PART II

ORAL ARGUMENTS

PUBLIC SITTINGS

held at the Peace Palace, The Hague, on May 15th to 17th, and July 1st, 1952, the President, Sir Arnold McNair, presiding at the opening of the hearing, and the Vice-President, M. Guerrero, Acting President, presiding in the Ambatielos case

DEUXIÈME PARTIE

PLAIDOIRIES

SÉANCES PUBLIQUES

tenues au Palais de la Paix, La Haye, du 15 au 17 mai et le 1er juillet 1952, sous la présidence de sir Arnold McNair, Président, pour l'ouverture de l'audience, et sous la présidence de M. Guerrero, Vice-Président, pour l'affaire Ambatielos

SECTION A

ORAL ARGUMENTS CONCERNING PRELIMINARY OBJECTION

PUBLIC SITTINGS

held at the Peace Palace, The Hague, on May 15th to 17th, and July 1st, 1952, the Vice-President, M. Guerrero, Acting President, presiding

SECTION A

PROCÉDURE ORALE CONCERNANT L'EXCEPTION PRÉLIMINAIRE

SÉANCES PUBLIQUES

tenues au Palais de la Paix, La Haye, du 15 au 17 mai et le 1er juillet 1952, sous la présidence de M. Guerrero, Vice-Président faisant fonction de Président

MINUTES OF THE SITTINGS HELD FROM MAY 15th TO 17th, AND JULY 1st, 1952

YEAR 1952

FIRST PUBLIC SITTING (15 V 52, 11 *a.m.*)

Present: President Sir ARNOLD MCNAIR; *Vice-President* GUERRERO; *Judges* ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, ZORIČIĆ, KLAESTAD, BADAWI, READ, HSU MO, CARNEIRO, Sir BENEGAL RAU, ARMAND-UGON; Professor JEAN SPIROPOULOS, *Judge* ad hoc; *Registrar* HAMBRO.

Also present:

For the United Kingdom of Great Britain and Northern Ireland:

Mr. V. J. EVANS, Assistant Legal Adviser of the Foreign Office, *as Agent;*

assisted by, as Counsel:

Sir Eric BECKETT, K.C.M.G., Q.C.;

Mr. D. H. N. JOHNSON;

Mr. J. E. S. FAWCETT.

For the Royal Hellenic Government:

His Excellency M. N. G. LÉLY, Envoy Extraordinary and Minister Plenipotentiary of Greece, *as Agent;*

assisted by, as Counsel:

The Right Hon. Sir Hartley SHAWCROSS, Q.C., M.P., former Attorney-General of the United Kingdom;

Dr. C. J. COLOMBOS, Q.C., LL.D.;

Professor Henri ROLIN, Professor of International Law at Brussels University, former President of the Belgian Senate;

M. Jason STAVROPOULOS, Legal Adviser to the Greek Foreign Office.

In opening the session, the PRESIDENT called upon the three newly-elected Judges to make the solemn declaration prescribed by Article 20 of the Statute of the Court.

M. CARNEIRO, Sir BENEGAL RAU and M. ARMAND-UGON in turn made the solemn declaration.

The PRESIDENT placed on record the declarations just made by M. Carneiro, Sir Benegal Rau and M. Armand-Ugon, and declared them duly installed as Judges of the International Court of Justice.

PROCÈS-VERBAUX DES SÉANCES TENUES DU 15 AU 17 MAI ET LE 1er JUILLET 1952

ANNÉE 1952

PREMIÈRE SÉANCE PUBLIQUE (15 v 52, 11 *h.*)

Présents : Sir ARNOLD MCNAIR, *Président ;* M. GUERRERO, *Vice-Président ;* MM. ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, ZORIČIĆ, KLAESTAD, BADAWI, READ, HSU MO, CARNEIRO, Sir BENEGAL RAU, M. ARMAND-UGON, *juges ;* M. Jean SPIROPOULOS, *juge* ad hoc ; M. HAMBRO, *Greffier.*

Sont également présents :

Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :

M. V. J. EVANS, conseiller juridique adjoint au Foreign Office, *en qualité d'agent ;*

assisté de, comme conseils :

Sir Eric BECKETT, K. C. M. G., Q. C. ;

M. D. H. N. JOHNSON ;

M. J. E. S. FAWCETT.

Pour le Gouvernement royal de Grèce :

S. Exc. M. N. G. LÉLY, envoyé extraordinaire et ministre plénipotentiaire de Grèce,

en qualité d'agent ;

assisté de, comme conseils :

Le Très Honorable Sir Hartley SHAWCROSS, Q. C., M. P., ancien Attorney-General du Royaume-Uni ;

Dr C. J. COLOMBOS, Q. C., LL. D. ;

M. le professeur Henri ROLIN, professeur de droit international à l'Université de Bruxelles, ancien Président du Sénat belge ;

M. Jason STAVROPOULOS, conseiller juridique du ministère des Affaires étrangères.

En ouvrant la séance, le PRÉSIDENT prie les trois nouveaux membres de la Cour de prendre l'engagement solennel que prescrit l'article 20 du Statut de la Cour.

M. CARNEIRO, sir BENEGAL RAU et M. ARMAND-UGON prononcent successivement la déclaration solennelle.

Le PRÉSIDENT donne acte à M. Carneiro, à sir Benegal Rau et à M. Armand-Ugon de l'engagement qu'ils viennent de prendre et les déclare installés dans leurs fonctions de juges à la Cour internationale de Justice.

The President stated that, before calling upon the Vice-President to open the hearing of the first case on the Court's list, he wished to say a few words about the retiring President, M. Basdevant. When M. Basdevant was elected to the Court in 1946, he already enjoyed a world-wide reputation as Professor, author and counsel, and it only remained for him to apply his great qualities to the judicial office. In doing this during the past six years, and particularly the past three, he had both enhanced his own reputation and added to the prestige of the Court.

He had brought to bear upon the work of the Court a powerful intellect and a wide legal culture. But intellectual qualities alone were not enough to make a good judge, much less to make a good President; certain moral qualities must also be present—integrity, an innate courtesy, infinite patience, a sense of fairplay and a capacity to regard all facts as "free and equal" in their claim to recognition. With all these qualities President Basdevant had been generously endowed, and with their aid he had indeed deserved well of the cause of international justice.

The President referred to the fact that MM. Fabela, Charles De Visscher and Krylov, who were elected Judges in 1946, were no longer Members of the Court; he was sure that his colleagues would not wish this occasion to pass without placing on record the Court's appreciation of the services which they had rendered and the pleasure it had been to work with them. The President mentioned in particular the value of the collaboration of M. De Visscher, for he, like the Vice-President, had been a Member of the Permanent Court of International Justice and thus made it easier for the International Court of Justice to draw upon the traditions and experience of that Court.

The President welcomed to the Bench two distinguished jurists from Latin America, Dr. Carneiro of Brazil, and Dr. Armand-Ugon of Uruguay, and also Sir Benegal Rau, who had had long experience as judge, legislator and statesman in India. It was deeply regretted that a fourth new colleague, Dr. Golunsky of the Union of Soviet Socialist Republics, was prevented by illness from taking his seat.

The President stated that, in accordance with Article 13 of the Rules of Court, he would now transfer the Presidency to the Vice-President, and request him to open the proceedings in the Ambatielos case.

(The President and Vice-President exchanged chairs.)

