SEPARATE OPINION OF JUDGE TANAKA

The following observations are limited to the Court's opinion on the second principal Preliminary Objection raised by the Respondent Government.

I can completely agree with the conclusion of the Court in rejecting this objection. Furthermore, I cannot deny the well-foundedness of the reasons by which the Court reached this conclusion. Nor do I hesitate to say that these reasons in general are in themselves sufficient to overrule this Preliminary Objection.

However, to my regret, I cannot agree with the Court's choice of reasons. To reach a conclusion there may be found many concurrent reasons upon which a decision of the Court can be based. Some of them may be more immediate, essential and straightforward than others which are of indirect and subsidiary importance and serve simply to corroborate the principal reasons.

The choice of reasons as grounds for a decision, however, is necessarily subject to a limitation which is required by the nature of judicial activities. I am well aware that some consideration should be given to the existence of precedents in regard to a case which the Court is called upon to decide. Respect for precedents and maintenance of the continuity of jurisprudence are without the slightest doubt highly desirable from the viewpoint of the certainty of law which is equally required in international law and in municipal law. The same kind of cases must be decided in the same way and possibly by the same reasoning. This limitation is inherent in the judicial activities as distinct from purely academic activities.

On the other hand, the requirement of the consistency of jurisprudence is never absolute. It cannot be maintained at the sacrifice of the requirements of justice and reason. The Court should not hesitate to overrule the precedents and should not be too preoccupied with the authority of its past decisions. The formal authority of the Court's decision must not be maintained to the detriment of its substantive authority. Therefore, it is quite inevitable that, from the point of view of the conclusion or reasoning, the minority in one case should become the majority in another case of the same kind within a comparatively short space of time.

What I want particularly to emphasize is not only the concrete appropriateness of the conclusion, namely the operative part of each decision, but the reasoning upon which the conclusion is based. The more important function of the Court as the principal judicial organ of the United Nations is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the development of international law. It seems hardly necessary to

say that the real life of a decision should be found in the reasoning rather than in the conclusion.

Therefore, the above-mentioned choice of reasons by which the Court disposes of a matter in issue becomes important. It affects the intrinsic value and weight of a reason on the basis of which a concrete issue is dealt with.

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In the light of these short preliminary remarks I shall consider the matter at issue as regards the choice of reasons by which the Court has disposed of the second Preliminary Objection raised by the Respondent Government.

There is not the slightest doubt that this objection denying the Court's jurisdiction in the present case has been motivated and inspired by the existence of two precedents, namely the Judgments in the *Aerial Incident* case of 26 May 1959 (*I.C.J. Reports 1959*, p. 127), and the *Temple of Preah Vihear* case of 26 May 1961 (*I.C.J. Reports 1961*, p. 17).

First I shall consider the Court's Judgment in the *Aerial Incident* case, which marked the starting point of the subsequent history of the jurisdictional matter with which we are concerned.

In this case the Bulgarian Government raised a preliminary objection denying the validity of the Declaration of 12 August 1921, by which Bulgaria accepted the compulsory jurisdiction of the Permanent Court of International Justice. This Declaration, the Bulgarian Government insisted, "ceased to be in force on the dissolution of the Permanent Court" of International Justice on 18 April 1946 and therefore "cannot accordingly be regarded as constituting an acceptance of the compulsory jurisdiction of the International Court of Justice, by virtue of Article 36, paragraph 5, of the Statute of that Court". The Government of Israel, on the other hand, to establish the jurisdiction of the Court in that case, invoked the Bulgarian Declaration of 1921 and Article 36, paragraph 5, of the Statute and the fact that Bulgaria became a Member of the United Nations on 14 December 1955 and accordingly a party to the Statute.

The Court upheld this objection and ruled that it had no jurisdiction in the case.

