The Modernity of the 1927 PCIJ Advisory Opinion on the Jurisdiction of the European Commission of the Danube between Galatz and Braila

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Romania and the International Court of Justice

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Section 2.1.

The Beginning: from the Permanent Court of International Justice to the ICJ Advisory Opinions of the Fifties

The Modernity of the 1927 PCIJ Advisory Opinion on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*

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I. Introduction

The subject-matter of my intervention is not necessarily a burning issue: it concerns an almost centennial advisory opinion of the PCIJ, relating to the powers of the late European Commission of the Danube, on a small portion of the River between Galatz and Braila[1]. Still, it is an interesting topic, on more than one account. That was Romania's first case before The Hague Court. As such, it is a good pretext to dive into history. As any self-respecting internationalist, I started with the little history, that of international law in Romania. The 1927 Advisory Opinion coincided with a period of great interest for international law among Romanian Academics. Vespasian Pella had published his visionary studies in international criminal law, a couple of years before the PCIJ was seized.[2] The Advisory Opinion itself increased the taste

1 PCIJ, Advisory Opinion, 8 December 1927, *Jurisdiction of the European Commission of the Danube, Series B*, No. 14 (hereafter 1927 Advisory Opinion).

2 *La criminalité collective des États et le droit pénal de l'avenir*, Bucarest : Imprimerie de l'État, 1925. See also G. Sbârnă (ed.), *Vespasian V. Pella - în slujba ştiinţei dreptului şi a cauzei păcii*, Ploieşti : Ed. Karta-Graphic, 2011, 769 p.

for the discipline: some years afterwards, the Romanian Deputy-Judge Dumitru Negulescu delivered at The Hague Academy a very interesting course, about the system of advisory opinions before the PCIJ.[3] The course was published in 1936, but many of its conclusions are still valid today. At the same period, Paul Negulescu gave a forward thinking course on international administrative law,[4] which inspired the new school of global administrative law.[5] Mention must be also made of Mircea Djuvara, who, around the same period, delivered a course of theory of law, entitled *Le fondement de l'ordre juridique positif en droit international.*[6] I hope the 2009 Judgment will initiate a trend similar to the one created by the 1927 Advisory Opinion (and this conference augurs well for).

The topic of the 1927 Advisory Opinion is also a good pretext to dive into the big history, of Europe in general and of Romania in particular. The Advisory Opinion is first a reflection of the European history during the 19th and 20th century – the exorbitant powers of the European Commission of the Danube are merely a mirror the succession of empires, of the rivalry between the Orient and the Occident, it has a flavour of *Mittleuropa*. The Treaty of Paris (1856) setting up the 1st Commission, internationalized the Danube. The Treaty was a direct consequence of the defeat of the Russian Empire during the Crimean War, by an alliance of the French Empire, the Sublime Gate, Great Britain and Sardinia. Subsequently to the 1856 Treaty, several others were concluded,

D. Negulescu, *L'évolution de la procédure des avis consultatifs de la Cour permanente de justice internationale*, 57 *RCADI* (1936), pp. 1-96.

P. Negulescu, *Principes du droit international administratif*, 51 *RCADI* (1935), pp. 579-691.

N. Kingsbury *et all.*, "The Emergence of Global Administrative Law", *Law and Contemporary Problems*, vol. 68 (2005), *passim*.

M. Djuvara, *Le fondement de l'ordre juridique positif en droit international*, 64 *RCADI* (1939), pp. 479-625.

adapting the status of the River to the balance of powers in Europe and to the necessity to ensure freedom of navigation.[7] As an observer noted, "[b]y its physical presence at the mouth of the Danube the Commission was a symbol and sentinel of the political interest of the west in preserving south-eastern Europe and Turkey from Russian domination."[8] The exorbitant, quasi-sovereign powers of the Danube Commission (as well as those of the other river commissions in Europe) can only be apprehended within this larger historic context.

