitable measures to remove any obstacle or danger to navigation and to ensure the maintenance of good conditions of navigation".

In Art. 10, para. 1 of the Statute of Barcelona the priority of navigation has been admitted as a general rule: "Each riparian State is bound to refrain from all measures likely to prejudice the navigation of the waterway or to reduce the facilities for navigation . . ." ¹⁵¹. The term "likely" means in this context that the prejudicial effect need not necessarily be present; measures reasonably capable of raising the fear of prejudicial effects which may result in the future are also covered by this provision. On the other hand, as F. Corthésy observes (author's translation): "This absolute priority for the interests of navigation must be understood within reason. A minor impediment . . . should be suffered by navigation where an essential interest of the riparian population is concerned" ¹⁵².

The burden of proof that withdrawal of water for feeding a canal is likely to prejudice the navigability of the river concerned is incumbent, according to the generally recognized rule originating from Roman law – *ei incumbit probatio qui dicit non qui negat* ¹⁵³ – upon the person who alleges the violation of an international obligation in this matter. As the Permanent Court of International Justice said in the Case of the *Diversion of Water from the Meuse* (1937): "in alleging that the navigability of the common section of the Meuse had suffered, the Belgian Government should, in

¹⁵¹ It may be noted in this context that an unfavourable alteration of the natural flow of waters in a particular section of the river is regarded as detrimental to navigability. Reduction of facilities for navigation results from impediments which engineering works or other constructions in the channel or on the banks of the river may constitute to the movement of vessels.

¹⁵² Etude de la Convention de Barcelone sur le régime des voies navigables d'intérêt international (1927), p. 124.

¹⁵³ Dig., lib. XXII, tit. III, 2.

support of its contention, have produced evidence regarding the intensity of the traffic and of the injurious effect upon it of the barrage"¹⁵⁴.

It would no doubt be difficult to furnish such evidence in the case of the Danube. The Federal Government has ordered the execution of large-scale works for the purpose of improving the conditions of navigation on the German section of the Danube; it does not appear probable that the putting into operation of the canal forming the connection with the Main will have the effect of reducing the navigation of the Danube on the other sections below the level decided on in the Treaty. Art. 3 of the Convention of Belgrade does not impose on the riparians in this respect any other obligation but that of maintaining their sections of the Danube in a navigable condition for river-going vessels and, on the appropriate sections, for sea-going vessels (Art. 36 names these sections as those between the mouth of the Sulina channel and Braila).

It might be recalled that against the Dutch contention that the construction by Belgium of works which render it possible for the Albert Canal to be supplied with water taken from the Meuse was contrary to the Treaty of 12 May 1863¹⁵⁵ the Permanent Court of International Justice had taken the following point of view: "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 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"¹⁵⁶.

§ 3. The view of the Federal Government

On the occasion of the visit in Moscow of the Federal Minister of Communications, in October 1977, Mr. Wrede, Secretary of State for Communications, declared that the Federal Government does not share the opinion of certain Soviet circles according to which the canal ought to be an international waterway, open indiscriminately to all flags and exempt from any dues¹⁵⁷. In fact, the German delegation specified in Moscow that the Federal Government considers the future canal as a national waterway, placed under the exclusive jurisdiction of the Federal Republic. On the other hand, not a single official request as to the internationalization of the

¹⁵⁴ P.C.I.J., Series A/B, no. 70, p. 30.

¹⁵⁵ Martens, N.R.G. 2nd series, vol. 1, pp. 117 *et seq.*

¹⁵⁶ P.C.I.J., Series A/B, no. 70, p. 26.

¹⁵⁷ Rev. de la nav. fluv. 1977, p. 605.

canal appears to have been made on the part of the Soviet Government¹⁵⁸. At a meeting of the representatives of the interests of German internal navigation, held at Duisburg in December 1977, the delegate of the Federal Government stated, once again, that the Federal Republic will oppose the internationalization of the Rhine-Main-Danube junction by any means and will adhere in any circumstances to the national character of those waterways¹⁵⁹.

In 1980 Sengpiel, Counsellor to the Federal Ministry of Communications, summed up the official view of the Federal Government in this matter as follows (author's translation): "The Federal Republic of Germany constructs the canal without being obliged to do so under international law. The canal lies exclusively on the territory of the Federal Republic of Germany. It is not covered by the Rhine Navigation Act of 1868 or the Belgrade Convention on the Danube of 1948 or by any other international treaties"¹⁶⁰.

The correctness of the German view, as regards the Bamberg-Kelheim canal, appears to us to be obvious. As appears from our conclusions in §§ 1 and 2, the Federal Republic is not obliged under international law to subject this artificial navigable waterway to an international regime or to open it to the flags of the other States. Nevertheless, it has always been affirmed in official German circles that the canal is not constructed solely to serve German internal traffic, but indeed to establish a junction between the two great European river basins and to facilitate in this way the stream of exchange traffic between Eastern and Western Europe¹⁶¹. As Sengpiel has declared, the Federal Republic is prepared, also in the absence of the international character of the canal, to admit the vessels of all interested States on a treaty basis to the traffic on the entire Rhine-Main-Danube connection¹⁶².

