

for waiver. A final refusal to submit to the jurisdiction at this late stage might be a breach of agreement, but it was a breach with respect to which no national court could assume jurisdiction in the absence of consent.

The decision in *Duff Development Co. v. Government of Kelantan* seems peculiarly unfortunate at this day when sovereign immunities are regarded with less favor and are certainly less important than they may once have been.<sup>23</sup> It is in accord, however, with what seems to have been a tendency in the English cases to restrict waiver closely. While there are no American cases precisely in point, it is believed that American courts may be expected to approach the problem somewhat more liberally, with less concern for an arbitrary and somewhat archaic principle and more attention to the requirements of substantive justice.<sup>24</sup> If compulsory arbitration under modern statutes is not a judicial proceeding, it is at least closely analogous thereto. And certainly the ends of justice are ill subserved when a foreign state may arbitrate, proceed through all the courts of the land to have the award set aside, and finally defeat an order to enforce the award by claiming sovereign immunity.

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#### THE OPIUM CONFERENCES

On March 2, 1923, the President approved the Porter resolution which urged him to negotiate with various poppy and coca producing states for limiting their production of those substances to "strictly medicinal and scientific purposes." This led to discussion of this problem by representatives of the United States in the League's Advisory Committee on Opium and to the British suggestion on June 1, 1923, that two conferences be held. As a result of resolutions by the Assembly (Sept. 27, 1923) and Council (Dec. 13, 1923) of the League, official invitations for such conferences were issued by the League.<sup>1</sup>

The first, which consisted of representatives of eight states<sup>2</sup> with possessions in which the smoking of opium is either considered legitimate or extensively practiced, met from November 3, 1924, to February 11, 1925, and

<sup>23</sup> See Hayes, "Private Claims Against Foreign Sovereigns," 38 *Harvard Law Review*, 599.

<sup>24</sup> In addition to the cases discussed above, see *Porto Rico v. Rosaly* (1913), 227 U. S. 270; *Porto Rico v. Ramos* (1914), 232 U. S. 627; *Richardson v. Fajardo Sugar Co.* (1916), 241 U. S. 44.

<sup>1</sup> For discussion of earlier international negotiations, see Wright, "The Opium Question," this *JOURNAL*, Vol. 18, p. 231. Accounts of the two recent conferences and the essential documents have been published by Buell, *World Peace Foundation Pamphlets*, Vol. 8, Nos. 2 and 3, and *Foreign Policy Association*, Pamphlet No. 33, 1925. See also *League of Nations, Monthly Summary*, Vol. 5, p. 54. On March 15, 1924 the League Council authorized a special preparatory committee to draft proposals for the conference. This committee failed to agree, and a proposal drafted by the League Advisory Committee on Opium was used as the basis of conference discussions. (Minutes, 6th session, p. 111.) The United States independently offered suggestions. (Buell, *op. cit.*, p. 144.)

<sup>2</sup> Great Britain, France, Netherlands, Portugal, Japan, India, Siam, China.

produced an agreement, a protocol and a final act<sup>3</sup> designed to facilitate the gradual suppression of smoking as required by Chapter II of the Hague Opium Convention of 1912. These documents have been signed by the participating governments, except China, whose delegation withdrew from the conference on February 6, 1925. The protocol is to come into force for each signatory at the same time as the agreement, and the latter comes into force for ratifying Powers ninety days after deposit of the second ratification with the League Secretariat. It may be denounced on a year's notice.

The second conference, which consisted of representatives of forty-one states,<sup>4</sup> parties to the Opium Convention of 1912 or members of the League of Nations, met from November 17, 1924, to February 19, 1925, and produced a convention, a protocol and a final act<sup>5</sup> designed to supersede as between the parties Chapters I, III, and V of the 1912 Opium Convention (Art. 31). Chapters II (prepared opium) and IV (smuggling into China) remain unaffected. Russia was invited but did not attend,<sup>6</sup> and the United States and Chinese delegations withdrew on February 6.<sup>7</sup> The convention has been signed by eighteen states, the protocol by twelve and the final act by twenty-one. The convention remains open for signature by states represented in the conference, members of the League of Nations, and other states to which the League Council shall have communicated it, until September 30, 1925, after which it is open to accession by such parties. The protocol comes into force for each signatory at the same time as the convention, and the latter comes into force for ratifying Powers ninety days after deposit with the League Secretariat of ratifications of ten Powers, including seven of the states by which the central board is to be appointed, of which two are permanent members of the League Council. It may be denounced on a year's notice.