It must also be recalled that, at the time of the Advisory Opinion, Romania was a young State: the Opinion was given less than a decade after "the Great Union" of 1918, when Transylvania was annexed to Romania, and fifty years after Romania's independence from the Ottoman Empire. Romania's position during the 1927 proceedings fully reflects its external politics during the interbellum period, the gist of which was a consolidation of territorial sovereignty, but also integration into "the concert of nations". The proceedings bear witness of Romania's attachment to the League of Nations: although it had not accepted the Court's jurisdiction to settle the dispute by contentious proceedings, Romania agreed the matter be submitted for an advisory opinion. As Charles de Visscher pointed out: "*l'avis de la Cour (...) a exactement rendu aux Gouvernements intéressés le service qu'ils en attendaient: en les fixant sur leurs situations juridiques respectives, il a facilité les négociations ultérieures.*"[9] Romania's normative stance in that particular case,

[7] On the succession of treaties relating to the Status of the Danube River, see S. McCaffrey, *European Commission of the Danube, Jurisdiction of the (Advisory Opinion)*, in R. Wolfrum *et all.* (eds.), *Max Planck Encyclopedia of Public International Law*, available at : http://www.mpepil.com/, §§ 2-4.

[8] J. Campbell, "Diplomacy on the Danube" (1949), available at: http://www.foreignaffairs.com/articles/70728/john-c-campbell/diplomacy-on-the-danube.

[9] Ch. de Visscher, *Les avis consultatifs de la Cour permanente de Justice internationale*, 26 *RCADI* (1929), pp. 41-42.

and the Court's answer about the extent of the obligations incumbent upon it, can only be understood by resituating the judicial reasoning in that case within the normative context of the 19th century. Since the Court had to interpret and apply treaties signed during the 19th century, the Advisory Opinion necessarily bears the mark of this era, where the principle of sovereign equality of States had but little place in international law.[10]

Finally, the 1927 Advisory Opinion is above all an excellent pretext to review the development of the international organizations, and of the legal principles governing their action and their relations with States.

II. Modalities of Engagement in a System of Inequality of States

"Sovereign equality is a fundamental axiomatic premise of the international legal order."[11] Such statements are in fact founded upon a fundamental achievement of the 20th century, not upon a natural truth, inherent to the international legal system from its incipit. One may too quickly overlook the fact there was an evolution towards "formal equality".[12] The case-law of the Permanent Court reflects some of its episodes.

As Judge Anzilotti underlined in his Individual Opinion in the *Customs Regime between Germany and Austria* case:

> "Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law. The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it which the exceptional and, to some extent, abnormal class of States known as 'dependent States'. These are States subject to the authority of one or more other States. The idea of dependence therefore necessarily implies a relation between a superior State (suzerain, protector, etc.) and an inferior or subject State (vassal, protégé, etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of international law."[13]

Therefore, because of the "abnormal class of States known as 'dependent States'", the international system of the 19th and the first half of the 20th century was not one of formal equality of States. When the regime for internationalization of the Danube was established (in 1856), Romania was such a "dependent State". The first problematic issue in the 1927 Advisory Opinion was to determine whether and how Romania could be held bound by the regime established by the Great Powers.

The Advisory Opinion reflects another peculiarity of the law-making process during the 19th century: at that time, participation in treaty-making was considered a privilege. It was not sufficient for an (independent) State to have a legitimate interest in the

[10] On the origin and the scope of the principle of sovereign equality, see J. Crawford, "Chance, Order, Change: The Course of International Law. General Course on Public International Law", RCADI (2013), forthcoming, §§ 460-472.

[11] J. Kokott, "States, Sovereign equality", in *MPEPIL*, *op. cit.* note 70.

[12] J. Crawford, *op. cit.* note 73, §§ 464-468.

[13] PCIJ, Advisory Opinion, 5 September 1931, *Customs Regime between Germany and Austria, Series A/B, No. 41, Individual Opinion Judge D. Anzilotti*, p. 57.

subject-matter of the treaty for its participation to be granted. It also had to be co-opted by the other powers.