¹⁵⁸ *Ibid.*, p. 641.

¹⁵⁹ *Ibid.*, p. 788.

¹⁶⁰ *Op.cit.* in note 79, p. 44.

¹⁶¹ Cf. Jaenicke, *op.cit.* in note 26, p. 99.

¹⁶² *Op.cit.* in note 79, p. 41.

Section VI. Envisaged Solutions of the Regulation of the Passage through the Canal and of the Traffic of Vessels Going to the Rhine Basin.

§ 1. The system of bilateral agreements

Official German circles prefer to regulate questions connected with the right of transit through the canal in bilateral agreements. The experts of the Federal Ministry of Communications declared already in 1972 before the Commission of the Danube: "In the opinion of the Federal Republic of Germany ... the determination of the national waterways of the Federal Republic of Germany on which navigation is allowed, as well as the definition of the rights of transport that can be exercised in the Federal Republic of Germany in connection with the passage through the Main-Danube canal, are operations which can only be regulated by means of bilateral agreements between the Federal Republic of Germany and each of the interested countries. For this reason the Federal Republic of Germany declares itself here and now prepared to conclude with those countries – to wit: riparians of the Danube –, on the basis of reciprocity, treaties for the regulation of transit through the Federal territory and transport between the Federal Republic of Germany and the Contracting State, and *vice versa*. For the grant of transport rights it will be important to know whether, and to what extent, it will be possible to resolve the competition problems resulting from the differences in economic structure existing between the Danubian States and the Federal Republic of Germany"¹⁶³. During the visit of the Austrian Chancellor, Mr. Kreisky, to Bavaria, in June 1975, Mr. Gscheidle, the Federal Minister of Communications, emphasized that the Federal Republic of Germany is striving to conclude, in due time, apart from trade agreements, special navigation treaties with the States of the Danube basin¹⁶⁴. In a diplomatic note addressed in April 1978 to the Danubian States the Federal Government confirmed that it is fundamentally prepared to grant access to this navigable waterway to the vessels of other States. That is why it has proposed to all the Danubian States that it should conclude with them bilateral agreements on navigation rights¹⁶⁵.

¹⁶³ Commission of the Danube, 30th session, Doc. CD/SES 30/26.

¹⁶⁴ Rev. de la nav. fluv. 1975, p. 460.

¹⁶⁵ Mr. Haar, Secretary of State at the Federal Ministry of Communications, made the following declaration about this (author's translation): "The Federal Government never ceases to defend the idea that in the agreements to be concluded with the Danubian States with a collectivist economy it is necessary to state precisely provisions which take into

In support of the system of bilateral agreements Sengpiel derives arguments from two kinds of considerations. First he recalls that in the past foreign vessels carried out transport almost exclusively on the international rivers which traversed several States. Thanks to the works for the canalization or the improvement of the navigability of the national watercourses, as well as owing to the construction of artificial waterways joining river basins which formerly did not communicate with each other, the internal waterways now are of considerable interest for international communications. On the other hand, the navigation acts were always based on the presumption that the conditions of free commercial competition also act with regard to shipping companies without regard to their nationality. It was therefore sufficient to include in the navigation acts some fundamental rules, such as freedom of navigation, the gratuitous use of international rivers for navigation, etc. Since at present the shipping companies of the countries with a market economy and those with a collectivist economy develop their business activities on a different basis, it is an inevitable necessity to distinguish the different categories of traffic precisely and to define exactly the rights by which foreign shipping benefits with regard to special categories of trade. On that account multilateral treaties of a general kind for the regulation of these relations do not appear suitable. Indeed, for reciprocal trade the interests are too various and the conditions too dissimilar. The Federal Republic of Germany therefore takes the view that the grant of rights to an adequate share in the traffic on the navigable waterways of the other Party can only be ensured on a bilateral basis. It is only when the process of *rapprochement* between States belonging to different economic and social systems has led to similar competition conditions that multilateral agreements on the scope of the freedom of navigation on national waterways can be considered¹⁶⁶.

The preference given on the German part to the regulation in bilateral agreements of the questions raised by the utilization of the canal by the vessels of the Comecon countries is comprehensible. Apart from recent

account differences in the competitive conditions as well as the economic objectives of the river shipping trade operating in the East and the West respectively. It is only in this way that it will be possible in the long term to realize the objective mentioned in the Final Act adopted at the Conference of Helsinki, aimed at favouring the development of the international traffic of passengers and merchandise as well as the possibilities of equitable participation in this traffic on the basis of reciprocal advantage. The Federal Government declares its solidarity with all the countries of Western Europe having river navigation, among which one must of course include Austria". *Ibid.*, 1978, pp. 317-318.