It seems to be generally recognized that if these agreements come into force they will assure more effective suppression of the narcotic evil than has the 1912 Opium Convention.<sup>8</sup> It is also recognized that they do not promise so

<sup>3</sup> This contained a resolution and reservations by Great Britain, Portugal, and Siam.

<sup>4</sup> Albania, Germany, United States, Australia, Belgium, Bolivia, Brazil, British Empire, Bulgaria, Canada, Chile, China, Cuba, Denmark, Free City of Danzig, Dominican Republic, Egypt, Spain, Finland, France, Greece, Hungary, India, Irish Free State, Italy, Japan, Luxemburg, Netherlands, Nicaragua, Persia, Poland, Portugal, Roumania, Kingdom of Serbs, Croats and Slovenes, Siam, Sweden, Switzerland, Czechoslovakia, Turkey, Uruguay, Venezuela.

<sup>5</sup> This contained seven resolutions and reservations by Persia and Siam.

<sup>6</sup> The superior results already obtained and the suspicion that the participating Powers were really "seeking to promote their commercial interests and to earn business profits for themselves" were the reasons given by the Soviet government. Letter and memorandum, October 29, 1924, O.D.C. 4.

<sup>7</sup> This JOURNAL, Vol. 19, p. 380, and comment, *ibid.*, p. 348.

<sup>8</sup> U. S. memorandum on withdrawal, *supra*, note 7; concluding remarks of M. Zahle, of Denmark, president of the conference, Minutes 38th Plenary meetings, printed in Foreign Policy Association pamphlet, *op. cit.*, pp. 18-22; Buell, *op. cit.*, p. 116; Foreign Policy Association pamphlet, *op. cit.*, p. 16.

speedy an elimination of that evil as some delegations, notably that of the United States, desired.<sup>9</sup> This is the usual result of international conferences. "The process of finding what it is worth while to try to do internationally," says Elihu Root, "is a good deal like the old problem of finding the greatest common denominator, which used to be so tedious when we were children."<sup>10</sup> Opium conferences have been no exception to this general rule. At the close of the Hague conference of 1912, Bishop Brent, one of the American representatives, remarked that it is "the common experience of human endeavor to fall short of the full purpose. . . . When the smoke of discussion has cleared away, I doubt not that he who now feels least satisfied with the result of this conference will find that we have taken a real step in advance."<sup>11</sup> In withdrawing from the present conference on February 6, the American delegation said:

Despite more than two months of discussion and repeated adjournments, it now clearly appears that the purpose for which the conference was called cannot be accomplished. . . . There is no likelihood under present conditions that the production of raw opium and coca leaves will be restricted to the medicinal and scientific needs of the world. . . . In the matter of manufactured drugs and the control of transportation an improvement over the Hague convention is noticeable.<sup>12</sup>

In his closing address, the President of the conference, M. Zahle, of Denmark, said:<sup>12</sup>

The conference has not . . . removed the world's drug evil. . . . Yet it has struck a most powerful blow. . . . I feel confident the convention would have been an even better one if the (American) delegation had remained to the end. . . . Let me again reaffirm my conviction that the drug question has entered upon a new period. It is now caught in the day-to-day machinery of the League of Nations. It cannot escape. Where the Hague Conference adjourned without leaving behind it either organization or permanent machinery, this present conference is but the opening step in a movement which will accelerate from day to day and from month to month.<sup>13</sup>

There is no space here to consider the debates of these conferences in detail. The problem of narcotic control is intrinsically difficult. The countries which stand to lose revenue and independence in domestic administration naturally resent the high morality of those countries which stand to lose nothing and gain everything by suppression of opium production. It is not surprising that India, Persia, Turkey, Jugo-Slavia, and other producing countries, were reluctant to discuss American proposals which they consid-

<sup>9</sup> *Ibid.*

<sup>10</sup> *Foreign Affairs*, Vol. 3, p. 356, April, 1925.

<sup>11</sup> *Conference Internationale de l'Opium, La Haye, 1912, Proces-Verbaux officiels*, p. 244.

<sup>12</sup> *Supra*, note 7.