This reasoning shows through in the *Commission of the Danube* Advisory Opinion, where the Court underlined, in respect to the Ottoman Empire:

> "It was not until 1856 that definite provision was made for the internationalization of the Danube. *Turkey*, under whose dominion the mouths of the lower part of the Stream lay, *was not a party to the arrangements of Vienna, and was not then admitted to the concert of the Powers*. But by the Treaty of Peace between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey, signed at Paris on March 30th, 1856, bringing to a close the Crimean War, Turkey was (Article 7) admitted *'to participate in the advantages of the public law and concert of Europe'*, and the contracting Powers, while engaging each to respect the independence and territorial integrity of the Ottoman Empire, agreed to guarantee in common the strict observance of that engagement. Coincidently with this *elevation of the position of Turkey in Europe*, Article 15 of the Treaty expressly declared that the Vienna principles relating to the internationalization of rivers should in future be applied to the Danube and its mouths, that this provision should henceforth form 'a part of the Public Law of Europe', and that the High Contracting Parties took it 'under their guarantee'."[14]

Indeed the Treaty of Paris brought the regime for the Danube in alignment with that of the Rhine, as the latter had been established at the end of the Napoleonic Wars, by the Final Act of the Congress of Vienna (1815). Since the Ottoman Empire had

[14] 1927 Advisory Opinion, p. 40 (emphasis added).

not participated in the Congress of Vienna, the Final Act was of course not binding upon it as such. But the "principles of Vienna", namely the legal rules relating to the internationalization of rivers referring embodied in the Final Act, became opposable to Turkey through Article 15 of the Treaty of Paris, who referred to and thus incorporated them in the conventional regime applicable to the Danube.

After its independence, Romania became the sovereign on the territory of which the regime of internationalization of the Danube was applicable. It was not contested that the Ottoman Empire had been a Party to the Treaty of Paris and the subsequent treaties adjusting the regime on the Danube. It was also not contested that Romania had substituted itself to the Ottoman Empire as far as the obligations relating to the Danube were concerned. Still, the Court did not hold that Romania was bound through succession to treaties or to territorial regimes. The reason is simple: the modern legal concepts relating to State succession only emerged after the great wave of decolonization in the 1960's.[15] At the end of the 19th century and the beginning of the 20th, voluntarism was the predominant doctrine in international law, which "denied the possibility of succession to pre-existing rights and obligations".[16] Accordingly, the only way a State could be held to be bound by treaty obligations was through its consent.

Now, Romania was obviously not a party to the 1856 Treaty of Paris establishing the Commission – this was not an open treaty, in the first hall of the 19th century the possibility for States to ratify treaties after their adoption was not envisaged. Moreover, even

[15] See A. Zimmermann, State Succession, in *MPEPIL op. cit.* note 70, § 3. On the difference between the conceptualization of State succession during the 19th and 20th century, see S. Rosenne, *An International Law Miscellany*, Nijhoff Publishers, 1993, pp. 294-295.

[16] M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties*, Oxford U.P., 2010, p. 90.

if Romania had been fully independent since 1878, it was not admitted to participate to the Berlin and London conferences of 1878-1883, other than as an observer. Still, these conferences were aimed at extending the powers of the Commission between Galatz and Braila.

On the other hand, Romania had ratified the 1919 Treaty of Versailles and the Definitive Statute of the Danube of 1921. And both treaties recognized that the Commission would exercise the same competences as before WWI. Indeed, Article 41 of the Definitive Statute "expressly provide(d) that all treaties, conventions, acts and agreements relative to international waterways generally, and particularly to the Danube and its mouths, which were in force when the Statute was signed, are maintained in all their stipulations not abrogated or modified by the Statute itself." Because of this let's call it "referral clause",[17] the Court held that "the Definitive Statute was not complete in itself".[18] Prior obligations were thus incorporated into it and became opposable to Romania. The Court could thus hold that Romania's ratification of the Statute was worth consent to these prior obligations.

Therefore, like in the case of Turkey, treaty-clauses providing referral to previous conventions ensured that the norms enshrined in these prior conventions become applicable to States which had not ratified them. By relying on the mechanism of the referral clauses, the Court could formally identify the consent at the basis of a State's obligation. Its consent did not apply to the prior treaty as such, but to the obligations contained therein[19]. Still, the

[17] On "referral clauses", see M. Forteau, "Les renvois inter-conventionnels", 49 *Annuaire français de droit international* (2003), pp. 71-104.

[18] 1927 Advisory Opinion, p. 23.