I quote a passage of the Judgment which seems most clearly to indicate its essential reasons :

> "At that date [namely, 14 December 1955], however, the Bulgarian Declaration of 1921 was no longer in force in consequence of the dissolution of the Permanent Court of International Justice in 1946. The acceptance set out in the Declaration of the compulsory jurisdiction of the Permanent Court of International

> Justice was thereafter devoid of object since that Court was no longer in existence. The legal basis for that acceptance in Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice, ceased to exist with the disappearance of that Statute. Thus, the Bulgarian Declaration had lapsed and was no longer in force" (*I.C.J. Reports 1959*, p. 143).

This ruling of the Court was based on two main reasons which were concerned with the interpretation of Article 36, paragraph 5. The one was the recognition of the destructive effect of the dissolution of the Permanent Court on 18 April 1946 upon the Bulgarian Declaration of 1921. The other was the distinction made between original and non-original Members of the United Nations concerning the interpretation of Article 36, paragraph 5, of the Statute.

Although this Judgment was given in consideration of the particular circumstances of the case and its binding force was limited to the parties and to this particular case (Article 59 of the Statute), it has exercised tremendous influence upon the subsequent course of the Court's jurisprudence and the attitude of parties vis-à-vis the jurisdictional issues relative to this Court.

The first repercussion of the Judgment in the *Aerial Incident* case may be seen in the Judgment in the *Temple of Preah Vihear* case delivered on 26 May 1961, precisely two years after the delivery of the Judgment in the *Aerial Incident* case.

It is to be noted that the repercussion is found not in the conclusion of the Judgment itself, but in the argument of the party raising a preliminary objection to the Court's jurisdiction, and in the reasoning of the Court in disposing of this objection.

The question at issue was concerned with the effect of the Thai Declaration of 20 May 1950 which renewed for a period of ten years the Declaration of 3 May 1940, constituting the ten-year renewal of a Declaration dated 20 September 1929, accepting the compulsory jurisdiction of the Permanent Court of International Justice. The question was whether the 1950 Declaration of Thailand was valid by the operation of Article 36, paragraph 5, notwithstanding the dissolution of the Permanent Court on 18 April 1946 and the fact that Thailand became a Member of the United Nations and thus a party to the Statute on 16 December 1946, eight months after the dissolution of the Permanent Court.

One may recognize that Thailand was legally in an analogous position with Bulgaria in regard to the application of Article 36, paragraph 5, except that, while the Bulgarian Declaration was made for an indefinite period, the Thai Declaration covered a period of ten years with the possibility of renewal. Accordingly, it was quite natural that, when the Thai Government raised a preliminary objection denying the jurisdiction of the Court by excluding the application of Article 36,

paragraph 5, to that declaration, it did not fail to refer to the Judgment in the *Aerial Incident* case.

The Preliminary Objection and Submissions of Thailand on this point read as follows :

> "(i) that the Siamese declaration of the 20th September, 1929 lapsed on the dissolution of the Permanent Court of International Justice on the 19th April, 1946, and thereafter could not be renewed ;
>
> (ii) that the Thai declaration of the 20th May, 1950 purported to do no more than renew the said declaration of the 20th September, 1929, and so was ineffective *ab initio* ;
>
> (iii) that consequently Thailand has never accepted the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute".

It is not unreasonable to suppose that this objection of Thailand was encouraged by the Judgment in the *Aerial Incident* case. However, differently from that case, the objection was not successful for the cause of Thailand. The Court, although it recognized its jurisdiction in the case, reached its conclusion not by way of the application of Article 36, paragraph 5, but by recognizing the validity of the Thai Declaration of 1950 as made independently under Article 36, paragraphs 2 to 4 (*I.C.J. Reports 1961*, p. 29).

It is to be noted that in the *Temple of Preah Vihear* case the Court did not establish its jurisdiction by considering the question whether or not the dissolution of the Permanent Court resulted in the lapse of the Thai Declaration of 1940, renewed in 1950. This question was left untouched and the matter was decided by stressing the particularity of the case, which was different from the *Aerial Incident* case.

Furthermore, the Court's interpretation that the Thai Declaration of 1950 should be considered as independent from that of 1940 does not seem quite in conformity with the text of the declaration which renewed the previous declaration, and with the real intention of Thailand from which the historical continuity between the two declarations is undeniable. From this viewpoint the solution presented by the Judgment does not seem quite satisfactory.