¹⁶⁶ *Op.cit.* in note 79, pp. 44-45.

developments outlined by Sengpiel, States have at all times regulated the admission of the foreign flag to navigation on their internal navigable waterways by bilateral agreements.

The late President Winiarski has explained the reasons why States preferred bilateral agreements in this field: a) concessions imply equivalent compensation; b) the States remain masters of their own waterways, sole judges of their state of navigability and of the necessity or timing of works; c) related questions in the economic sphere may be settled at the convenience of the Contracting Parties; d) disputes between the Parties can be settled in a manner to be considered the most appropriate at that moment; e) treaties regarding exercise of shipping trade on internal waterways are always concluded for a limited time¹⁶⁷.

During the *travaux préparatoires* of the Conference of Barcelona, the Commission of Enquiry recommended the establishment of a navigation regime based on equality of treatment not only for international, but also for internal waterways¹⁶⁸. The Conference, knowing that the inclusion of provisions on internal waterways would make the Statute unacceptable to some of the delegations, yet wanting to meet the wishes of other delegations not to confine the Statute to international waterways, then adopted a compromise and treated internal waterways in a separate protocol. This Additional Protocol¹⁶⁹ led a legal life of its own, in the sense that it was opened for signature and adherence only to States Parties to the Statute, but participation in the Statute implied no obligation whatsoever on these States to sign or to adhere to the Protocol.

The States signing the Protocol declared that they conceded, on condition of reciprocity, without prejudice to their rights of sovereignty and in time of peace, a) on all navigable waterways; b) on all naturally navigable waterways which are placed under their sovereignty and which, not being considered as being of international concern, are accessible to ordinary commercial navigation to and from the sea, perfect equality of treatment for the flags of any State signatory to this Protocol. Considering the terms of this document, one would be inclined to approve the opinion of Corthésy (author's translation): "By its considerable extension of the principle of free navigation on rivers, the Additional Protocol goes far beyond the principles of the Congress of Vienna"¹⁷⁰. In view of the fact,

¹⁶⁷ *Principes généraux du droit fluvial international*, 45 Hague Recueil 1933, p. 155.

¹⁶⁸ Conference on Navigable Waterways, p. 421.

¹⁶⁹ Martens, N.R.G. 3rd series, vol. 18, pp. 734-737.

¹⁷⁰ *Op.cit.* in note 152, p. 102.

however, that the Protocol has been ratified by an even smaller number of States than the Statute¹⁷¹ it is of academic interest rather than real importance in international relations.

This shows clearly the difficulties confronting regulation in this matter in an Act destined to be valid in the relations between numerous States. The use of bilateral agreements enables States to regulate this matter within the general context of their mutual relations, whereas the more rigid structure of multilateral treaties, in which identical obligations must be undertaken towards all Contracting Parties, leaves no room for individual assessment of the proportion between concession and compensation. In addition, the revocability of the obligations undertaken in a bilateral agreement by means of denunciation seems to be more appropriate to preserve the liberty of action of the States than the rather permanent character of the obligation arising from multilateral treaties.

It is evident that the bilateral agreements to be concluded by the Federal Republic with the Comecon States in the matter of the navigation of the canal or of its internal navigable waterways in general will not fail to have effect for the other countries of Western Europe which vessels flying the flag of the Comecon countries can reach by means of these waterways. For this reason already the resolution of the »Arbeitsgemeinschaft der Rheinschiffahrt« of 1974 considered it desirable to limit to some extent the freedom of action of the Federal Republic or, more properly speaking, the institutionalization of the collaboration on this point of the riparians of the Rhine and the other Member States of the European Economic Community. This representative organ has suggested that the States Parties to the Act of Mannheim conclude treaties with third States in the matter of the traffic of vessels of the latter on the Rhine and on the waterways giving access to the Rhine only after consultation with the Central Commission for Rhine-Navigation and with the European Economic Community. The Additional Protocol No. 2 of 1979 to the Rhine Navigation Act indeed prescribed consultation of the Central Commission before the conclusion of bilateral agreements with regard to participation of vessels not belonging to the Rhine navigation in the exchange traffic between ports situated on the Rhine basin and ports situated on the territory of a third State (see Section III § 2).

¹⁷¹ Until 31 March 1981 only 12 States have ratified the Protocol, which number does not include any of the riparians of the Rhine.