<sup>13</sup> *Ibid.*, 8.

ered beyond the agenda of the conference<sup>14</sup> and contrary to the principles which they had accepted. Further difficulties arose because of the inability of China, in the midst of internal disorder, to offer adequate assurances of limiting production in her own territory, because of the misunderstanding by the American delegation of the division of the agenda between the two conferences and the precise sense in which the "American principle" had been accepted by the League of Nations; and especially because of that delegation's rigorous instructions, described by M. Loudon, of the Netherlands, as placing it under "imperative orders to impose its will upon the others under pain of leaving the conference."<sup>15</sup>

However, comparing the agreements signed with the 1912 convention, much was accomplished. International regulation was extended to other dangerous narcotics, such as Indian hemp (hashish) and synthetic products, such as Ecgonine, though codeine was not included as desired by the United States.<sup>16</sup> Provision was also made for the extension of regulation to other narcotic drugs which might be discovered in the future, by acceptance of the parties on recommendation of the League Council (Arts. 1, 4, 10, 11). More definite provisions were agreed upon for limiting (1) production and (2) consumption, and (3) for regulating international trade in these substances.

#### (1) LIMITATION OF PRODUCTION

Steps toward limitation of production of raw opium were taken by a resolution of the second conference (No. 5) authorizing the League Council to consider sending a commission to certain poppy-growing countries with their consent to investigate the difficulties of limitation and to advise on measures, such as crop substitution, which might make such limitation possible.<sup>17</sup> This may eventually lead to practical results, but not immediately. Limitation of production of raw opium and coca leaves had been the main item on the American instructions, and the dissatisfaction of the American delegation with these meagre results was the main reason for their withdrawal from the conference.

By the 1912 convention the parties agreed to "enact effective laws or regulations for the control of the production and distribution of raw opium" (Art. 1). The producing countries, parties to this convention, had such laws, but they were either unenforced<sup>18</sup> or imposed no serious limitation upon the

<sup>14</sup> The principles and the agenda were fixed by the Assembly and Council resolution calling the conferences, and more specifically by the preparatory committee. See League of Nations Official Journal, April, 1924, p. 523; Buell, *op. cit.*, pp. 83-86.

<sup>15</sup> Minutes 26th meeting, February 7, 1925. See also this JOURNAL, Vol. 19, pp. 350-354.

<sup>16</sup> Minority report of Surgeon General Blue of United States, sub-committee F., O. D. C. 73, and Polish proposal, O. D. C. 62. See also Opium Committee, 5th session, Minutes, pp. 68-72.

<sup>17</sup> See discussion in 6th meeting, League Opium Committee, Minutes, pp. 56-58.

<sup>18</sup> As China.

amount of production.<sup>19</sup> India effectively controlled production and distribution, but on the principle that the amount of "excise opium" used for domestic eating was for her own decision and the amount of "provision opium" used for export was for decision of the importing country. Turkey and Persia, which had not ratified the convention, depended to a considerable extent on opium revenue and did not limit production. Jugo-Slavia actually stimulated poppy cultivation, though her product was all used for drug manufacturing.<sup>20</sup> Coca leaf production was not covered by the convention, and was uncontrolled, as it grows wild in Peru and Bolivia and is extensively grown by the natives of Java for hedges. Thus, practically, the amount of opium and coca in the world was limited only by natural conditions and economic demand. Demand was of course effected by restrictions on consumption enforced by the governments of consuming states, but, except from India, extensive smuggling reduced the importance of this limitation.

The American "suggestions," submitted to the second conference, added to the 1912 convention "coca leaves" and the phrase, "so that there will be no surplus available for purposes not strictly medical and scientific."<sup>21</sup> This principle had been accepted by the Opium Advisory Committee and the Fifth Assembly of the League of Nations, but with the reservation by France, Germany, Great Britain, Japan, the Netherlands, Portugal and Siam that "the use of prepared opium and the production, export, and import of raw opium for that purpose are legitimate" if in accordance with Chapter II of the convention. The United States incorporated this in its proposal perhaps without fully understanding its importance.<sup>22</sup> But the American proposal took no notice of the Indian reservation that "the use of raw opium according to the established practice in India and its production for that use are not illegitimate under the convention." The reserving Powers took the stand that the conferences were bound by these reservations, which meant that the interpretation of Chapter II of the convention, and consequently the legitimacy of domestic uses, was to be decided by each consuming government for itself. Producing states were bound to recognize and aid in enforcing that decision, but were not bound to enforce a higher standard. Practically, this took all of the meaning out of the American proposal, which intended to place responsibility on the producing states for maintaining the standard of no use except "medical and scientific" throughout the world. The American principle was finally (February 10, 1925) accepted by the second conference, but with the proviso that any party could make reservations. Two days later, on suggestion of a French delegate that the conference had been prompted by a "beautiful impulse of enthusiasm" which failed to note that the proviso defeated the principle, this action was rescinded.