The question of the effect of the dissolution of the Permanent Court in the light of an interpretation of Article 36, paragraph 5, upon which the preliminary objection was based, should have been reconsidered by the Court.

There remained for the Court the following alternatives : either the Court would comply with the principle enunciated by the Judgment in the *Aerial Incident* case and uphold this objection, or it would overrule this principle and reject the objection.

In the case of the second alternative the Joint Dissenting Opinion of Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender appended to the Judgment in the *Aerial Incident* case (*I.C.J. Reports 1959*, pp. 156 *et seq.*) might naturally have much importance in deciding this issue.

This Joint Dissenting Opinion, different from the Court's opinion, firstly denied the lapsing effect of the dissolution of the Permanent Court upon the Bulgarian Declaration of 1921 by the interpretation and application of Article 36, paragraph 5, and secondly, it did not distinguish between original and non-original Members of the United Nations regarding the matter of transfer of compulsory jurisdiction. The fundamental idea upon which this opinion rested was nothing but the substantial identity of the old and the new Court and the continuity of their jurisdiction notwithstanding the dissolution of the old Court. Whether the conclusion was negative or positive, the Court should have tackled and solved this essential question without confining itself to reasons of a subsidiary character.

That the Court's attitude vis-à-vis the *Temple of Preah Vihear* case was influenced by the preoccupation of not impairing the authority of the Judgment in the *Aerial Incident* case is very probable. Respect for precedents and maintenance of jurisprudence are important considerations required in judicial activities. But the choice of reasons for a decision is no less important, as I said above. From this viewpoint the Court should have chosen in the *Temple* case more essential, more immediate reasons in deciding the matter at issue.

This is one reason why Judge Sir Gerald Fitzmaurice and myself appended a Declaration to the Judgment in the *Temple of Preah Vihear* case (*I.C.J. Reports 1961*, pp. 36 *et seq.*; cf. Declaration of Judge Wellington Koo, *ibid.*, p. 36).

Thus the doctrine of lapse by dissolution which was incorporated in the Judgment in the *Aerial Incident* case has remained intact. It has offered a powerful tool to those States which were not inclined to submit to the compulsory jurisdiction of the Court by the application either of Article 36, paragraph 5, or of Article 37 of the Statute. It has become an indirect obstacle to the Court in choosing reasons.

* * *

The thesis of lapse by dissolution has appeared for the third time in the second principal Preliminary Objection put forward by the Respondent Government in the present case. The Judgment in the *Aerial Incident* case has become the core of the argument of the Respondent Government in denying the validity of the jurisdictional clause contained in the Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927 between Belgium and Spain. The position

of the Respondent Government is to deny the jurisdiction of the Court by referring to the principles enunciated by the Judgment in the *Aerial Incident* case regarding the interpretation of Article 36, paragraph 5, of the Statute. The attitude of the Applicant Government vis-à-vis the Judgment in the *Aerial Incident* case, on the other hand, seems to be that it avoids challenging this Judgment openly and tries to attain the same purpose, namely justification of the jurisdiction of the Court, by another means. This means is to emphasize the difference between the two cases. The difference is found in the fact that, whereas a declaration referred to in Article 36, paragraph 5, is of a unilateral character and simply aims at the acceptance of the compulsory jurisdiction, and is furthermore intimately connected with the Statute of the Permanent Court, the jurisdictional clause with which Article 37 is concerned, is of a bilateral character and is incorporated in a treaty or convention which has a wider purpose than a declaration under the optional clause. Therefore, the jurisdictional clause in the Treaty of 1927, unlike the Bulgarian declaration of 1921, would not be subject to the annihilating effect of the dissolution of the Permanent Court.

On the other hand, the validity of the Treaty of 1927 as a whole is not denied by the Parties.

The result thereof is that the Parties have gone into the question of the severability of the provisions of a treaty : the Spanish Government is in favour of severability provided this does not come into conflict with the validity of the remaining parts of the treaty, namely the parts relative to conciliation and arbitration ; the Belgian Government is in favour of inseverability of the treaty in order to save the validity of the jurisdictional clause as an integral part of the Treaty of 1927.