[19] The present Court was also confronted to the effect of referral clauses, for instance in the *Pulp Mills* case, in which the Status of the Uruguay River contained a reference to other "applicable international agreements and (...) to the guidelines and recommendations of international technical bodies" (ICJ, Judgment, 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, § 6). For various reasons, in this case, the referral clause was nonetheless of a lesser effect; the ICJ considered it could not incorporate "the obligations of the parties under [these] international agreements and other norms envisaged within the ambit of the 1975 Statute" (*ibid.*, § 62).

distinction is tenuous. Indeed, in order to determine the extent of Romania's obligations, the Court had to interpret and apply various provisions of the Treaty of Paris, of the 1866 Protocole, of the 1878 Treaty of Berlin and the 1883 Treaty of London – to which Romania was not a party[20] - and also the 1881 Additional Act and the 1919 treaty of Versailles, which Romania had signed, together with various regulations of the Danube Commission.[21] The normative regime was more than complex, and the powers of the Danube Commission under this regime, overwhelming, as will further be seen.

III. An International Institution Precursory of the Organizations of Integration

The institutional framework established by this network of treaties was complex: it comprised in fact two commissions, with quite distinct powers: on the Lower or maritime Danube (between the River mouth and Braila), the European Commission whose membership was reduced to Great Britain, France, Italy, and Romania; on the upper or "fluvial Danube" (between Ulm and Braila), an International Commission, whose membership included all riparians as well as the non-riparians on the European Commission.[22] The 1927 Advisory Opinion is only concerned with the European Commission. This explains why Parties to the

[20] 1927 Advisory Opinion, p. 11.

[21] See 1927 Advisory Opinion, pp. 41-42.

[22] See A. F. Zeilinger, "Danube River", in *MPEPIL op. cit.* note 70, § 6.

Advisory Opinion were Romania, on the one side, France, Great Britain and Italy on the other.[23]

The Commission was endowed with powers to regulate navigation over the River, under all its aspects. The purpose of this transfer was comprehensive: to ensure "freedom of navigation for all flags under a uniform law uniformly administered".[24] In addition to carrying out technical works, it established taxes; it maintained its own vessels, its own police force and its own courts. Its regulations were directly applicable within the riparian States or to all private persons using the River. It even had the competence to institute criminal sanctions for those violating its regulations. These are really extraordinary powers. Anton Florian Zeilinger considered that: "[i]n hindsight it can be attested that it was one of the first international organizations with international legal personality, equipped with supranational powers (...) comparable to those enjoyed today by the European (Economic) Community".[25] Moreover, the European Commission enjoyed great autonomy vis-à-vis its Members. Its officials were appointed autonomously and enjoyed quasi-diplomatic immunities. It is for good reasons that it was metaphorically called *"un État fluvial"*.[26]

On substance, Romania's position was defence of its territorial sovereignty. This meant, in that case, the will to suppress or alleviate the territorial servitudes it had inherited as a "successor"

[23] The term "Parties" may seem inadequate for an advisory opinion; however, as D. Negulescu explained, the mechanism of advisory opinions before the Permanent Court was also used to resolve international disputes between States. He called this type of advisory opinions an *"arbitrage consultative"* (*op. cit.* note 66, pp. 87-88).

[24] 1927 Advisory Opinion, Observations by Judge Moore, p. 82.

[25] A. F. Zeilinger, *op. cit.* note 88, § 5.

[26] J. Spiropoulos, "L'individu et le droit international", 30 *RCADI* (1929), pp. 232-233 and F. von Holtzendorff cited by J. Kunz, "Privileges and immunities of international organizations", *AJIL* (1947), p. 848.

State. Thus, Romania's position in relation to the subject-matter submitted to the Court was to agree that the Commission had the technical powers to engage into works for maintaining the navigability of the River, and to dispute that it had any "normative powers", as Romania called them, namely powers to establish taxes or powers of police and jurisdiction to enforce its decisions. The essence of the dispute before the Court thus concerned the powers of the Commission and their layout with the sovereign powers of the State.