The VICE-PRESIDENT, as Acting President, stated that the Court had met to deal with a dispute between Greece and the United Kingdom of Great Britain and Northern Ireland. Since the Greek Government did not have a judge of its nationality on the Bench, it had availed itself of its right under Article 31, paragraph 2, of the Statute of the Court and had appointed Professor Spiropoulos as its Judge *ad hoc* in the present case. The Acting President requested the Deputy-Registrar to escort M. Spiropoulos to his seat on the Bench.

(M. Spiropoulos entered the Hall of Justice and took his seat.)

The Vice-President, as Acting President, called upon M. Spiropoulos to make the solemn declaration prescribed by Article 20 of the Statute of the Court.

Avant de faire appel au Vice-Président pour ouvrir la procédure orale en la première des affaires inscrites à l'ordre du jour, le Président prononce quelques mots d'hommage au Président sortant, M. Basdevant. Lors de son élection en 1946, M. Basdevant jouissait déjà d'une réputation mondiale comme professeur, comme auteur, comme jurisconsulte, et il ne lui restait qu'à donner la mesure de ses grandes qualités dans l'exercice des fonctions de juge. C'est ce qu'il a fait pendant les six dernières années, et en particulier pendant les trois dernières années; et ainsi, il a tout à la fois accru son renom personnel et ajouté au prestige de la Cour. Il a apporté à la tâche commune sa puissante intelligence et sa culture juridique étendue. Mais des qualités intellectuelles ne suffisent pas à faire un bon juge, bien moins encore un bon Président. Des qualités morales sont nécessaires : intégrité, courtoisie innée, patience infinie, sens de ce qui est juste dans la vie de tous les jours et capacité de considérer les faits comme ayant tous, en pleine liberté et égalité, le même droit à être reconnus. Étant généreusement pourvu de toutes ces qualités-là, le Président Basdevant a vraiment bien mérité de la justice internationale.

Le Président rappelle que MM. Fabela, De Visscher et Krylov, qui avaient été élus juges en 1946, ont cessé de faire partie de la Cour. Il traduit certainement l'intention de ses collègues en exprimant publiquement leur reconnaissance à MM. Fabela, De Visscher et Krylov pour les services qu'ils ont rendus à la Cour, ainsi que la satisfaction qu'ils ont éprouvée à travailler avec eux. Il tient à dire tout particulièrement combien la collaboration de M. De Visscher a été précieuse, car, comme le Vice-Président, il a fait partie de la Cour permanente de Justice internationale, ce qui a permis à la Cour de tirer aisément profit de la tradition et de l'expérience acquise.

Le Président souhaite la bienvenue à deux juristes éminents de l'Amérique latine : M. Carneiro, du Brésil, et M. Armand-Ugon, de l'Uruguay, ainsi qu'à sir Benegal Rau, qui a acquis dans l'Inde une longue expérience comme juge, comme législateur et comme homme d'État. La Cour regrette vivement que le quatrième des nouveaux juges, M. Golunsky, de l'Union des Républiques socialistes soviétiques, se soit trouvé empêché par son état de santé de prendre séance.

Le Président déclare que, conformément aux dispositions de l'article 13 du Règlement de la Cour, il va transmettre la présidence au Vice-Président, en le priant d'ouvrir la procédure orale dans l'affaire Ambatielos.

(Le Président et le Vice-Président changent de fauteuil.)

Le VICE-PRÉSIDENT faisant fonction de Président déclare que la Cour est réunie pour examiner un différend entre la Grèce et le Royaume-Uni de Grande-Bretagne et l'Irlande du Nord. La Grèce, ne comptant pas sur le siège de juge de sa nationalité, s'est prévalue du droit que lui confère l'article 31, paragraphe 2, du Statut, et a désigné M. Jean Spiropoulos en qualité de juge *ad hoc*. Il invite le Greffier-adjoint à prier M. Spiropoulos d'entrer en séance, et à le conduire à sa place sur le siège.

(M. Spiropoulos entre dans la salle de Justice et prend séance.)

Le Vice-Président faisant fonction de Président prie M. Spiropoulos de prendre l'engagement solennel que prescrit l'article 20 du Statut de la Cour.

(M. Spiropoulos made the solemn declaration prescribed by Statute.)

The Vice-President, as Acting President, recalled that proceedings in the dispute between Greece and the United Kingdom were instituted by an Application of the Hellenic Government filed in the Registry on April 9th, 1951, the dispute relating to damages allegedly suffered by M. Ambatielos, a Greek national. On February 4th, 1952, the Government of the United Kingdom, the Respondent, filed its Counter-Memorial in which it challenged the Court's jurisdiction in the Ambatielos case. It now fell to the Court to hear the Parties on the Objection.

The Vice-President, as Acting President, called upon the Registrar to read the respective submissions of the Parties as they appeared in the last documents of the written proceedings filed by each of them.

The REGISTRAR read the relevant passages from the Counter-Memorial of the United Kingdom and from the Observations and Conclusions of the Hellenic Government.

The VICE-PRESIDENT, as Acting President, stated that the Parties were represented as follows :

The Government of the United Kingdom of Great Britain and Northern Ireland by :

Mr. V. J. EVANS, Assistant Legal Adviser of the Foreign Office, as Agent ;

assisted by :

Sir Eric BECKETT, K.C.M.G., Q.C.,

Mr. JOHNSON, and

Mr. FAWCETT,

as Counsel ;

The Royal Hellenic Government by :

His Excellency M. Nicolas LÉLY, Greek Minister at The Hague, as Agent ;

assisted by :

The Right Hon. Sir Hartley SHAWCROSS, Q.C., M.P., former Attorney-General of the United Kingdom,

Dr. COLOMBOS, of the English Bar, and

Professor Henri ROLIN, Professor of International Law at Brussels University, former President of the Belgian Senate,

M. Jason STAVROPOULOS, Legal Adviser to the Greek Foreign Office,

as Counsel.

The VICE-PRESIDENT, as Acting President, noted that the Agents and Counsel of the two Governments were present in Court. He reminded the Parties that the present hearing was held for the purpose of hearing oral argument on the Preliminary Objection to the Court's jurisdiction, and he directed them to confine their remarks to this matter and, in so doing, to touch upon the merits of the case only in so far as they considered this to be absolutely necessary.

(M. Spiropoulos prend l'engagement solennel prévu au Statut.)

Le Vice-Président faisant fonction de Président rappelle que le différend entre la Grèce et le Royaume-Uni a été introduit par une requête du Gouvernement hellénique, déposée au Greffe le 9 avril 1951 ; il a trait au dommage qu'aurait subi le sieur Ambatielos, ressortissant hellénique. Le Gouvernement du Royaume-Uni, défendeur, a, dans son contre-mémoire déposé le 4 février 1952, excipé de l'incompétence de la Cour pour connaître de l'affaire Ambatielos. La Cour est appelée maintenant à entendre les plaidoiries des Parties sur l'exception d'incompétence.

Le Vice-Président faisant fonction de Président prie le Greffier de donner lecture des conclusions des Parties telles qu'elles figurent dans la dernière pièce écrite déposée par chacune d'elles.

Le GREFFIER donne lecture de l'extrait pertinent du contre-mémoire du Gouvernement du Royaume-Uni et des observations et conclusions du Gouvernement hellénique relatives à l'exception d'incompétence.

Le VICE-PRÉSIDENT faisant fonction de Président déclare que les Parties sont représentées comme suit :

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord par

M. V. J. EVANS, conseiller juridique adjoint du Foreign Office, comme agent ;

assisté de :

Sir Eric BECKETT, K. C. M. G., Q. C.,

M. JOHNSON, et

M. FAWCETT,

comme conseils ;

Le Gouvernement royal hellénique par

S. Exc. M. Nicolas LÉLY, ministre de Grèce à La Haye,

comme agent ;

assisté de :

Le Très Honorable sir Hartley SHAWCROSS, Q. C., M. P., ancien Attorney-General du Royaume-Uni,

Dr COLOMBOS, du barreau anglais,

Professeur Henri ROLIN, professeur de droit international à l'Université de Bruxelles, ancien Président du Sénat belge,

M. Jason STAVROPOULOS, conseiller juridique du ministère des Affaires étrangères,

comme conseils.