<sup>19</sup> See Buell, *op. cit.*, pp. 47-53.

<sup>20</sup> See translation of *Belgrader Zeitung*, February 27, 1925, printed in Buell, *op. cit.*, p. 108.

<sup>21</sup> O.D.C., 34; Buell, *op. cit.*, p. 145.

<sup>22</sup> See remarks of M. Loudon, of the Netherlands, Minutes 26th plenary meeting, February 7, 1925.

With respect to manufactured drugs there was little difficulty. In accordance with the American proposal, the manufacture of narcotic drugs was limited to "medical and scientific purposes," instead of "medical and legitimate purposes" as formerly, and the list of narcotic drugs was made more accurate and exhaustive, though the American desire to have the manufacture of heroin prohibited altogether was not accepted.

## (2) LIMITATION OF CONSUMPTION

The agreement of the first conference marks progress toward suppressing the smoking of opium. It seeks to abolish private profits in the business through requiring government monopoly and prohibiting its "farming out." It urges propaganda through schools and otherwise,<sup>22a</sup> prohibits sale to minors, and provides for a meeting to review the situation not later than 1929.<sup>23</sup> By the protocol of the first conference the parties agreed to suppress completely the consumption of prepared opium within fifteen years from the time a commission of the League Council declares that poppy-growing countries are effectively preventing smuggling. These provisions were considered inadequate by the American delegation.

By the 1912 convention the parties had agreed to "take measures for the gradual and effective suppression of the manufacture of, internal trade in, and use of prepared (*i.e.*, smoking) opium," with due regard to the varying circumstances of each country concerned (Art. 6). Opium smoking was prohibited or little practiced except in the Far East. The countries with possessions there had regulations in pursuance of the convention but, with the exception of Japan in Formosa and Britain in Burma, these had not been very successful in eradicating the vice among Chinese inhabitants.<sup>24</sup> Japan successfully prohibits smoking in her home territory. The United States attempts prohibition without complete success in the Philippines. China prohibits smoking but is unable to enforce her laws in much of her territory. In many of the provinces the Tutchuns encourage opium cultivation and live from the revenue of its sale. Japan in Formosa and Britain in Burma have greatly reduced smoking by a system of government monopoly, which dispenses opium only to confirmed addicts who are individually licensed. France, The Netherlands, Portugal, Siam and Great Britain in far eastern territories other than Burma have attempted limitation by government monopoly, shop licenses and price regulations, but with little result except to increase smuggling. In fact, many governments do not appear to have

<sup>22a</sup> For activities of the International Narcotic Education Association, *see* remarks of Representative Lineberger of California, reproducing an article by Capt. Richmond P. Hobson, Cong. Record, Feb. 18, 1925. For activities of the International Anti-Opium Association of Peking, *see* War Against Opium, Tientsin, 1922.

<sup>23</sup> A resolution of the first conference somewhat equivocally endorsed the license-rationing system.

<sup>24</sup> Buell, *op. cit.*, pp. 58-64.

been over-energetic in suppression because of the danger that deprivation of opium will mean labor troubles among the Chinese, who are numerous in all these colonies, and the importance of the revenue from the licenses and the trade. Where they are energetic, as the United States in the Philippines, the difficulty of enforcing regulations and prohibitions, while places exist from which smuggling can proceed, is almost insuperable.<sup>25</sup> Except among the Chinese inhabitants, smoking of prepared opium is not common, but raw opium is extensively eaten, especially in India. This practice, however, as indulged in by the natives is alleged to be harmless by the British government, though many others take a contrary view,<sup>26</sup> and is not dealt with in the 1912 convention.<sup>27</sup>

The American delegation came to realize that it would be impossible to get the producing countries to assume responsibility for enforcing a standard of consumption higher than that of the governments of importing states, and consequently that effective suppression of smoking by all governments must precede limitation of production to "medical and scientific purposes." Thus success of the American program in the second conference depended on the decisions of the first conference, in which the United States, as a country which already prohibits the use of prepared opium both at home and in the Philippines, was not represented.