§ 2. The leading principles of the bilateral agreements

On the official German side from the first there was a tendency to frame the agreements to be concluded with the Danubian countries with a collectivist economy on the model of the Convention relating to transport of merchandise by means of inland craft, concluded on 5 February 1971 with Poland¹⁷² and on that of the Treaty of 3 June 1972 with the German Democratic Republic¹⁷³. Those treaties dissociate freedom of movement of vessels from freedom of transport of goods. The vessels of the other Party enjoy complete freedom of movement without cargo on the internal navigable waterways. On the other hand, their right to carry out transport is limited to certain fixed relations. Art. 2 of the Convention with Poland grants to the vessels of the Contracting Parties reciprocally the right to transport merchandise: a) from their country of origin to a destination in the other contracting country (*exchange traffic*); b) from their country of origin through the other contracting country to a destination in third countries (*transit traffic*); c) from a third country to a destination in the other contracting country on the occasion of the return from a transit voyage (*traffic with third countries*). The execution of other transport between third countries and the other contracting country, as well as transport between ports of the other Contracting Party – cabotage – are in principle prohibited, unless by special authorizations.

The "National Federation of German Internal Navigation", basing itself on the lessons learned from the practice of traffic on the Danube as well as on the experience gained with the two above-mentioned treaties, has established the points which it considers necessary for the protection, on the practical level, of the interests of German internal navigation. As to the reciprocal exchange traffic, the Federation proposes equal allocation of freights according to the performance of transport in metric tons, taking into account the kind of the freight and the traffic relations. In the view of the Federation the allocation as well as the verification of the proportion agreed upon might be entrusted to a joint commission consisting of representatives of the German river carriers and the State merchant fleets of the Comecon country concerned. The Contracting States ought to reserve to themselves the right to associate the merchant fleets of third countries with their share of the freight. The equal allocation of the tonnage of the

¹⁷² Bundesanzeiger 1971, no. 34

¹⁷³ Cf. article of Hübener referred to in note 103.

traffic presupposes that the rates of freight are fixed at a level which makes it possible to cope with the cost of exploitation.

Transit of a vessel flying the flag of a Comecon country towards Western Europe or *vice versa* ought to be subjected to a special authorization which can only be issued on condition that the transit does not cause any prejudice either to the merchant fleet of the Federal Republic or to any directly interested fleet of Western Europe.

Traffic with third countries will not be admitted, in the vital interest of German shipping. Any participation of Comecon flags between two ports both situated on the territory of the Federal Republic ought to be excluded. Occasional cabotage which a vessel coming from a Comecon country should carry out between two German ports or between a foreign and a German port in the course of a return voyage from a third country to its country of origin ought to be affected by the same prohibition, because conditions of reciprocity do not exist, and moreover could not exist, because of the different economic systems¹⁷⁴.

There is reason to adopt a reserved attitude with regard to these wishes in so far as they concern navigable waterways endowed with an international statute. With regard to this, Zemanek has pointed out that the Federal Republic has no competence to agree with the Comecon States on the conditions of their participation in traffic on the Rhine¹⁷⁵. Even if one admits that the consultation of the Central Commission, under Art. II, para. 2 of the new Additional Protocol, before the conclusion of bilateral agreements with third States in the matter of exchange traffic and traffic with third countries between the Rhine basin and other river basins may make up for the lack of competence of the Federal Republic, this does not do away with its incompetence to lay down provisions which have effect on parts of the Rhine basin which are not situated on its territory. Besides, its freedom of action is subject to limitations even with regard to the river area under its sovereignty on account of the international status of certain watercourses. The bilateral agreements of the Federal Republic with the Danubian States therefore can only operate within the limits of the international regime of the Rhine basin.

It should be recalled in this context that the recent modification of the Act of Mannheim has not affected the general freedom of navigation provided for in Art. 1 to the benefit of the vessels of all nations. Since Art. 1 does not limit the field of application of this rule to vessels coming from the

¹⁷⁴ Bundesverband der deutschen Binnenschifffahrt, Jahresbericht 1976/77, Beilage.

¹⁷⁵ *Op.cit.* in note 3, p. 63.

open sea or going there, the liberty to transport merchandise in transit to a destination outside the Rhine basin also operates in favour of vessels of all nations which arrive on the Main and the Rhine by making use of the Kelheim-Bamberg canal. The restriction of the freedom of transit conflicts therefore with this provision of the Act of Mannheim¹⁷⁶. Besides, the Act of Mannheim is based, *inter alia*, on the freedom of affreightment¹⁷⁷. Of

¹⁷⁶ The Study Group of the Chambers of Commerce of Amsterdam and Rotterdam has not considered it necessary, from the economic point of view, that some limitation or other should be applied to the freedom of transit traffic and traffic with third countries on the Rhine basin. Report, pp. 34–35.

¹⁷⁷ Already Art. 48 of the 1831 Act of Mainz introduced complete freedom of freight into the regime of navigation on the Rhine. Later, in the view of economic liberalism, complete freedom of affreightment seemed self-evident and the very insertion of provisions on this matter into navigation acts seemed to be superfluous. This appears from the Prussian Note of 1867 relating to the revision of the Act of Mainz. On this question the Prussian Government took the view that the provisions of the 1831 Navigation Act dealing with matters which belonged in the sphere of civil law should not be reproduced in the new Convention (*Révision de l'Acte de navigation de 1831*, p. 91). The other riparian States agreed with the Prussian proposal. Therefore, Title V of the Act of Mainz, which provided expressly for freedom of freight, was suppressed.