Thus the discussions deviated in the wrong direction by dealing with a question which does not seem to be relevant to the interpretation of Article 37 of the Statute, the main legal issue in the second principal Preliminary Objection.

The Court's viewpoint seems to support, in general, the contention of the Belgian Government resting upon the emphasis of a difference between Article 36, paragraph 5, and Article 37 of the Statute in so far as the interpretation of these two provisions is concerned.

I shall now consider the question whether Article 37 can be interpreted differently from Article 36, paragraph 5, in regard to the effect of the dissolution of the Permanent Court. The question is concerned with the identity or divergence of these provisions.

It is quite true that there exist many points of difference between Article 36, paragraph 5, and Article 37 of the Statute, for example, the wording, the source of compulsory jurisdiction, the unilateral character of the declaration and the bilateral character of the jurisdictional clause incorporated in a treaty, etc. The question, however, is whether these differences are relevant to a decision of the matter at issue, namely the effect of the dissolution of the Permanent Court on the fate of

declarations made under the optional clause and jurisdictional clauses in treaties.

In a matter of this kind we cannot assert absolutely that one thing is identical with or different from the other. There may be found many elements of similarity and difference. What matters is from what viewpoint they are identical or different. The decision as to whether one thing is identical or not with the other depends upon the position from which one regards the matter. Therefore, the decision is relative to the viewpoint one adopts.

Concerning the matter at issue, namely the question of identity or diversity between Article 36, paragraph 5, and Article 37 of the Statute, the criterion should be sought in the viewpoint of the essential purpose of both provisions, i.e., the continuity of the acceptance of compulsory jurisdiction. If these provisions are identical in this fundamental purpose, they may be considered as identical notwithstanding the possible difference in many other respects which are not related to the purpose itself.

Now, nobody would dare deny the fact that the above-mentioned purpose is common to Articles 36, paragraph 5, and 37. Consequently, the Court, called upon to give an interpretation on Article 37 in regard to the second principal Preliminary Objection, could not have ignored the existence of the Judgment in the *Aerial Incident* case, whatever the conclusion of the Court might be : either to follow or to overrule this precedent. The Court should have met the question which is common to Articles 36, paragraph 5, and 37, instead of dealing with the present case independently of the *Aerial Incident* case.

The Court should have made its position clear on the jurisdictional matter, vis-à-vis the Judgment in the *Aerial Incident* case as involving an issue which is of the same legal nature as the present case. That is what is dictated by the value and importance of the matter at issue.

I am not unaware of the fact that, while there now exists no optional clause declaration which needs to be saved by the operation of Article 36, paragraph 5, a large number of treaties and conventions containing a jurisdictional clause are still in existence. In the former case this issue, namely the question of the interpretation of Article 36, paragraph 5, may have lost all practical value ; accordingly, the Judgment in the *Aerial Incident* case would do no harm to the interpretation of Article 36, paragraph 5, even if it should be overruled.

However, consideration should be given not only to the practical significance of the Court's decisions but also to their theoretical meaning and value. I consider that the Court should have dealt primarily with the Judgment in the *Aerial Incident* case as this involved the same legal question as the present issue rather than evade it because it was an inconvenient obstacle. General international law might have benefited by such an attitude of the Court by finding a common solution

to the jurisdictional question which has arisen or might arise concerning Articles 36, paragraph 5, and 37.

* * *

So far as my view on the interpretation of Article 36, paragraph 5, is concerned, I agree fundamentally with the view put forward in the above-mentioned Joint Dissenting Opinion appended to the Judgment in the *Aerial Incident* case. Not only do I share the view of this Opinion as an interpretation of Article 36, paragraph 5, but I agree with the view of its authors which does not make a distinction between the interpretation of Article 36, paragraph 5, and Article 37 (*I.C.J. Reports 1959*, pp. 180-182) so far as the effect of compulsory jurisdiction is concerned.