Le VICE-PRÉSIDENT faisant fonction de Président constate la présence devant la Cour des agents ainsi que de leurs conseils. Il rappelle que l'audience actuelle se tient pour entendre les arguments oraux sur l'exception préliminaire ; il invite donc les orateurs à se limiter à cette question et, en restant dans cette limite, à ne toucher au fond de l'affaire que dans la mesure où il leur paraît absolument nécessaire de le faire.

He called upon the Agent of the Government of the United Kingdom.

Mr. EVANS begged the Court's leave to allow Sir Eric Beckett to present the United Kingdom Government's case.

The VICE-PRESIDENT, as Acting President, called upon Sir Eric Beckett.

Sir Eric BECKETT commenced the statement reproduced in the annex [1].

(The Court adjourned from 12.45 p.m. to 4 p.m.)

Sir Eric BECKETT continued and concluded the statement reproduced in the annex [2].

The VICE-PRESIDENT, as Acting President, reminded the Parties of the meeting to be held in his office the following morning, May 16th, at 10 a.m., concerning the production of certain documents which the Court had requested. The hearing of the case would continue at 10.30 a.m., on Friday, May 16th, at which time the Court would hear the presentation of the case of the Royal Hellenic Government.

(The Court rose at 6.30 p.m.)

(Signed) J. G. GUERRERO,
Vice-President.

(Signed) E. HAMBRO,
Registrar.

SECOND PUBLIC SITTING (16 v 52, 11 *a.m.*)

Present : [See sitting of May 15th.]

The ACTING PRESIDENT opened the hearing and called upon the Agent of the Hellenic Government.

His Excellency M. LÉLY made the statement reproduced in the annex [3].

The ACTING PRESIDENT called upon Sir Hartley Shawcross.

Sir Hartley SHAWCROSS began the statement reproduced in the annex [4].

The ACTING PRESIDENT reminded Counsel for the Hellenic Government of the necessity of confining their remarks to the matter of the Court's jurisdiction, which was the only question before the Court. (See annex [5].)

Sir Hartley SHAWCROSS continued and concluded the statement reproduced in the annex [6].

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[1] See pp. 279-286.
[2] ,, ,, 286-299.
[3] ,, p. 300.
[4] ,, pp. 301-304.
[5] ,, p. 304.
[6] ,, pp. 304-315.

Il donne la parole à l'agent du Gouvernement du Royaume-Uni.

M. EVANS demande à la Cour d'autoriser sir Eric Beckett à exposer la thèse du Gouvernement du Royaume-Uni.

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à Sir Eric Beckett.

Sir Eric BECKETT prononce l'exposé reproduit en annexe [1].

(L'audience est suspendue de 12 h. 45 à 16 heures.)

Sir Eric BECKETT reprend la parole et termine l'exposé reproduit eu annexe [2].

Le VICE-PRÉSIDENT faisant fonction de Président rappelle aux Parties la réunion qui doit avoir lieu dans son bureau le lendemain 16 mai à 10 heures, au sujet de la demande de production de documents formulée par la Cour. L'audience reprendra à 10 h. 30, le vendredi 16 mai. La Cour entendra alors la plaidoirie du Gouvernement hellénique.

(L'audience est levée à 18 h. 30.)

Le Vice-Président,
(Signé) J. G. GUERRERO.

Le Greffier,
(Signé) E. HAMBRO.

DEUXIÈME SÉANCE PUBLIQUE (16 v 52, 11 *h.*)

Présents : [Voir séance du 15 mai.]

Le PRÉSIDENT EN EXERCICE ouvre l'audience et donne la parole à l'agent du Gouvernement hellénique.

Son Excellence M. LÉLY présente la déclaration reproduite en annexe [3].

Le PRÉSIDENT EN EXERCICE donne la parole à sir Hartley Shawcross.

Sir Hartley SHAWCROSS commence l'exposé reproduit en annexe [4].

Le PRÉSIDENT EN EXERCICE rappelle au conseil du Gouvernement hellénique la nécessité de limiter son exposé à la question de compétence, la seule dont la Cour soit actuellement saisie. (Voir annexe [5].)

Sir Hartley SHAWCROSS continue et termine l'exposé reproduit en annexe [6].

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[1] Voir pp. 279-286.
[2] » » 286-299.
[3] » p. 300.
[4] » pp. 301-304.
[5] » p. 304.
[6] » pp. 304-315.

The ACTING PRESIDENT fixed the next sitting of the Court for Saturday, May 17th, at 10.30 a.m.

(The Court rose at 12.50 p.m.)

[Signatures.]

THIRD PUBLIC SITTING (17 V 52, 10.50 *a.m.*)

Present : [See sitting of May 15th.]

The ACTING PRESIDENT opened the hearing and stated that, before he called upon Counsel for the Government of the United Kingdom, Judge Hsu Mo wished to put a question to the representatives of the two Parties.

Judge HSU MO put the question reproduced in the annex [1].

The AGENT OF THE UNITED KINGDOM GOVERNMENT gave a provisional answer to the question put by Judge Hsu Mo [1].

The ACTING PRESIDENT called upon Sir Eric Beckett to present the oral reply on behalf of the United Kingdom Government.

Sir Eric BECKETT began and concluded the statement reproduced in the annex [2].

The ACTING PRESIDENT called upon Professor Henri Rolin to present the oral rejoinder on behalf of the Hellenic Government.

Professor ROLIN began the statement reproduced in the annex [3].

(The Court adjourned from 1.30 p.m. until 4 p.m.)

Professor ROLIN concluded the statement reproduced in the annex [4], in the course of which he gave the answer, on behalf of the Hellenic Government, to the question put by Judge Hsu Mo at the morning sitting.

The ACTING PRESIDENT declared that the hearings on the Preliminary Objection were closed.

(The Court rose at 5.25 p.m.)

[Signatures.]

FIFTEENTH PUBLIC SITTING (1 VII 52, 10 *a.m.*)

Present : The *President* and the *Judges* present at the sitting of May 15th ; Registrar HAMBRO ; Mr. EVANS, *Agent of the United Kingdom Government ;* Mr. GARRAN, *Counsellor of Embassy at the Hague ;* H. Exc. M. LÉLY, *Agent of the Hellenic Government.*

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[1] See p. 316.
[2] ,, pp. 316-324.
[3] ,, ,, 325-332.
[4] ,, ,, 332-341.

Le PRÉSIDENT EN EXERCICE fixe la prochaine audience de la Cour au samedi 17 mai à 10 h. 30.

(L'audience est levée à midi 50.)

[Signatures.]

TROISIÈME SÉANCE PUBLIQUE (17 V 52, 10 *h.* 50)

Présents : [Voir séance du 15 mai.]

Le PRÉSIDENT EN EXERCICE déclare, en ouvrant l'audience, qu'avant de donner la parole au conseil du Gouvernement du Royaume-Uni, M. Hsu Mo a demandé à poser une question aux représentants des deux Parties.

M. HSU MO pose la question reproduite en annexe [1].

L'AGENT DU GOUVERNEMENT DU ROYAUME-UNI donne à la question posée par M. Hsu Mo une réponse provisoire [1].