Since the world-wide economic crisis of the thirties several Rhine basin States saw themselves obliged to intervene in river affreightment. State intervention usually manifested itself: a) in proportional cargo-sharing either by trade organizations or through State organs; b) in the determination of the essential contents of transport contracts, including freight rates. However, the extension of the force of such national regulations to the river area which falls within the territorial scope of the Act of Mannheim is in principle opposed to the international regime of the Rhine. Application of national laws to sections of international waterways should remain within the scope of the international regime. Art. 233 of the 1956 French Code of Navigable Waterways and of Inland Navigation therefore explicitly states that the navigation of the Rhine is subject to the provisions of international conventions. The Act on River Transport of 1 October 1953 of the Federal Republic of Germany (B.G.Bl. 1953 I, pp. 1453 *et seq.*) is not applicable to international transport. The Federal Government has abolished again the Decree issued in 1967 on cargo-sharing in internal shipping traffic after the institution of proceedings relating to an infringement of the obligations under the Treaty according to Art. 169 of the Treaty of Rome on the part of the Commission of the European Communities. The compulsory participation of boatmen in trade organizations has been abolished. Boatmen have the right to organize on a voluntary basis, and their organizations are entitled to accept freights. The fixing of the freight rates is entrusted to those professional organizations.

Under the German occupation of the Netherlands the Decree No. 216 (*Verordeningsblad* 1940, pp. 624 *et seq.*) provided that owners of Dutch inland craft used for frontier-crossing transport should join certain trade organizations and conform to the regulations of these organizations. After the war the Dutch Government, relying on this Decree, by the ministerial decisions of 13 May 1948 (Stc. 1948, No. 93) and 28 March 1950 (Stc. 1950, No. 66), made the permissibility of the frontier-crossing voyage dependent on the consent of the organization which purports to establish proportional cargo-sharing. Only vessels having a licence issued by one of these organizations could pass the customs at Lobith (on the

course, Art. 2, para. 2 of the Additional Protocol has subordinated the conditions for transport of merchandise in exchange traffic and in traffic between ports situated on the Rhine basin and ports situated in third countries, by vessels not belonging to the Rhine navigation, to bilateral agreements. This falls under the subject of the exercise of the shipping trade. The freedom of affreightment is another matter. It has not been affected by this regulation. Even if it were admitted that the authorization given to the States Parties to the Act of Mannheim to conclude agreements with third States individually on the conditions of participation of the latter in exchange traffic and in traffic with third countries includes compulsory allocation of freights and fixing of the obligatory tariffs, that authorization would not extend to the derogation from a principle of the Rhine regime in the relations with certain countries with regard to vessels belonging to the navigation of the Rhine, including those which fly their flags. It should be borne in mind that in the opinion of the Supreme Court of the Netherlands – according to its Judgment of 25 January 1952¹⁷⁸ – governmental measures tending to establish proportional cargo-sharing in respect of frontier-crossing transport executed by Dutch inland craft on the Rhine was incompatible with the principles of the Act of Mannheim. Likewise, bilateral agreements in matters of compulsory allocation of freights or of obligatory tariffs would constitute an infringement of this Act. The situation is therefore quite different from that of the German national waterways, with regard to which the freedom of action of the Federal Republic is not subject to any restriction. The compulsory allocation of freights and the

German frontier) to carry out frontier-crossing transport on the Rhine. The Judgment of the Supreme Court of 25 January 1952 has made this Decree inoperable in practice. The *Wet Goederenvervoer Binnenscheepvaart* of 1 November 1951 (Stb. No. 472), in which a system of licences was established, applies exclusively to transport of goods by internal craft from one place situated in the Netherlands to another. The Act does not apply to transport on waterways to which the Act of Mannheim applies with internal craft of alien subjects and legal persons (Art. 2). In Belgium the system of cargo-sharing is regulated by the Royal Decree of 3 December 1968 (*Moniteur belge/Belgisch Staatsblad* of 15 January 1968), containing a revision of the Statute of the Office for the Regulation of Inland Navigation, implementing the Decree of 12 December 1944 (*Moniteur belge/Belgisch Staatsblad* of 16 December 1944), which created this Office, whose task consists first of all in regulating the affreightment of the voyage and the time chartering of inland craft. Inland craft, even if they belong to nationals of other countries, can only be chartered with a view to transport carried out within Belgium for the account of third parties through the intermediary of the Office, which allocates the freight. The freight rates and allocation conditions are fixed by the Minister of Communications. Belgian and foreign inland craft can participate without restriction in frontier-crossing transport from and to Belgian ports.

¹⁷⁸ *Nederlandse Jurisprudentie* 1952, No. 125.

establishment of obligatory tariffs on the navigable waterways which fall within the field of application of the Act of Mannheim in the special relations between two States can only take place on the level of agreements between professional organizations, *i.e.* between the representatives of the shipping companies and the boatmen of the State with a market economy, on the one hand, and the State shipping enterprises of the Comecon country on the other.