It is unnecessary to describe the content of this Opinion in detail. I would rather limit myself to stressing some of its essential points from my own viewpoint.

What I have to say below is concerned with the interpretation of Article 36, paragraph 5, which constitutes the subject of that Opinion, but this can be applied *mutatis mutandis* to the interpretation of Article 37.

The principal question we are confronted with is the effect of the dissolution of the Permanent Court of International Justice upon the compulsory jurisdiction accepted by a unilateral declaration under Article 36, paragraphs 2 to 4 of the Statute. It has a bearing on the interpretation of Article 36, paragraph 5, which stipulates :

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

Nobody can deny that the purpose of this provision is the preservation of the effect of compulsory jurisdiction accepted in regard to the old Court under the régime of the new Court. The alleged effect of the lapse of declarations by the dissolution of the Permanent Court shall be considered from this point of view, namely the purpose of Article 36, paragraph 5.

The theory of "lapse" advanced by the Bulgarian Government and supported by the Judgment in the *Aerial Incident* case is based on the great significance attached to the fact of the dissolution of the Permanent Court. It presupposes the existence of some difference between the old and new Courts. If some differences between the two Courts, either fundamental or in detail, exist then declarations made

under the old Court could not be expected to continue the same effect in regard to the new Court. In this case the dissolution of the Permanent Court might have a serious effect upon the fate of the said declarations.

Now there is no doubt that not only in their fundamental purpose but in every detail, namely from the viewpoint of organization, composition and procedure, the old and the new Court are identical with each other; the latter being the exact counterpart or copy of the former. They do not differ except in name. The continuance of substantially the same Court, differing only in name, has never been contested, even by those who sought to deny the compulsory jurisdiction of the International Court.

The continuity between the two Courts under a different name guaranteed the subsistence of the same jurisdictional rights and obligations of the declarant States. There would seem to be no inconvenience or disadvantage to the parties concerned. Presumably if when the switchover from one Court to the other was carried out no change of name had been effected, no one, in this case, would contend for the lapse of an already existing declaration.

Furthermore, it should be noted that the dissolution of the Permanent Court did not occur suddenly but had been anticipated and that there was no temporal gap between the dissolution of the old Court and the creation of the new one.

Consequently, the real circumstances are not so much the transfer of jurisdiction from the old Court to the new one as the replacement of the former by the latter. The acceptances by the declarant States of the compulsory jurisdiction remain unchanged. Accordingly there did not occur the "transfer of jurisdiction" nor the "automatic succession" (in the proper sense of the terms). The circumstances concerning the dissolution of the Permanent Court being such, it does not seem to be in conformity with the true intention of the parties or with a commonsense conclusion to attach the lapsing effect to the fact of the dissolution of the Permanent Court. Nor does there exist here any material change in the compulsory jurisdiction originally accepted. It matters only that declarations are "still in force" or "faites ... pour une durée qui n'est pas encore expirée" (Article 36, paragraph 5).

From what is indicated above, I may conclude that Article 36, paragraph 5, simply affirms the true and reasonable intention of declarant States and does not impose any new obligations upon them. This provision is nothing but the expression of what is required by logic and reason. This provision may be conceived as an authentic interpretation concerning the law on jurisdictional matters.

If the dissolution of the Permanent Court could have so important an effect upon declarations accepting the compulsory jurisdiction, the legislators of this provision would have expressly mentioned this matter. However, the term "dissolution" does not appear in Article 36, paragraph 5. It is certain that they did not approve the destructive effect of dissolution. What they contemplated must have been, on

the contrary, to save the effect of declarations accepting the compulsory jurisdiction by excluding the possible erroneous construction of the effect of the dissolution. Such construction is radically opposed to the purpose inherent in Article 36, paragraph 5.

The real and only obstacle to the continuance of the compulsory jurisdiction existing with regard to some States is the fact that they did not become Members of the United Nations and accordingly parties to the Statute of the International Court before the dissolution of the Permanent Court. In this case one of the most important conditions required for acceptance of compulsory jurisdiction is lacking. But this condition can be fulfilled by admission to the United Nations and *ipso facto* becoming a party to the Statute of the International Court of Justice.