Le PRÉSIDENT EN EXERCICE donne la parole à sir Eric Beckett pour présenter la réplique orale au nom du Gouvernement du Royaume-Uni.

Sir Eric BECKETT commence et termine l'exposé reproduit en annexe [2].

Le PRÉSIDENT EN EXERCICE donne la parole à M. Rolin pour présenter la duplique orale au nom du Gouvernement hellénique.

Le professeur ROLIN commence l'exposé reproduit en annexe [3].

(La séance est suspendue de 13 h. 30 à 16 heures.)

Le professeur ROLIN conclut l'exposé reproduit en annexe [4], au cours duquel il répond, au nom du Gouvernement hellénique, à la question posée à l'audience du matin par M. Hsu Mo.

Le PRÉSIDENT EN EXERCICE prononce la clôture des débats sur l'exception préliminaire.

(L'audience est levée à 17 h. 25)

[Signatures.]

QUINZIÈME SÉANCE PUBLIQUE (1 VII 52, 10 *h.*)

Présents : Le *Président* et les *Juges* présents à la séance du 15 mai ; M. HAMBRO, Greffier ; M. EVANS, *agent du Gouvernement du Royaume-Uni ;* M. GARRAN, *conseiller d'ambassade à La Haye ;* S. Exc. M. LÉLY, *agent du Gouvernement hellénique.*

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[1] Voir p. 316.
[2] » pp. 316-324.
[3] » » 325-332.
[4] » » 332-341.

Vice-President GUERRERO, Acting President, opened the sitting and stated that the Court was meeting for the reading of the Judgment which it had to deliver in the Ambatielos case between the Kingdom of Greece and the United Kingdom of Great Britain and Northern Ireland. These proceedings were instituted on April 9th, 1951, by an Application of the Hellenic Government.

In conformity with Article 58 of the Statute, the Agents of the two Parties had been given due notice that the Judgment would be read in open Court at the present public sitting.

Vice-President Guerrero, Acting President, noted that these Agents were present in Court ; an official copy of the Judgment would be handed to them during the present sitting.

Vice-President Guerrero, Acting President, added that the Court had decided, in conformity with Article 39 of the Statute, that the English text of the Judgment would be the authoritative text ; however, it was the French text that he would read.

(Vice-President Guerrero, Acting President, read the Judgment [1].)

He called upon the Registrar to read the operative clause of the Judgment in English.

(The REGISTRAR read the operative clause in English.)

Vice-President GUERRERO, Acting President, said that Judge Levi Carneiro and M. Spiropoulos, Judge *ad hoc*, had appended to the Judgment statements of their individual opinions [2], that Judge Alvarez declared that there were in the present case sufficient grounds for holding that the Court had jurisdiction to deal with the merits of the Ambatielos claim, and that the President, Sir Arnold McNair and Judges Basdevant, Zoričić, Klaestad and Hsu Mo appended to the Judgment statements of their dissenting opinion [3]. He added that the authors of these opinions had informed him that they did not wish to read them in open court.

Vice-President Guerrero, Acting President, closed the sitting.

(The Court rose at 10.45 a.m.)

[Signatures.]

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[1] See Court's publications : *Reports of Judgments, Advisory Opinions and Orders 1952*, pp. 28-47.

[2] *Ibid.*, pp. 48-57.

[3] ,, , ,, 58-88.

M. GUERRERO, Vice-Président faisant fonction de Président dans cette affaire, ouvre l'audience et constate que la Cour s'est réunie pour prononcer l'arrêt qu'elle doit rendre dans l'affaire Ambatielos entre le Royaume de Grèce et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord. Cette instance avait été introduite le 9 avril 1951 par requête du Gouvernement hellénique.

Conformément à l'article 58 du Statut, les agents des deux Parties ont été dûment prévenus qu'il serait donné lecture de l'arrêt au cours de la présente audience publique.

Le Vice-Président faisant fonction de Président en cette affaire constate que ces agents sont présents ; une expédition officielle de l'arrêt leur sera remise au cours de la présente audience.

Le Vice-Président faisant fonction de Président en cette affaire ajoute que la Cour a décidé, conformément à l'article 39 du Statut, que le texte anglais de l'arrêt ferait foi ; toutefois, c'est du texte français qu'il donne lecture.

(Le Vice-Président faisant fonction de Président donne lecture de l'arrêt [1].)

Il prie le Greffier de donner lecture du dispositif de l'arrêt dans le texte anglais.

(Le GREFFIER lit le dispositif en anglais.)

M. GUERRERO, Vice-Président faisant fonction de Président en cette affaire, constate que M. Levi Carneiro, juge, et M. Spiropoulos, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion individuelle [2], que M. Alvarez, juge, déclare que l'affaire présente des motifs de compétence qui suffiraient à la Cour pour se prononcer sur le fond de la réclamation Ambatielos, et que sir Arnold McNair, Président, et MM. Basdevant, Zoričić, Klaestad et Hsu Mo, juges, joignent à l'arrêt les exposés de leur opinion dissidente [3]. Il ajoute que les auteurs des opinions individuelles et dissidentes ne désirent pas en donner lecture.

M. Guerrero, Vice-Président faisant fonction de Président, lève la séance.

(L'audience est levée à 10 h. 45.)

[Signatures.]

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[1] Voir publications de la Cour : *Recueil des Arrêts, Avis consultatifs et Ordonnances 1952*, pp. 28-47.

[2] *Ibid.*, pp. 48-57.

[3] » » 58-88.

ANNEX TO THE MINUTES
ANNEXE AUX PROCÈS-VERBAUX

1. ORAL ARGUMENT OF SIR ERIC BECKETT
(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTINGS OF MAY 15th, 1952

[Public sitting of May 15th, 1952, morning]

May it please the Court.

In this case the Hellenic Government, taking up the case of its national M. Nicholas Ambatielos, claims that the Government of the United Kingdom is answerable for breaches of its obligations under treaty and under the rules of general international law on the ground that M. Ambatielos suffered a denial of justice in the English courts, in 1922 and 1923. This claim, made by the Hellenic Government, is certainly a claim of an international character and, if I am right in inferring from a remark in paragraph 15 of the Greek Observations of April that our opponents have thought that the United Kingdom denied that this claim by the Hellenic Government possessed this character, that remark is based on a misunderstanding. The United Kingdom did say, and still says, that the original dispute between M. Ambatielos and the British Ministry of Shipping was not a dispute of an international character, but that, of course, is quite a different thing, because the dispute between M. Ambatielos and the Ministry arose out of a contract for the sale of ships governed by English municipal law. However, the United Kingdom is disputing the jurisdiction of the Court to entertain this international claim by the Greek Government. At first sight, this action may appear to be inconsistent with the general policy of the United Kingdom towards this Court, since the United Kingdom is known, both by its own conduct and by its recommendations to others, to desire generally that the jurisdiction of the Court should be accepted as widely as possible by States for the decision of international legal disputes. I wish, therefore, to begin with a few remarks to explain the reason why the United Kingdom in this case has chosen to exercise its undoubted right to contest the jurisdiction instead of waiving that right and accepting the jurisdiction of the Court even if not legally obliged to do so.