The agreement of the first conference, which was based on a British draft, was put in final form on December 5, 1924. This agreement was bitterly denounced by Bishop Brent on his departure for America on December 7,<sup>28</sup> and the American delegation attempted to have the question with which it dealt reconsidered in the second conference. After the Christmas recess and the addition of Viscount Cecil to the British delegation, this was done, but the American proposal to reduce the use of prepared opium ten per cent a year until its extinction in ten years came to grief because of the Chinese situation. China was unable to prevent production and smuggling because of domestic disorder. "The British Government," said Viscount Cecil, "feel very strongly that as long as that amount of opium is being produced . . . to forbid opium smoking in the British Far East Dominions either immediately or in a period of years would merely be to put so much extra profit into the pockets of those who at present are smuggling opium into those territories."<sup>29</sup> Then referring to a suggestion in Bishop Brent's appeal that the Powers move "*pari passu* with China," he suggested that suppression begin when the League Council declared that China was effect-

<sup>25</sup> Statement of Bishop Brent, Opium Committee, 5th Session, Minutes, p. 52.

<sup>26</sup> Wright, this JOURNAL, Vol. 18, p. 293; Buell, *op. cit.*, pp. 42-45. Eating of coca leaves is also defended by the Bolivian Government, *ibid.*

<sup>27</sup> The British Government has always considered the regulation of "excise" opium as a domestic question. See instructions for British delegation, 1912, Cd. 6605 (1913), p. 3. It is now under the control of the native Indian provincial legislatures. Buell, *op. cit.*, p. 45.

<sup>28</sup> Text printed by Buell, *op. cit.*, pp. 159-165.

<sup>29</sup> Minutes, 19th Plenary meeting.

ally suppressing smuggling and be completed within fifteen years. Mr. Porter of the American delegation said of this:<sup>30</sup>

To our astonishment we find years after the obligation to suppress the traffic in prepared opium was undertaken that we are asked to give our assent to a proposal that the Powers concerned shall not immediately take steps to prevent new recruits entering the ranks of opium smoking, but that such steps shall not be taken until occurrence of an event as uncertain and as indefinite as the time when homicide, burglary, larceny and smuggling shall cease.

The small prospect of Chinese suppression seemed to be justified by the Chinese insistence in the first conference that enforcement of her laws against opium production and use was a domestic question and her refusal to consider practical means of getting results.<sup>31</sup> Consequently, Mr. Porter, though willing to accept the fifteen year period instead of ten, wanted it to begin at once.

A resolution was then passed suggesting that the first conference meet again and that a joint committee of eight from each consider the question. This joint committee accepted the Cecil proposal as a protocol for the first conference and a proposal that smuggling be stopped within five years as a protocol for the second conference. Each conference accepted its part of the report. The League Council is authorized to declare whether the second protocol is carried out after five years, and presumably if the report is favorable the fifteen year period of the first protocol will begin to run.

### (3) REGULATION OF TRADE

The most important additions to the 1912 convention relate to the control of international trade in narcotics. The 1912 convention had required governments to limit exports of narcotic substances according to the laws of the importing state (Arts. 3, 8, 13). The present convention makes more elaborate provision for ascertaining the requirements of the importing country and for preventing smuggling.

The League had developed a plan of export and import certificates which had been accepted by thirty-four states. This is extended and incorporated in the new convention. Under this plan, no narcotic shipment is legitimate unless accompanied by an import certificate signed by the importing government, and an export certificate supplied by the exporting government after a properly signed import certificate has been produced. Thus the governments of export, import and transit can easily ascertain the legitimacy of each shipment, and are required to penalize smuggling by "adequate penalties, including in appropriate cases the confiscation of the substances concerned" (Art. 28), and to consider the possibility of legislation punishing acts within their territory designed to assist smuggling operations abroad (Art. 29). As has been noted, the Powers at the first conference agreed in the

<sup>30</sup> Minutes, 20th Plenary meeting.