Thus, upon the basis of the already existing objective condition, namely declarations accepting the compulsory jurisdiction of the Permanent Court, the compulsory jurisdiction can become effective, being completed by the fulfilment of a subjective condition, namely membership of the United Nations and party to the Statute.

So long as this subjective condition is unrealized, the declaration remains inoperative or "dormant" ; it has not become null and void by the effect of the dissolution of the Permanent Court. The cause of the fact that temporarily the declaration remains inoperative, is found not in the effect of the dissolution, but in the lack of the capacity of the declarant State.

From what has been stated above, it is clear that the dissolution of the Permanent Court cannot have such an important effect as to decide the fate of declarations having accepted the compulsory jurisdiction of the Permanent Court by those States which were not original Members of the United Nations, or did not become Members before the dissolution of the Permanent Court. Therefore the doctrine of the "lapse" first put forward by the Bulgarian Government in the *Aerial Incident* case, and reiterated by the Thai Government in the *Temple of Preah Vihear* case regarding Article 36, paragraph 5, of the Statute (and finally invoked by the Spanish Government regarding Article 37) is quite illusory and unsound. This doctrine, I am inclined to consider, might have been artificially devised by those parties who, in concrete cases, did not want to submit themselves to the compulsory jurisdiction which they had accepted and the effective continuance of which they had never doubted before.

The logical fallacy of this doctrine is clear. As is indicated above, the replacement of the Permanent Court by the International Court in itself does not possess any negative effect on the continuance of the declaration accepting the compulsory jurisdiction, owing to the existence of exact identity between these two juridical organs. This is a sociological fact underlying the legal issue. However, these organs

have a distinct legal existence. Accordingly, to carry out smoothly the "transfer of jurisdiction" or the "automatic succession" between the old and the new Court a legislative measure or technique had to be adopted. This is precisely the purpose which was intended to be realized by Article 36, paragraph 5, and which is in conformity with the presumed intention of reasonable declarant States. It is evidently a contradiction to invoke the lapsing effect of dissolution and to deny the application of this provision, because its principal aim, undoubtedly, is nothing but the exclusion of such invocation.

The objective of the preservation of the effect of declarations under the old Court, as much as possible in regard to the new Court, must govern the interpretation of Article 36, paragraph 5, of the Statute. This objective is related to the institution of compulsory jurisdiction and, thereby, linked with the ideals of justice and peace which are to prevail in the international community. Those who advocate the doctrine of the "lapse" seem to view the concept of "dissolution" as if it presents an obstacle interrupting the continuity of the natural process of cause and effect. We should beware of falling into the excess of the legal formalism of so-called "conceptual jurisprudence" of which the doctrine of the "lapse" presents a conspicuous example. Sociological and teleological approaches, I consider, are particularly needed in the field of international law.

* * *

What I have stated above is limited to the question of the effect of the dissolution of the Permanent Court upon the existing declarations in the light of the interpretation of Article 36, paragraph 5. With regard to another question, namely whether or not "the parties to the present Statute" within the meaning of the said Article is limited to original members of the United Nations, and therefore the signatories of the Statute, I need only refer to the above-mentioned Joint Dissenting Opinion and will not go further into the matter.

These fundamental arguments relative to the interpretation of Article 36, paragraph 5, can be applied unchanged to that of Article 37, since, as I mentioned above, so far as the fundamental objective is concerned, these provisions are exactly identical and there is no room for different interpretations of these two provisions. Accordingly, the Joint Dissenting Opinion which originally related to the interpretation of Article 36, paragraph 5, can be naturally extended to the interpretation of Article 37, in so far as common questions are concerned.