The United Kingdom first adopted the policy of accepting the jurisdiction of the Hague Court generally in the year 1930 when it ratified its acceptance by a declaration of 1929 of the Optional Clause of Article 36 of the Court's Statute, a declaration which is still in force. Previously, the United Kingdom had only accepted the jurisdiction by clauses in particular treaties applying to disputes arising out of those treaties or *ad hoc* in regard to particular cases. But when it first accepted the jurisdiction of the Court generally under the Optional Clause, the United Kingdom made, by its Declaration of 1929, the same exceptions *ratione temporis* which various States had previously made and so many other States have since made. It excluded disputes which arose before February 1930, or which arose out of situations and facts before February 1930. The reason for this exception was

admirably stated in the *Morocco Phosphates Case* by the Permanent Court in the following words:

> "Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned, was not in a position to foresee the legal proceedings to which these facts and situations might give rise." (Series A/B, No. 74, p. 24.)

Now, it is part of my argument that in this case there was no dispute between the two Governments until after 1930—not I think till 1933 at the earliest—but the facts out of which the dispute arose all took place before 1930, namely in November 1922, the date of the hearing in first instance before the Admiralty Division of the High Court of Justice in England, of the action between the Crown and M. Ambatielos, and in 1923, the date of the decision of the Court of Appeal. It was in these two hearings in the Admiralty Division and the Court of Appeal respectively, that the alleged miscarriage or denial of justice took place. So it is entirely consistent with the general policy of the Government of the United Kingdom to dispute the jurisdiction of this Court, in any case where the claim arises out of facts prior to the date of the ratification of its declaration accepting the Optional Clause. But there are in this particular case certain features which have led my Government to consider that there are additional reasons for exercising its right to dispute the jurisdiction, and I wish briefly, in deference to the Court, to indicate them. I shall not, however, find it necessary in order to do so, to go in detail into the merits of the case, because as you, Mr. President, have reminded us, the Court is not concerned with the merits at this stage.

The case arises out of a contract concluded in July 1919 between M. Ambatielos and the Ministry of Shipping in London, by which M. Ambatielos contracted to buy nine ships then being built for the Ministry by shipyards in the Far East. The purchase price of the nine ships was £2,275,000. M. Ambatielos had not this sum at his disposal, but he took the risk that he would be able to realize a large part of the money by profitable charters of the vessels which were to be delivered first. He gambled on the extraordinarily favourable market for freight existing in July 1919, continuing long enough after delivery of the earlier vessels to enable him to pay for the later vessels out of the charters of the earlier vessels. The vessels were completed by the shipbuilders in the Far East rather later than M. Ambatielos expected, and possibly the rates of freight fell sooner and further than he expected. As a result, M. Ambatielos was unable to pay for the later vessels as required by the contract, and when he was in difficulties he claimed that, though there were no dates specified in the written contract of 1919 for the delivery of any of the ships, there was, nevertheless, an oral agreement by which the vessels were to be delivered in certain specified months, and that the British Government was in default under the contract by reason of late delivery. Now

that issue was tried between M. Ambatielos and the Crown in November 1922 in the Admiralty Division, and it was held that no such oral agreement had ever been made.

M. Ambatielos lodged an appeal to the Court of Appeal against this judgment and also applied to the Court of Appeal to be allowed to call two witnesses in the appeal who had not been called at the hearing in the Admiralty Division. The Court of Appeal refused this application on the ground that both these witnesses were available at the hearings in the Admiralty Division and M. Ambatielos could have called them at this hearing if he had desired to do so.

The claim now made before this Court by the Greek Government is that in the first place there was a denial of justice in the Admiralty Division because the Crown did not call these two witnesses and did not produce certain letters exchanged between these two persons, which the Greek Government alleges the Crown was under a duty to do. This is an alleged denial of justice for which the Greek Government states those conducting the case of the Crown were responsible. Secondly, the Greek Government alleges that there was a denial of justice in the Court of Appeal for which the judges of the Court of Appeal were responsible, on the ground that the decision of the Court of Appeal, refusing M. Ambatielos's application to call these two witnesses, was not in accordance with English law and practice, was influenced by anti-foreign prejudice and was a decision so wrong that in giving it the Court of Appeal fell below the minimum standard of justice required by international law.

M. Ambatielos did not prosecute his appeal in the Court of Appeal when his application to call these two witnesses was refused, and he did not appeal to the House of Lords against the refusal of the Court of Appeal to grant his application to call the two witnesses. Thus, M. Ambatielos did not exhaust his municipal remedies. If the decision of the Court of Appeal had been as faulty as the Greek Government alleges, and of course, I contend that this decision affords no grounds for complaint at all, but if it had been, the House of Lords would have been able, and no doubt would have reversed it. That, in a nutshell, is the international claim which the Greek Government brings before this Court, and this complaint of two denials of justice in the English Courts is developed in the Greek Memorial.

Confronted with the Greek Memorial, putting forward this complaint, the Government of the United Kingdom took the somewhat unusual course of putting in a Counter-Memorial, in which, at the same time as it took the Preliminary Objection that the Court had no jurisdiction, it made a full reply to the Greek Memorial on the merits. Whereas all the United Kingdom need have done, if it were contesting the jurisdiction, was to file the four pages of the Counter-Memorial, where the reasons why the United Kingdom contends that the Court has no jurisdiction are set out in paragraphs 6-16, the United Kingdom, in fact, filed a Counter-Memorial of 35 pages with annexes of another 30 pages—all of which, except the four pages which I have mentioned, are devoted to the merits. The Government of the United Kingdom, while convinced it was both right in law and morally justified in objecting to the jurisdiction of the Court in this case, was unwilling that these aspersions on the administration of justice in the English High Court and Court of Appeal should appear on the records of this

Court without an answer to them also appearing in those records. This Court, therefore, when hearing and determining this question of jurisdiction, which, of course, does not depend in any way upon the merits, will not be in the position, as it otherwise might have been, of knowing what Greece had to say on the merits and quite ignorant of what, if anything, the United Kingdom had to say on the merits too.

The fact that the United Kingdom has taken this course enables me, without going into the merits, to give to the Court as one of the additional reasons why in this case the United Kingdom has thought it was morally, as well as legally, justified in contesting the jurisdiction —the reason that the Government of the United Kingdom considered that this claim of denial of justice in the English courts has not the faintest foundation. The grounds for this view of the United Kingdom are in the Counter-Memorial, and we are not concerned with the merits at this stage.

The second reason why the Government of the United Kingdom feels morally as well as legally justified in objecting to the jurisdiction is that M. Ambatielos did not exhaust his municipal remedies. I have no doubt that if he had appealed to the House of Lords his appeal would have failed, but that is because in my view the decision of the Court of Appeal was right. However, there is no doubt at all that if the contentions made in the Memorial about that decision of the Court of Appeal had been correct, the House of Lords could and would have reversed it. The appeal to the House of Lords was an effective remedy against a decision which had the grave faults which the Memorial alleges.

The third reason is that if there ever was a case where a government is morally justified in contesting the jurisdiction to prevent an old and stale claim being revived, the present case is one.

The decision of the Admiralty Division and of the Court of Appeal were both given in 1923. In 1925 the Government of the United Kingdom received from the Greek Government an appeal on behalf of M. Ambatielos on a purely *ex gratia* basis—in a communication which admitted that legally the decisions of the courts had settled the matter and made no complaint at all about denials of justice. I refer particularly to page 69 of the Greek Memorial, Annex R 1. This appeal *ex gratia* was refused and since the Memorial makes amongst other things a claim of unjust enrichment against the United Kingdom Government, I will say one word about this point. At first sight the position of M. Ambatielos, who in the result had paid about £1,600,000 and was left with no ships at all, may seem a hard one and the position of the Government of the United Kingdom which had received that sum from M. Ambatielos, as well as the proceeds of the sale of the ships, rather an unjust one. But the United Kingdom was a loser over these ships too. It had paid £2,352,114 to the builders in the Far East who had constructed them and also substantial brokerage fees to M. Ambatielos's brother, and in the end the United Kingdom only realized about £1,900,000, including both what it received from M. Ambatielos and what it was able to realize for the vessels. M. Ambatielos's inability to fulfil his contractual obligations to pay for the ships left the United Kingdom Government out of pocket by some £450,000. It must not be thought, however, that M. Ambatielos was

out of pocket to the full extent of the £1,600,000 which he paid, because M. Ambatielos realized substantial profits on chartering the earlier ships while the freight rates were still high. Both parties were hit by the rapid fall of freight prices. M. Ambatielos's losses would not have been so great if he had not entered into a commitment beyond his financial resources on the basis of a gamble on the continuation of the high rates for freights.