IV. The Modernity of the Legal Principles Underlying the 1927 Advisory Opinion

The Court's decision was not a mere casuist assessment of the powers of a particular international institution; on the contrary, the Court went beyond that and established the bases of the law of international organizations (or institutional law, as it is now called). Its reasoning in this respect is striking of modernity. The 1927 Advisory Opinion laid the bases of essential principles of institutional law, such as the principle of enumerated powers and the principle of implied powers; it equally stressed the role of institutional practice for the interpretation of the constituent instrument.

a) The principle of enumerated powers (or principle of speciality)

First, the principle of enumerated powers: an international organization has only the powers vested in it by the constituent treaty (or treaties). This is one of the core-stone principles of international institutional law, and the Permanent Court's reasoning in this Advisory Opinion was relied upon frequently in the subsequent case-law. For instance, in the Advisory Opinion concerning the *Legality of the Use by a State of Nuclear Weapons in*

Armed Conflict (WHO), the ICJ referred to the 1927 Advisory Opinion as to an authority and recalled the tenure of the principle of speciality in terms similar of those used by the Permanent Court:

> "The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."[27]

Indeed, the Permanent Court stressed that the Danube Commission, despite its exorbitant powers, was "not an organization possessing exclusive territorial sovereignty".[28] It drew upon the difference of nature between a State and an international organization to underline the inequality in law between them:

> "As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose."[29]

The most obvious consequence of this assessment is that the State enjoys the plenitude of powers over a territory, while the international organizations only have the powers enumerated by the treaties:

[27] See ICJ, Advisory Opinion, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, [1996] ICJ Rep, p. 66, § 25 quoting the 1927 Advisory Opinion.

[28] 1927 Advisory Opinion, p. 63.

[29] *Ibid.*, p. 64.

The question of a possible concurrence between the powers of the State and those of the international organizations was further discussed. The idea was triggered by the far-fetched "internationalization"[30] of the River, at least in the maritime part, falling under the competence of the European Commission. In a dense and far-reaching statement, the Court considered that, if ever concurrence was to arise, it could only be resolved by ensuring that both entities can fulfil their missions:

> "When in one and the same area there are two independent authorities, the only way in which it is possible to differentiate between their respective jurisdictions is by defining the functions allotted to them."[31]

Indeed, the concept of "function" lies at the basis of international institutional law; it even accounts for the nature of the organisations. Of course, one may consider that both the State and the international organization are legal creatures; but the former is a complete subject, with a general competence, impersonating peoples and territories, whereas the international organizations are merely legal institutions created by those States, for a specific purpose. Their *raison d'être* is not inherent, but rests within the purpose attributed to them. Indeed international organizations tend to merge with the functions attributed to them.[32]

[30] The concept is defined by R. Wolfrum and J. Pichon as convering "a situation where a territory, a river, or a canal within the territory of one State was brought under the protection, control, or management of another State or of several States. (...) One feature of this concept is that the territorial sovereignty of a specific State is limited in favour of another State, a larger group of States, or the community of States as a whole." ("Internationalization" in *MPEPIL op.cit.* note 70, § 1. See also *ibid.*, § 18).

[31] 1927 Advisory Opinion, p. 64.

[32] V. aussi M. Virally, « La notion de fonction dans le théorie de l'organiation internationale », in *Mélanges offerts à Charles Rousseau*, Paris, Pedone, 1974, pp. 277-300.

b) The International Legal Personality of International Organizations

To an international lawyer's mind, this reasoning is very familiar: it brings to mind the ICJ's *celebrissime dictum* in the *Reparation for Injuries* case, where the Court held that the United Nations enjoyed legal personality, which "is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State".[33] In light of the Permanent Court's reasoning in 1927, this seems already less revolutionary.[34] What is surprising is that in 1945 an issue arose about the legal personality of an international organization, a question taken for granted in 1927. But the two opinions are complementary too: it is by reading them together that we conclude that the personality of an international organization is functional.

c) The Principle of Implied Powers

The 1927 Advisory Opinion also bears the first hint to the *principle of implied powers*. The Court stressed that the Danube Commission "has power to exercise [its] functions to their *full* extent."[35] Even if some means of action are not expressly provided for in the constituent treaty, the Organization is held to enjoy them, as long as that action is necessary to fulfil its purpose. The posterity of this principle[36] and its great influence on the development of institutional law need hardly to be recalled.