Briefly, I can agree with the opinion of the Court on the second principal Preliminary Objection, in its conclusion as well as in its reasoning. Next, it seems that the Court's view on Article 37, namely the question of the effect of the dissolution of the Permanent Court, is not essentially very different from that of the Dissenting Opinion on Article 36, paragraph 5, regarding the same question, except with regard to some points

which are derived from the particularity of a jurisdictional clause incorporated in a treaty. So far as the question of the effect of the dissolution of the Permanent Court on the compulsory jurisdiction is concerned, there should be no different answer or reasons as regards an independent unilateral declaration under the optional clause or a jurisdictional clause in a treaty. What can be said is that the reasons based on the particularity of the latter could be invoked *a fortiori* for the effective subsistence of the clause.

The following reasoning of the Court at the closing part of its consideration of the second principal Preliminary Objection is very convincing :

> "It was this fallacy which underlay the contention advanced during the hearings that the alleged lapse of Article 17 (4) was due to the disappearance of the 'object' of that clause, namely the Permanent Court. But that Court was never the substantive 'object' of the clause. The substantive object was compulsory adjudication and the Permanent Court was merely a means for achieving that object."

This reasoning can be very precisely applied to the interpretation of Article 36, paragraph 5.

The *Aerial Incident* case, the *Temple of Preah Vihear* case, and the present case, each of them possessing some particular aspect distinguishing the one from the others, involve an important legal issue which is common to them, namely the question of the effect of the dissolution of the Permanent Court upon the fate of the compulsory jurisdiction based on the optional clause of Article 36, paragraph 2, or the jurisdictional clause incorporated in a treaty. This common question was for the first time raised by the objection advanced by the Bulgarian Government in the *Aerial Incident* case. The Judgment in that case upheld the objection by recognizing the lapsing effect of the dissolution upon the compulsory declaration accepted by the optional clause. Although Article 36, paragraph 5, became obsolete, the Court's reasoning in that Judgment remains, unless it should be overruled by a subsequent judgment. Although the decision of the Court has no force of *res judicata* except between the parties, and in respect of that particular case, its reasoning should *de facto* exercise lasting influence upon matters involving the same kind of question. Accordingly, the attitude of the Thai Government and the Spanish Government, each invoking the Judgment in the *Aerial Incident* case, respectively in the *Temple of Preah Vihear* case and in the present case, is quite natural, so long as the reasoning of the Judgment in the *Aerial Incident* case has survived without being overruled by subsequent practice.

As one who shares the view of the Joint Dissenting Opinion concerning the interpretation of Article 36, paragraph 5, I consider that the Court should have overruled the Judgment of 1959 in the *Aerial Incident* case by the Judgment of 1961 in the *Temple of Preah Vihear* case. But as I pointed out above, the Court avoided meeting that Judgment directly and dealt with the matter in a different way. Now the Court has faced the same question for the second time. It should have made its standpoint on the interpretation of Article 36, paragraph 5, clear. But the Court has refrained from doing so from the viewpoint of stressing the difference between Article 37 and Article 36, paragraph 5, and has disposed of the issue quite independently of the interpretation of the Judgment of 1959. Thus, the Court has again lost the chance of rectifying the view adopted by that Judgment.

Whereas Article 36, paragraph 5, and Article 37 are as regards their fundamental objective quite identical and their differences are unessential, the matter involved in the second principal Preliminary Objection should have been disposed of in the light of the common principle underlying these two provisions, namely the preservation under the new Court of the compulsory jurisdiction accepted during the period of the old Court.

The Court's opinion, although it rests on the difference between the two provisions, is not limited to points peculiar to the interpretation of Article 37. Its essential reason can be *mutatis mutandis* applied to the interpretation of Article 36, paragraph 5. Furthermore, I assume that the Court's opinion is, in its fundamental reasoning, not very far from that of the Joint Dissenting Opinion in the *Aerial Incident* case. The above-cited passage from the Court's reasoning may be regarded as precisely the antithesis or refutation of what was declared in the essential part of the reasoning in the Judgment in the *Aerial Incident* case.

I consider that the Court's emphasis upon the difference between Article 36, paragraph 5, and Article 37 is more apparent than real. The Court has been careful not to deal directly with the 1959 Judgment, but the viewpoint adopted by the Court in 1959 is substantially overruled by the present Judgment.

(Signed) Kotaro TANAKA.