After the Greek Government's *ex gratia* appeal in 1925 there was a lapse of eight years, from 1925 till 1933, when nothing more happened, and after that lapse of time the Government of the United Kingdom was certainly entitled to regard the matter as at an end and any revival of it as an attempt to revive an old and stale claim. It was in August 1933, ten years after the events took place, that the Greek Government for the first time alleged miscarriage of justice—through the conduct of the case for the Crown before the Admiralty Division —and to the Greek note of that date a very full answer was given by the United Kingdom in December of the same year. The exchange of notes continued in 1934 and was revived in 1936, and the allegations made grew in seriousness as the lapse in time from the events in question grew longer. In each note the Greek Government varied somewhat the grounds of the claim and in each case it received a full, reasoned reply. Then three years later—16 years after the events— in November 1939, when war had broken out, the Greek Government for the first time alleged that there had been a breach of treaty, namely, paragraph 3 of Article 15 of the Treaty of 1886, and claimed arbitration under the Protocol attached to that Treaty. The suspension of further exchanges after 1940 during the war calls for no comment, but at least by 1946 there was a Greek Government once more established in more or less normal conditions, and yet another three more years elapse and it is only in 1949 that the Greek Government once more took up the matter again and, being met with a refusal to reopen the matter, began proceedings by Application in April 1951.

If I may just sum up the reasons why in this case the Government of the United Kingdom, in spite of its general policy that the Court's jurisdiction should be accepted for international legal disputes, feels justified in exercising its legal right to object to the jurisdiction of the Court, these reasons are:

1. Where a dispute relates to facts before 1930, the first acceptance of the Optional Clause by the United Kingdom, it is in accord with the general policy of the United Kingdom to refuse to accept the jurisdiction of the Court, if in regard to the particular subject-matter it has not bound itself by treaty to accept the jurisdiction, and this case relates to facts which took place in 1922 and 1923.

2. In addition, the United Kingdom feels morally justified in not waiving its right to object to the jurisdiction in the present case because (i) it considers the claim of denial of justice to be completely unfounded on the merits for reasons given in the Counter-Memorial; (ii) it considers that it is clear that municipal remedies were not exhausted; (iii) no claim of any denial of justice or other breach of an international obligation was made till 1933, ten years after the events had happened and eight years after a refusal of a request *ex gratia*, in which request it had been admitted that no legal claim could be made, and there were two subsequent silences of three years

—1936 to 1939, 1946 to 1949—each of which also justified the belief that the case had been dropped.

For these reasons, the Government of the United Kingdom will in this case accept the jurisdiction of the Court to deal with the merits of this case, only if the Court on a strict interpretation of the United Kingdom's treaty obligations holds that the United Kingdom has bound itself to do so. Consequently, in this case there is no question of the Court acquiring jurisdiction on the basis of *forum prorogatum*.

The jurisdiction of the Court depends on Article 36 of its Statute. The second paragraph of Article 36, the Optional Clause, does not apply for two reasons: first, Greece has never accepted the Optional Clause at all; secondly, the United Kingdom in its acceptance excluded disputes arising out of facts prior to February 1930. We are left, therefore, with the first paragraph of Article 36, and the question is whether or not the United Kingdom has by some treaty provision on which Greece is entitled to rely, bound itself to accept the jurisdiction of the Court in this case.

The contentions of the United Kingdom on this issue have been set forth in paragraphs 6 to 16 of the Counter-Memorial, and my principal task to-day is to answer the Greek Observations of April last. In doing so, I shall state as accurately as I can the arguments of my opponents. As, however, in some cases these arguments are expressed vaguely and are rather hinted at than developed, it may well be that I have not correctly understood them. If that proves to be so, it is possible that the reason for my failure is not merely my own obtuseness, but that even in its written Observations of April, the Greek Government has still not stated precisely its arguments on the question of jurisdiction.

I have just said that the jurisdiction of the Court in this case depends entirely on the first paragraph of Article 36 of the Court's Statute. However, there are certain remarks both in the Greek Memorial and in its Observations of April last where it appears to be contended, though in a very subsidiary way, that the Court derives jurisdiction from certain provisions of the Charter of the United Nations. I find it difficult to believe that these remarks are presented as a serious argument, but they have been presented to the Court and I think I should say a few words about them. As they are short, I will begin by quoting the remarks which the Greek Government has made on this point in its Pleadings. There is first of all paragraph 30 (5) (30, sub-para. 5) of the Memorial, and that reads as follows:

> "Alternatively, the United Kingdom Government is under an obligation as a Member of the United Nations to conform to the provisions of Article 1 (1) of the Charter of the United Nations, one of whose principal purposes is 'to bring about, by peaceful means and in conformity with the principles of international law, the adjustment or settlement of international disputes or situations', and to those of Article 36 (3) of the Charter, according to which 'legal disputes should as a general rule be referred by the parties to the International Court of Justice'. There is no doubt that the dispute between the Hellenic Government and the United Kingdom Government is a 'legal dispute' susceptible of adjudication by the Court."

That is my first quotation.

In this passage of the Greek Memorial there are in fact two misquotations of the provisions of the Charter. The first extract from Article 1 (1) should be completed by the words "which might lead to a breach of the peace", because Article 1 (1) of the Charter refers to disputes which might lead to a breach of the peace and it is difficult to believe that the Ambatielos claim falls into this category, and, secondly, and more important, Article 36 (3) of the Charter, when referring to the reference of disputes to the International Court of Justice, adds "in accordance with the provisions of the Statute of the Court", words omitted in the Greek Observations but which, of course, entirely destroy the Greek argument. However, if the argument really is that these provisions of the Charter give compulsory jurisdiction to the Court and its jurisdiction is the only question with which the Court is concerned at present, the contention can be answered briefly by the well-known facts that there were many States who desired that the Charter should make the jurisdiction of this Court obligatory, but it is well known and undisputed that this desire was not realized at San Francisco, and none of the Charter provisions quoted says that the Court is given any jurisdiction by them.

Now in the Greek Observations of April last we find two passages referring to the Charter, and I shall again quote them both.

Paragraph 4 reads :

> "Subsidiarily, if the Court, contrary to the submissions of the Hellenic Government, should hold that it cannot deal with the claim for damages, the Hellenic Government will rely not only on the 1926 Declaration, which is not severable from the Treaty, but also on Article 1 (1), Article 2 and Article 36 (3) of the Charter to request the Court to order the British Government to join in the arbitration proceedings provided for in the Protocol annexed to the Treaty of 1886."

Now this observation is completed in paragraph 15, where it is said—and I quote again :

> "But if it is the case that generally speaking breaches of treaties are outside the jurisdiction of the Court unless the parties have conferred such jurisdiction upon it, the Hellenic Government is of the opinion that the position is quite different where a certain method of settlement by arbitration has been accepted by the parties, which one of the parties subsequently seeks to disregard. For it is the Court's function to act as the guardian of the principle accepted by the United Nations to settle its disputes by peaceful means in such manner that justice is not endangered (Article 2 of the Charter)."