<sup>31</sup> Minutes, 11th Plenary meeting.



protocol to suppress smuggling of opium within five years, so that it will no longer constitute an obstacle to the suppression of opium smoking.

The 1912 convention had required narcotic laws and statistical information on the trade to be exchanged through the Netherlands Foreign Ministry. The present convention substitutes the League Secretariat as the medium for communicating laws and regulations (Art. 30), and provides a permanent central board for giving publicity and continuous supervision to the narcotic business. The board consists of eight experts selected by the League Council, Germany and the United States for terms of five years and eligible for reappointment. To this board the parties are bound to submit annual estimates of their import requirements; annual statistics of production of raw opium and coca leaves, manufactured drugs, stocks on hand, consumption and amounts confiscated for smuggling; quarterly statistics of exports and imports of all narcotics to or from each country; and if the use of prepared opium is temporarily authorized, annual statistics on its manufacture and consumption. The annual estimates are not binding on governments, as suggested in the American as well as the League Advisory Committee proposals, but the board has power by majority of its entire membership (Art. 19) to ask for explanations in case excessive stores of narcotics seem to be collecting in any state even though such state is not a party to the convention (Art. 26); and if these are not satisfactory, to recommend that the parties stop exports to that state (Art. 24). The League Council may be appealed to by objectors to such recommendations, and the board is required to make an annual report to that body (Art. 27).

In addition to the sanction of publicity of laws, production, consumption and trade statistics, and board recommendations for boycott of delinquent states, the convention requires submission of differences on its own interpretation to the Permanent Court of International Justice, in case the parties are not able to settle the difference by diplomacy, the League, or arbitration.

Smuggling, smoking and surplus production must all be stopped, if narcotic consumption is to be confined to medical and scientific purposes; but which is to be stopped first? America wished to begin with surplus production, but states producing the raw products refused to sacrifice revenues to enforce standards of morality above those recognized by the governments of the consuming countries themselves. America then wished to start with smoking, but the governments which temporarily recognize the practice refused to sacrifice revenue and risk labor troubles so long as the ease of smuggling, especially from China, threatened to render efforts at suppression fruitless.

Consequently, the convention begins with smuggling, although because of the small bulk and great value of the substances, smuggling is difficult to prevent unless production or the demand of smokers is reduced. Import and export certificates, domestic punitive measures, a permanent interna-

tional board for publishing statistics and recommending boycotts, and the assumption of a definite obligation effectively to suppress smuggling of opium within five years, give, however, some promise of results. If and when this promise is fulfilled, the eastern countries have accepted the obligation to suppress smoking within fifteen years. If and when this is accomplished, the way will be clear for reducing production of raw opium for export. There will no longer be a legitimate foreign market for supplies beyond medical and scientific needs, and limitation of production for export will follow from the export limitations imposed by the convention.

"We, in India," said Mr. Campbell in the League's Advisory Committee, "can give the most formal undertaking that we will observe the restrictions which the governments of consuming countries may impose, even if those restrictions go as far as entire prohibition."<sup>32</sup> Thus, so far as exportable opium is concerned, agreements are made for accomplishing the American objective in twenty years. Production of raw opium and coca leaves for domestic consumption, however, is not touched by the agreements. The difficulty of maintaining an effective control of exports, even in India, while great quantities of the raw product exist for domestic consumption, cannot be ignored, but apparently international regulation on this subject will have to await developments within the countries concerned. Those countries still regard the matter as one wholly within their domestic jurisdiction.

The recent international discussions of the opium question indicate that all governments are becoming convinced of the evil of narcotics, except for medical and scientific uses, but governments of consuming countries wish to place responsibility for eliminating the evil on producing states, while governments of producing states have insisted that responsibility belongs to the consumers alone. Clearly if results are to be obtained, consumers must shoulder responsibility for suppressing smoking and other illegitimate uses, producers for suppressing surplus production, and both for suppressing smuggling. The present agreements mark an advance over those of 1912, though much remains to be done. The immediate steps toward further progress are general ratification of the recent agreements, strengthening of weak governments, particularly China, so that they can meet the responsibilities there accepted, and effective support of the international supervision provided.

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<sup>32</sup> League of Nations, Advisory Committee on Opium, 6th meeting, Minutes, p. 40.