[33] ICJ, Advisory Opinion, 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, Reports 1949, p. 179 and Advisory Opinion, 20 July 1962, Certain Expenses of the United Nations, Reports 1962, p. 159.

[34] See also C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, CUP Cambridge, 2005, p. 77. See also S. Mc Caffrey, *op. cit.*, para. 16.

[35] 1927 Advisory Opinion, p. 64.

[36] See ICJ, *Reparation for Injuries*, *op. cit.* note 99, p. 180.

d) The Role of Institutional Practice

The last aspect of legacy of the 1927 Advisory Opinion concerns the role of institutional practice for the interpretation of a constituent treaty. The extension of the powers of the Danube Commission was a contentious issue between Romania and the other members of the Commission because it resulted not from previous treaties, but from institutional practice. At the end of the 19th century, the Commission had gradually elaborated regulations and took measures to enforce them for the portion of the River between Braila and Galatz. Before the Court, Romania challenged the legality of these regulations. However, the Advisory Opinion recalled that:

> "In this usage the Roumanian delegate tacitly but formally acquiesced, in the sense that a *moda vivendi* was observed on both sides according to which the sphere of action of the Commission in fact extended in all respects as far as above Braila."[37]

The Court treated the question as a matter of opposability of international obligations of Romania and not of legality or validity of institutional law. In this perspective, the Court acknowledged that tacit acquiescence in institutional practice is source of powers for the international organizations, and of correlative obligations for their member States.

This is another far-reaching finding. For instance, the ICJ was again confronted to the effect of institutional practice in the *Whaling* case[38]. The International Whaling Commission has adopted, over the years, a series of resolutions concerning

[37] 1927 Advisory Opinion, p. 17.

[38] ICJ, Judgment of 31 March 2014, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*.

scientific whaling. Japan contested their legality, on grounds that, according to the 1946 Whaling Convention, this form of whaling could not be regulated by the Commission. Australia and New Zealand, on the other side, argued that institutional practice was an informal way for developing the powers of the Commission; insofar it remained in line with its mission under the Convention. In its Judgment of 31 March 2014, the Court avoided the thorny question of the validity of institutional acts. It however addressed the interaction between institutional practice and evolving interpretation of institutional treaties. In line with the 1927 Advisory Opinion, the Court stressed that recommendations, which obviously lack binding force *per se*, cannot become opposable to Member States *via* the process of interpretation of the constitutive act, *a fortiori* if the said States expressed their opposition to these resolutions:

> "[M]any IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs *(a)* and *(b)*, respectively, of paragraph (3) of Article 31 of the Vienna Convention on the Law of Treaties."[39]

Thus, as a matter of interpretation of constitutive acts of international organizations, the Court thus conditioned the relevance of the non-binding resolutions to their unanimous or consensual adoption:

[39] *Ibid.*, para. 83.

> "These recommendations, which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[40]

Today, the principles of enumerated powers, implied powers or development of powers through institutional interpretation are so consolidated that they resemble to mere technical maxims of international institutional law. But, as the 1927 Advisory Opinion shows, they were first a way of formulating and resolving the tension between State sovereignty and decisions taken by international organizations, sometimes against the will of the State. In the 1927 Advisory Opinion, the Court's response consisted in a constant reference to Romania's consent: consent to the existence of the Commission, consent to its mission, and tacit consent to its powers. Thus, for the Permanent Court, participation in international organizations endowed with powers to create new legal obligations was simply another form of international commitment, which, far from being an "abandonment of (...) sovereignty (...)", were an attribute of it – to quote the judgment in the *Wimbledon* case.[41]

The Court had already had the occasion to apply the *Wimbledon* rationale to a treaty creating an international organization in the 1922 Advisory Opinion concerning the *Competence of the ILO*. In that case, it was argued that extensive interpretation of a constituent treaty could amount to an infringement of the States' sovereignty. The Court held there that sovereignty was not in peril as long as the competence of the organization was expressly or implicitly foreseen by the constituent treaty:

[40] *Ibid.*, para. 46.

[41] PCIJ, Judgment, 17 August 1923, *S.S. Wimbledon, Series A, No. 1*, p. 25.