However, apart from considerations of a legal order, doubts had arisen as to the practical value of agreements concerning compulsory allocation of freights in exchange traffic. The Study Group of the Chambers of Commerce of Amsterdam and Rotterdam considered freight allocation agreements useless, in view of the difficulties of putting such agreements into practice and the interest of Western European ports in freedom of exchange traffic¹⁷⁹. Likewise, according to the opinion of K. D ü t e m e y e r, secretary of the »Arbeitsgemeinschaft der Rheinschiffahrt«, in the case of reservation of transport between two ports both situated on the navigable waterways to which the Act of Mannheim applies to the States represented on the Central Commission and to the other States of the European Economic Community, one might relinquish allocation of freights by treaty in the exchange traffic with the Danubian States with a collectivist economy. He refers to the experience with the Convention on inland navigation with Poland. German inland navigation has never succeeded in obtaining, or even in approaching to, half the freight in the exchange traffic with Poland, which was nevertheless reserved to it by treaty. Since imports of Germany into Poland exceed exports in the opposite direction, the German shipping companies must take into account the return voyages without cargo, a factor which increases their exploitation cost. Finally, D ü t e m e y e r warns against illusions in connection with the realization on the practical plane of treaties with the Comecon countries on compulsory allocation of freights¹⁸⁰.

Meanwhile the Federal Government has taken the first steps towards putting into practice its conceptions on bilateral agreements destined to regulate the questions connected with the opening of the canal with the Danubian States. A draft treaty concerning the traffic of inland craft was initialled on 18 September 1980 in Vienna between the Federal Republic of

¹⁷⁹ Report, p. 34.

¹⁸⁰ Probleme der Rhein-Main-Donau Verbindung in ökonomischer und rechtlicher Sicht, Conference held in December 1977 at the German Association of Transport Sciences; multiplied, pp. 6-7 and 16-17.

Germany and Austria: this treaty embraces the whole of the subject-matter of transport carried out by the vessels of one Party on the navigable waterways situated on the territory of the other Party. This draft has been qualified by Mr. Gscheidle, the German Minister of Communications, as a "pilot agreement", which might serve as a model for the agreements that will be concluded on this matter by the Federal Republic with the Danubian countries with a collectivist economy¹⁸¹.

The fundamental defect of the draft consists, in our opinion, in that no clear distinction is made, either for the whole of the treaty or as to the fields of application of the special provisions, between the German internal navigable waterways (which naturally include the Bamberg-Kelheim canal) and the international navigable waterways situated on German territory. As regards the former, they fall under the exclusive competence of the Federal Republic, which has the right to fix or stipulate in full liberty the conditions of admission of the foreign flag, whether in a unilateral declaration or in a bilateral agreement on the basis of reciprocity. As regards the international waterways or ports thereof situated on German territory, this is a different matter. The jurisdiction of the Federal Republic, as moreover of all States with regard to the international waterways which pass through or border on their territories, is subject to limitations on account of the international statute of the respective international waterways. This amounts to saying that the unilateral provisions promulgated or the bilateral agreements concluded by the territorial State cannot conflict with the international statute of the navigable waterway in question. In other words: they do not in any way entail the withdrawal of facilities granted under the international statute of the waterway concerned for the exercise of navigation. According to this train of thought Art. 233 of the French Code of Navigable Waterways and Inland Navigation explicitly states that the navigation of the Rhine is subject to international conventions. Likewise, Art. 42(2) of the German Act on River Shipping Trade of 1 October 1953¹⁸² establishes that "existing international agreements are not affected by this Act".

From this point of view the text of Art. 13, according to which the obligations of the Federal Republic of Germany under the Act of Mannheim with regard to the Contracting States to this Act and the obligations of the Austrian Republic under the Convention of Belgrade with regard to

¹⁸¹ Rev. de la nav. fluv. 1980, p. 591.

¹⁸² B.G.Bl. 1953 I, pp. 1453 *et seq.*

the Contracting States to this Convention are not affected by this treaty, does not appear satisfactory. It is known that both Art. 1 of the Act of Mannheim and Art. 1 of the Convention of Belgrade provide for general freedom of transit traffic to the benefit of the vessels of all nations, which means that both treaties impose obligations on the riparian States not only with regard to the other Contracting States, but *erga omnes*.

According to Art. 3, para. 1, the maximum number of voyages in *transit traffic* will be established by a joint commission, without prejudice to multilateral agreements. This provision appears to be confused and rather contradictory. By multilateral agreements one can only mean the Act of Mannheim and the Convention of Belgrade, since no other multilateral conventions are in force which relate to the navigation of the Rhine and of the Danube respectively. In this case the whole provision becomes void, since neither the former nor the latter of those multilateral agreements recognizes any restriction on the freedom of transit traffic. Provisions of bilateral conventions cannot derogate, not even in the relations between the two Contracting States (with the exception of the cases provided for in Art. 41 of the Vienna Convention on the Law of Treaties), from the provisions of multilateral conventions imposing upon the States Parties obligations with regard to all States, which is the case with the freedom of transit on the Rhine basin and on the Danube.