There I end the quotation from the Greek Observations.

Now, in these passages the contention is apparently put forward that, if in a treaty two States have agreed to submit a certain category of disputes to arbitration and if in a particular case included in the category, one of the parties refuses to do so, then, on the basis of the provisions of the Charter which have just been mentioned, the Court has a compulsory jurisdiction over the dispute which arises from this failure to go to arbitration and the Court derives from the Charter the jurisdiction

to order that party to do so because the Court is the guardian of the principle set forth in Article 2 of the Charter.

Now there is not one word in the Charter which provides that the Court derives any jurisdiction whatever from these provisions or which says that the Court is the guardian of the principle laid down in Article 2. There is nothing in the Charter which says that the Court derives jurisdiction from the Charter in a case which is not covered by Article 36 of its Statute, because a State has not complied with any particular provision of the Charter. There is not a word in the Charter to suggest that, where two parties have agreed by treaty to have recourse to arbitration in any particular class of case and it is alleged that one party has wrongfully refused to do so, the Court is constituted by the Charter the guardian of arbitration clauses and derives from the Charter the right to order that party to proceed to arbitration.

Now if, of course, the Court were to accept these contentions of the Greek Government, its judgment would be of the highest importance as a general precedent and it would have repercussions of the greatest significance in other cases, including another case with regard to jurisdiction which will very shortly come before this Court for decision.

I hardly think, however, that these remarks form a serious part of the contentions of the Greek Government in the present case, and, therefore, I will not delay the Court at the present time by making any further answer to them. I shall have another opportunity to do so, if in its oral answer the Greek Government shows that it does present these contentions as serious legal arguments relating to the jurisdiction of the Court.

Mr. President, I should be grateful if you would indicate your wishes to me on this point. If I continue now, then, including the translation, I should be keeping the Court until about 1.10 p.m. If I were to stop now, I should be able to complete all I have to say to the Court, including translation, between 4 p.m. and 6.30 p.m., but it might be necessary, if I were going to complete, that the Court should sit up to about 6.30 p.m.

Le PRÉSIDENT EN EXERCICE: Tenant compte de l'explication que vous venez de nous fournir, j'estime que nous pouvons renvoyer l'audience à cet après-midi à 16 heures. L'audience est suspendue.

[Public sitting of May 15th, 1952, afternoon]

May it please the Court. I now return to Article 36 (1) of the Statute on which alone in the present case the jurisdiction of the Court must be based, and I observe in passing that, when Article 36 (1) refers to "all matters provided for in the Charter of the United Nations", it is well known that these words were inserted in the draft at a time when it had not yet been decided whether the Charter would make the Court's jurisdiction obligatory or not, and they were not removed from this paragraph of the Court's Statute when the decision was taken at San Francisco that the Charter should not confer obligatory jurisdiction on the Court. So far as I know, these words in Article 36 (1) have no practical meaning at all at present, and I would remind the Court that in the first Corfu case where the United Kingdom put

forward to the Court a contention which endeavoured to give these words an application in a case where the Security Council had passed a substantive resolution recommending the parties to submit the dispute to the Court, a strong minority of this Court in a separate opinion held this contention of the United Kingdom to be unfounded, while the majority of the Court, having reached a decision on other grounds, thought it unnecessary to observe on this contention at all. Therefore, under Article 36 (1), the Court has jurisdiction in this case if, but only if, some treaty or convention in force provides for it. Now there is only one treaty provision which has been invoked by our opponents as being a treaty in force which gives the Court jurisdiction in this case, and that is Article 29 of the Treaty of Commerce and Navigation between Greece and the United Kingdom, of 1926. Article 29 of that Treaty reads as follows :

> "The two Contracting Parties agree in principle that any dispute which may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either party, be referred to arbitration. The Court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at The Hague, unless in any particular case the two Contracting Parties agree otherwise."

Now, this provision, coupled with Article 37 of the Court's Statute, does give this Court jurisdiction over disputes between the United Kingdom and Greece relating to the interpretation or application of any of the provisions of the Treaty of 1926. We have therefore to see whether this case involves a dispute as to the interpretation or application of the provisions of the Treaty of 1926.

There is attached to the Treaty of 1926 a certain Declaration which is important for the purpose of this case. I am going to deal fully with this Declaration later, but I first want to deal with the effect of this Article 29 apart altogether from this Declaration.

Now, the Treaty of 1926 was brought into force, pending ratification, on 28th July 1926 ; it only became operative on that date. None of the provisions of the 1926 Treaty have any application at all to anything that took place before July 1926. The United Kingdom only became bound to apply to Greek nationals or Greek companies the provisions of the Treaty of 1926 as from July 1926. It could not have committed a breach of the Treaty of 1926 by any action which it took before the Treaty of 1926 became binding on it. I should have thought that this was elementary and self-evident, but I am obliged to emphasize it, having regard to certain contentions which form quite an important part of the argument in the Greek Observations of April last. In these Observations it is argued in more than one place—for instance, the second sub-paragraph of paragraph 6, and again in the fourth sub-paragraph of that paragraph ; sub-paragraph 3 of paragraph 7, and again in sub-paragraph 2 of paragraph 8—now, in these places, the Greek Observations argue (1) that certain provisions of the 1926 Treaty, which came into force in July 1926, are in substance the same as certain provisions of the earlier Treaty of 1886 between the two countries, a treaty which ceased to operate when the Treaty of 1926 came into force ; and (2) that where the two Treaties contain

provisions similar in substance, you can invoke the similar provision of the 1926 Treaty in regard to acts done at a time before the 1926 Treaty came into force, and when the old 1886 Treaty was still in force. Or, it may be that our opponents' argument is that you can invoke Article 29 of the 1926 Treaty (the arbitration article) in respect of a claim based on a provision of the 1886 Treaty, where there is a similar provision in the 1926 Treaty. I admit I am not clear which of these two things our opponents say. Some passages which I have referred to suggest one way of putting it, other passages the other way. I do not think it matters very much which of the two ways it is put, but I do find their observations on this point a little difficult to follow. As I understand it, this position, that is to say, the position that "a question—some act complained of—may be referable to the old and the new Treaty at the same time" (to use our opponents' words) is alleged to result merely from the fact that the new Treaty contains provisions similar in substance to those of the old Treaty. Now, our opponents have not cited in support of this contention any precedent or authority, and I must admit that it is a contention of a kind which we have never heard of being put forward before. My answer to it is simply that there was a date in July 1926 when the Treaty of 1886 ceased to operate so that the Treaty of 1886 could not be invoked in regard to anything that happened after that date, and that the Treaty of 1926 only began to operate in July 1926 and cannot be invoked in regard to anything that took place before that date. It is quite immaterial whether or not the two Treaties contain provisions which are similar in wording or in substance. You can only make a claim based on a treaty in regard to acts done, when the treaty which you invoke was operative. By its own terms, you can only invoke Article 29 of the Treaty of 1926 in regard to breaches of the provisions of the Treaty of 1926, and not in regard to breaches of the provisions of the 1886 Treaty, because Article 29 uses the words "interpretation or application of the provisions of the present Treaty". A claim that a provision of the 1886 Treaty has been infringed is not a claim relating to the application of the 1926 Treaty, even if the 1926 Treaty had a similar provision in it.