"It was much urged in argument that the establishment of the International Labour Organisation involved an abandonment of rights derived from national sovereignty, and that the competence of the Organisation therefore should not be extended by interpretation. There may be some force in this argument, but the question in every case must resolve itself into what the terms of the Treaty actually mean, and it is from this point of view that the Court proposes to examine the question."[42]

V. River Commissions: Search for New Forms of International Cooperation

The principle of speciality and the principle of implied powers were thus meant to strike the right balance between sovereignty and enhanced international cooperation through international organization. It seems however that this balance was precarious: to be sure, the principles survived, but not the model of international organization formed by the river Commissions themselves. Indeed, no organization exists today having powers as extended as those of the river commissions during the 19th and the beginning of the 20th century.

The present Danube Commission is formed by Riparian States; and it took a while until they were all admitted. Its mission was reduced to the supervision of technical works over the River; it is not vested with any power to take binding decisions. Its means – normative, but also budgetary – are just like its missions: greatly lowered.[43] This is certainly due to the context of the adoption of the 1948 Belgrade Convention, maybe the first "conventional" act

[42] PCIJ, Advisory Opinion, 12 August 1922, *Competence of the ILO, Series B, Nos. 2 and 3*, p. 23.

[43] See L. Imbert, "Le régime juridique actuel du Danube", 55 *RGDIP* (1951), pp. 73-94.

of the Cold War to come.[44] The western powers – UK, France, US – refused to sign the draft prepared by the Soviet representative, who otherwise was not too much sadden by this refusal. He was thus reported to have said to the western delegates: « The door was open for you to come in; the door is open for you to leave, if that is what you wish. »[45] And that is what the Western Powers in fact did.

Beyond these circumstantial, historical reasons, the decline of the river commissions is essentially due to the consolidation of State sovereignty during 20th century. Indeed, the 19th century commissions were set out by States victorious in war, as a form of securing their interests beyond their territory. The membership in commissions reflected this essential purpose: riparian States – when they were represented – and non-riparian States were placed on an equal footing. No wonder that this model of international organization could not survive to the principle of sovereign equality. Even the Rhine Commission, a successful model otherwise, saw its means reduced by the 1963 revision of the Mannheim Convention. However, in contrast to the Danube Commission, the Rhine Commission still has the power to take binding decisions. States' consent is being secured by the rule of unanimity, as well as by the possibility for one State to opt out of decisions with which it does not agree[46]. The material scope of the Rhine Commission's powers is also great compared with those of the Danube Commission. Moreover, the Rhine Commission enjoys jurisdictional powers (special, tribunals are vested with the power "to investigate and judge

[44] On the dissolution of the Commission and its replacement by a new Danube Commission in 1948, see H. Schermers and N. Blokker, *International Institutional Law*, 5th ed., Martinus Nijhoff Publishers (2011), pp. 1052-1053, § 1635 and p. 1057, § 1642.

[45] J. Campbell, *op. cit.* note 71.

[46] See Article 46 of the Mannheim Convention.

all infringements of regulations regarding navigation and river police").[47]

The Danube is still in search for its model: a new convention has been negotiated since 2005; its challenges and promises were discussed at length during the conference organized by the Romanian Society of International Law and the CEDIN in 2008, in the superb Palais de Béhague of the Romanian Embassy in Paris.[48] But, not much has changed on that front; negotiations seem to have reached a stalemate, trapped by political inertia and unilateral actions of some Riparian States. There is also the European Union Strategy for the Danube Region, which has attracted much interest since 2008. As the website of the Romanian MFA makes known, this coordination program was initially conceived under the constraints of the "triple no": no new funds, no new institutions, no new regulations.[49] Then, I can only conclude with a question: thus conceived, may the new strategy live up to the promises of Europe's second longest River?

[47] See Article 34 of the Mannheim Convention.

[48] The acts of the conference were published: B. Aurescu and A. Pellet (eds.), *Actualité du droit des fleuves internationaux* , Paris, Pedone, 2010, 308 p. On the negotiations of the new convention, see I. Diaconu, "Pour une nouvelle convention concernant la navigation sur le Danube", in *ibid.*, pp. 153-160.

[49] http://www.mae.ro/strategia-dunarii.