In *exchange traffic* (transport of goods from one contracting country to the other) the voyages of Austrian vessels are subject to some limitations with respect to their place of destination or departure on German territory (Art. 4, paras. 1 and 2). In the words of Art. 5 of the draft, *traffic with third countries*, i.e. carrying out of transport between a port situated on the territory of the other Contracting State and a port situated on the territory of a third country, will be subjected to the special agreements to be concluded with the Contracting States. Transport of goods between two ports both situated on the territory of the other Contracting Party may be carried out only on special licences issued by the competent authorities (Art. 6). The stipulation of these conditions falls within the competence of the Parties to the Act of Mannheim granted to them in Art. II, para. 2 of the Additional Protocol. However, the conditions of execution of transport between two ports both situated on the Rhine basin ought to be determined according to Art. II, para. 1 by the Central Commission. As regards the compulsory allocation of freights in exchange traffic, which is referred to in Art. 4, paras. 4 and 5, we have already stated above that this may take place by means of agreements between professional organizations.

In any case the draft treaty does not grant to Austria the same status as that which the Member States of the Central Commission and those of the European Economic Community have. Austria is placed on a line with the countries with a collectivist economy. Nevertheless, the last sentence of point 3 of the Protocol of signature, in correlation with the Swiss declaration made at the moment of signature, authorizes the Central Commission to grant to vessels flying the flag of another State, whose economic system is similar to that of the Contracting States, the same treatment as that by which vessels belonging to the Rhine navigation benefit. In this context Austria was thought of in the first place¹⁸³.

As regards the bilateral agreements to be concluded with the Comecon countries, these will be drafted, as Mr. Gscheidle, the German Minister of Communications, has declared, on the model of the agreement with Austria. Besides, on the German part attempts will be made to define in a very precise way the notion of transit via the German national waterways and the range of its application. For example, whether the transit will solely allow vessels flying the flag of the Danubian State in question to navigate from the Danube to the Rhine by making use of the Danube-Main junction, or whether those vessels, by making use of other canals of the Federal Republic, will be able to go to the German Democratic Republic or to Poland, *i.e.* to the other States with a collectivist economy¹⁸⁴.

§ 3. The multilateral solution

Although Art. II, para. 2 of the Additional Protocol No. 2 sanctions the German conception which tends to regulate in bilateral agreements with the Comecon countries the conditions of their participation in exchange traffic and traffic with third countries with the Rhine basin, the wording of the provision does not seem to bar the establishment in a multilateral agreement of a uniform regime for the merchant fleets of the Comecon going through the canal to the Rhine basin. Indeed, there are arguments which impose a reservation against the system of bilateral agreements.

First of all, Düttemeyer emphasizes that a considerable number of bilateral agreements, the clauses of which lay down different traffic conditions, will create a situation which is not very clear. The implementation of those agreements, which abound in different details, will probably give rise

¹⁸³ Cf. the declaration by W. Müller, the Swiss member of the Central Commission, made in Vienna in November 1980, *Rev. de la nav. fluv.* 1980, p. 722.

¹⁸⁴ See the article of Sengpiel, cited in note 79, p. 45.

to difficulties of a practical nature. Besides, the conclusion of bilateral agreements between the Federal Republic and the Danubian countries about the utilization of the canal amounts in practice to enabling the Comecon merchant fleets to penetrate to the Rhine and its tributaries, which will confront the other riparians of the Rhine and the other States of the European Economic Community with accomplished facts. This state of affairs will inevitably entail an analogous attitude of the other States with a market economy, which will also conclude bilateral agreements of different contents with the Comecon countries for the regulation of the reciprocal participation of the merchant fleets in the traffic on the navigable waterways of the other Party. Such a development would naturally prejudice one of the objectives of the European Economic Community: the realization of a common transport policy¹⁸⁵.

Zemanek has moreover objected that an economic crisis entailing the retrogression of the spirit of integration might induce the Federal Republic to use the bilateral agreements which enable vessels of the Comecon countries to participate in exchange traffic to improve its competitive position in the relations with the Danubian States with a collectivist economy to the detriment of the other riparian countries of the Rhine and of Austria¹⁸⁶.

At present, against scruples of this nature one might advance the obligation to consult the Central Commission before the conclusion of bilateral agreements in order to guarantee the protection of the interests of the other States of the Rhine basin. However, the substance of this obligation remains rather vague. The general and ordinary meaning of the word "consultation" does not convey the obligation to conform to the advice given. In any case, the States of the Rhine basin are not explicitly bound to adopt the recommendations which the Central Commission may make to them on this matter.

