THE PCIJ AND THE PROTECTION OF FOREIGN INVESTMENTS

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I. INTRODUCTION

The list of issues on which investment tribunals have referred to the Permanent Court of International Justice's (PCIJ) case law is long. It includes jurisdictional issues, provisional measures, issues of substance such as whether contractual rights can be the object of an expropriation and the question of reparations, and a state of necessity.

Judgments and opinions in no less than thirteen cases\(^1\) decided by the PCIJ have found their way into decisions and awards of investment tribunals. This runs from frequently quoted cases like Factory at Chorzów and Mavrommatis to the Eastern Greenland case on which only a few investment tribunals relied.

Two of the issues touched upon by the have PCIJ left important traces in the case law of investment tribunals: one is jurisdiction *ratione temporis*; the other is the standard of reparation for treaty violations. Other judgments of the PCIJ are mentioned in only very few awards of investment tribunals. The subsequent sections address four representative aspects of current investment law, as reflected in arbitral jurisprudence, with a view to tracing the PCIJ’s legacy.

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\(^1\) Losinger & Co (Switzerland v Yugoslavia), (Jurisdiction) [1936] PCIJ Ser C No 78; Mavrommatis Palestine Concessions (Greece v UK) (Jurisdiction) [1924] PCIJ Ser A No 2; Case Concerning the Factory at Chorzów (Germany v Poland) [1927] PCIJ Ser A No 9; Case concerning Certain German Interests in Polish Upper Silesia (Germany v Poland) [1928] PCIJ Ser A No 17; Certain German Interests in Polish Upper Silesia (Germany v Poland) (Jurisdiction) [1926] PCIJ Ser A No 7; Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria) (Jurisdiction) [1939] PCIJ Ser A/B No 77; SS Wimbledon (UK v Germany) (Jurisdiction) [1923] PCIJ Ser A No 1; Payment of Various Serbian Loans Issued in France (France v Yugoslavia) (Jurisdiction) [1929] PCIJ Ser A No 20; Phosphates in Morocco (Italy v France) (Jurisdiction) [1938] PCIJ Ser A/B No 74; Jurisdiction of the Courts of Danzig (Advisory Opinion) [1928] PCIJ Ser B No 15; Status of Eastern Carelia (Advisory Opinion) [1923] PCIJ Šer B No 5; Oscar Chinn (Jurisdiction) [1934] PCIJ Ser A/B No 63; Polish Postal Service in Danzig (Advisory Opinion) [1925] PCIJ Ser B No 11; Legal Status of Eastern Greenland (Denmark v Norway) (Jurisdiction) [1933] PCIJ Ser A/B No 53.
II. The Jurisdiction of Investment Tribunals

1. The Principle of Competence—Competence

The ICSID Convention in Article 41 (1) contains the rule that ‘The Tribunal shall be the judge of its own competence’.2 Despite this clear rule on competence-competence ICSID tribunals have referred in this regard to the judgment of the PCIJ in *The Electricity Company of Sofia and Bulgaria* case to confirm their finding that it is their task to decide upon the interpretation of the instrument of consent and thereby upon their own competence.

The approach of the Tribunal in *SPP v Egypt*4 can serve as an example in this regard. The case concerned the cancellation of a hotel project by the Egyptian authorities. The basis for the jurisdiction of the ICSID Tribunal in *SPP* was Article 8 of the Egyptian Law No 43 of 1974. The Tribunal did not accept the contentions of the parties on how the Egyptian Law had to be interpreted. With regard to Egypt’s contention that Egyptian law should be governing as far as the interpretation of its instrument of consent is concerned it said that it is for the Tribunal to decide upon its own competence:

While Egypt’s interpretation of its own legislation is unquestionably entitled to considerable weight, it cannot control the Tribunal’s decision as to its own competence. The jurisprudence of the Permanent Court of International Justice and the International Court of Justice makes clear that a sovereign State’s interpretation of its own unilateral consent to jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues (...).5

It is not entirely clear why the Tribunal relied on the *The Electricity Company of Sofia and Bulgaria*6 case in this context. The PCIJ had not announced openly in the *Electricity Company* that to exercise competence-competence was part of its judicial tasks. Furthermore, in the *Electricity Company of Sofia and Bulgaria* case, Belgium had invoked a Treaty of 1931 and Belgium’s and Bulgaria’s declaration of adherence to the Optional Clause of the PCIJ’s statute as bases for consent. Therefore, in

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3 *The Electricity Company of Sofia and Bulgaria* (Judgment) (n 1) 64.
5 Ibid [60].
6 *The Electricity Company of Sofia and Bulgaria* (Judgment) (n 1) 64.