In order to avoid the rather unfortunate consequences which the system of bilateral agreements may involve, already in 1974 the »Arbeitsgemeinschaft der Rheinschiffahrt« brought up the idea of the regulation of the questions connected with the opening of the canal in a convention to be concluded with the participation of all the interested Parties, *i.e.* of the riparian States of the Danube, on the one hand, and of the States Parties to the Act of Mannheim as well as the other States of the European Economic Community on the other. This *modus procedendi* would permit a uniform and clear regulation of the whole of the questions posed by the appearance

¹⁸⁵ Conference cited in note 180, p. 17.

¹⁸⁶ *Op.cit.* in note 3, p. 66.

of the merchant fleets of Eastern Europe on the Rhine basin, instead of provisions dispersed in special arrangements, creating a confused situation. The Study Group of the Chambers of Commerce of Amsterdam and Rotterdam has stated that the penetration of the merchant fleets of Eastern Europe, at the opening of the Main-Danube junction, on the Rhine basin affects the whole of the shipping trade on the Rhine. The report states that the obligation to follow a common line of conduct results from the Act of Mannheim as well as from the objectives designated by the Treaty of Rome (the creation of a common market, the establishment of a common transport policy, non-discrimination). Consequently, a multilateral treaty alone appears to be the appropriate instrument for the solution of the problems¹⁸⁷. Düttemeyer has taken an analogous point of view¹⁸⁸. Zemanek also prefers a regulation in a multilateral treaty of the regime of the future navigable waterway, of which he outlines several variants, which were afterwards largely superseded owing to the signature of the Additional Protocol¹⁸⁹. In the opinion of Ph. Grulois, negotiations with the Eastern European States in connection with the deep-draught Rhine-Main-Danube waterway affect the common transport policy of the E.E.C. The Community alone is competent to carry on negotiations about this subject¹⁹⁰.

On 11 May 1979 the European Parliament adopted, on the basis of a report of the Commission of Transport, a resolution in which it recommended certain measures to be taken within the framework of the European Economic Community in order to avoid a ruinous competition on the part of the Eastern European merchant fleets at the opening of the Main-Danube canal. The European Assembly considered that, having regard to the Act of Mannheim and the special interests of Switzerland in the matter of the Rhine navigation, negotiations had to take place with the latter country before Community measures were taken¹⁹¹.

In our opinion the creation, in a multilateral treaty uniting the riparian States of the Danube and those which are Parties to the Act of Mannheim, of a special regime for vessels going through the Danube-Main canal to the Rhine basin and *vice versa* would present the following advantages as compared with bilateral agreements:

¹⁸⁷ Report, p. 27.

¹⁸⁸ Conference cited in note 180, p. 18.

¹⁸⁹ *Op.cit.* in note 3, pp. 67-70.

¹⁹⁰ Lecture delivered at Ghent on 3 April 1976 on the occasion of the General Meeting of the Belgian Study Centre for Inland Navigation. Multiplied, pp. 9-10.

¹⁹¹ *Rev. de la nav. fluv.* 1979, p. 397.

a) Its field of application would extend to the whole river area falling under the Act of Mannheim – and that of the Convention of Belgrade –, whilst bilateral agreements concluded by particular riparians will only apply to the navigable waterways, or to parts thereof, which are subject to their sovereignty;

b) When establishing a special regime, the States Parties to the Act of Mannheim might derogate from the general regime established in Art. 1 of that Act. We have already indicated above (see Section III § 2) that this general regime does not in the least restrict the freedom of transit of the vessels of all nations. Likewise, the regime of the Rhine navigation also comprises freedom of affreightment. If one wants to establish a special regime with regard to this for the vessels making use of the canal, a derogation from the general regime can only take place with the consent of all the Parties to the Act of Mannheim.

It should be borne in mind that already Art. 2, para. 1 of the Act of Mannheim established a kind of special regime on the intermediate waters connecting the Rhine with the Scheldt and with the open sea on Dutch territory: the direction of the voyage determines the application of the regime of free navigation, by which benefit the vessels passing from the Rhine to Belgium or to the open sea and *vice versa*.

The system of bilateral agreements may, if desired, be combined with the multilateral convention. The former would regulate, within the frameworks designated in Art. II, para. 2 of the Additional Protocol, the exchange traffic and the traffic with third countries in the special relations between the individual riparians of the Rhine basin and those of the Danube, whilst the settlement of the questions which exceed the competence of the particular riparians, specifically derogations from the general freedom of transit traffic or the freedom of affreightment, would be laid down in a multilateral convention¹⁹².

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¹⁹² According to this train of thought, Counsellor Sengpiel also deems that the Federal Republic can only regulate in bilateral agreements the questions which fall under its exclusive competence, *i.e.* certain questions of transit through its territory and of exchange traffic with the Danubian countries which have signed the different bilateral agreements. *Op.cit* in note 79, p. 45.