I should have thought that what I have just said was self-evident as a matter of general principle, but I have added—if verbal support were needed—that by its own words, Article 29 of the 1926 Treaty confines its own operation to the interpretation and application of any of the provisions of the present Treaty. For these reasons I submit (1) that Article 29 of the 1926 Treaty is clearly confined to the application of the provisions of 1926 and does not extend to the application of any provision of the old 1886 Treaty unless the Declaration—which I shall consider in a minute—produces this effect; (2) that the provisions of the 1926 Treaty do not apply to anything which took place before July 1926 and therefore do not apply to the matters complained of in the present case.

Before I deal with the Declaration, however, I will just say a word about the alleged similarity of those provisions of the 1886 and 1926 Treaties which the Greek Government supposes to be relevant to the claim which it makes.

It is in paragraph 3 of the Observations of April last that the Greek Government sets out in parallel columns the provisions of the two

Treaties which it holds to be the same in substance. As a matter of fact, the first couple of allegedly parallel provisions are not in any way the same in substance. Article 15 (3) of the Treaty of 1886 relates to free access to courts of justice on the same conditions as nationals, and Article 12 of the 1926 Treaty, which is opposite to it, relates to laws and regulations with regard to Customs and similar matters and redress for abuses in Customs matters. These two provisions, referred to as being provisions in almost identical terms, seem to have no similarity at all, either in terminology or in regard to the subject-matter with which they deal. I can see, very vaguely, how the Greek Government attempts to bring the Ambatielos case under Article 15 (3) of the Treaty of 1886. I should very much like to see how they bring the case of M. Ambatielos under Article 12 of the Treaty of 1926, which is said to have been almost identical. They have not so far shown how they think they can do it.

While the next two pairs of provisions quoted in paragraph 3 of the Greek Observations are undoubtedly parallel in the sense that their substance is the same, we have so far been unable to understand what conceivable bearing these provisions can have on the case at all. They grant respectively national treatment and most-favoured-nation treatment to nationals of the other party in matters of commerce (trade) and navigation, but, of course, provisions relating to the treatment of nationals in courts of justice are *not* provisions relating to trade and navigation at all. They are provisions relating to Establishment. Yet in the penultimate sub-paragraph of paragraph 3 of its Observations the Greek Government appears to be supposing that a most-favoured-nation provision, relating to trade and navigation, in the Anglo-Greek Treaty of 1886, will attract for the benefit of Greece establishment provisions in other treaties concluded by the United Kingdom. But, of course, this most-favoured-nation provision will only attract provisions in those other treaties relating to trade and navigation.

Now in this case, the claim of our opponents on the merits is really a claim for redress for denials of justice in the courts in breach of the principles of general international law ; and in view of the provisions of the 1886 Treaty, the only treaty provisions which can be relied upon, the claim can really only be put on the basis of the principles of general international law. Now it is true that the Greek Government alleges that the acts of which it complains are also a breach of Article 15 (3) of the Treaty of 1886 and it may be they now say it is a breach of certain other articles of that Treaty ; but my opponents find, I think, a certain difficulty in bringing the actual claim they do make under the wording of Article 15 (3) or of any other article of the 1886 Treaty. And consequently we find the following passage in their Observations of April last. I now quote from the last sub-paragraph of paragraph 3 of these Observations :

> "Lastly the Hellenic Government proposes to rely on the rules of the law of nations relating to the treatment of aliens and in particular on the general principles of the law relating to the denial of justice, because it appears to be clear that when the United Kingdom and Greece agreed to the favours and special privileges which should be enjoyed by nationals of each of the

parties on the territory of the other, it was no part of their intentions to *renounce*—even if it were possible for this to be validly done—the benefit of the minimum treatment prescribed by the general law of nations."

Now to the literal sense of the passage which I have just quoted the United Kingdom makes no objection at all. Taken literally, that sentence is undoubtedly true, when it says that it was no part of the intention of either Government when the Treaty of 1886 or that of 1926 was concluded, to *renounce* in respect of their nationals the benefit of the minimum treatment prescribed by the general law of nations. They certainly did not renounce it, and therefore, if either in the United Kingdom or in Greece a national of the other party was treated in a manner which conflicted with the principles of general international law, undoubtedly the State whose national had been so treated could make a claim for a breach of obligation under general international law.

But how does this help the Greek argument that the Court has jurisdiction since, Greece not having accepted the Optional Clause, the Court has no jurisdiction as between Greece and the United Kingdom on claims based on a breach of the principles of general international law? In order that the Court should have jurisdiction, by virtue of Article 29, over disputes arising out of breaches of the general principles of international law, it would be necessary to find in the Treaty of 1926 a provision, applicable at the time when the breach was committed, by which the contracting parties undertook to treat the nationals of the other in its territory in accordance with the provisions of general international law. In other words, you would have to find a provision in the Treaty which incorporates general international law as part of the Treaty. And there are treaties where this has been done. To insert such a provision in the Treaty is of course quite a different thing from not renouncing rights under general international law when concluding a treaty conferring certain specified rights. Now if there were in the 1926 Treaty such a provision, then it could be said that the parties had incorporated and made part of the obligations, which they had undertaken by that Treaty, the observance of the principles of general international law and that a breach of the general principles of international law would then be a breach of the Treaty. But there is no such provision in the 1926 Treaty. Moreover, the 1926 Treaty does not apply to acts done before 1926. For that matter, there is no such provision in the 1886 Treaty either, and I have not found in our opponents' Observations any statement that there is such a provision, though it appears that they are searching for a provision of this kind through the most-favoured-nation clause. But the United Kingdom contend that the most-favoured-nation clause in the 1886 Treaty would not attract a provision of that kind in another treaty even if it could be found, because the most-favoured-nation clause in the 1886 Treaty is limited to matters of trade and commerce.

In any case, we are now concerned with jurisdiction. From the point of view of jurisdiction, the fact that more than one article of

the 1886 Treaty could be invoked, or that by virtue of some most-favoured-nation clause in the 1886 Treaty, some provisions in other treaties concluded by the United Kingdom could be invoked by Greece, would, if it were correct, still make no difference at all to my contention that the Court has by Article 29 of the 1926 Treaty no jurisdiction to deal with breaches of the 1886 Treaty at all, and that no provision of the 1926 Treaty can be invoked in regard to acts done, or events taking place before the 1926 Treaty came into operation. And therefore, Article 29 gives this Court no jurisdiction to deal with the merits of this case. If it were the case that Greece was able to invoke other provisions of the 1886 Treaty in addition to Article 15 (3), the effect of this would merely be to extend the grounds of claim which the Court had jurisdiction to entertain, supposing that, contrary to my contention, the Court found it had jurisdiction to deal with alleged breaches of the 1886 Treaty at all.

I now come to the Declaration of 1926 and will consider whether the Court has jurisdiction to deal with this case by reason of this Declaration, and I will begin by reading the provisions of the Declaration itself. It says:

> "It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any difference which may arise between our two Governments as to the validity of such claims shall at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10th, 1886, annexed to the said Treaty."

In this Declaration the Governments say two things: first, that the conclusion of the new Treaty does not prejudice claims on behalf of private persons based on the provisions of the old Treaty. I think they might have expressed their meaning with more complete legal accuracy if they had said that the replacement of the old Treaty by the new Treaty did not prejudice these claims based on the old Treaty, but it is quite clear that this is what they meant. The second thing they said was that, if there was any difference between the two Governments as to these claims based on the old Treaty, either Government could secure that the dispute should be submitted to arbitration in accordance with the Protocol annexed to the old Treaty. By this Declaration the two Governments were making sure that, notwithstanding the disappearance of the old Treaty, there could still be recourse to obligatory arbitration for these cases. Now the Greek Government claims that M. Ambatielos was, in 1922 and 1923, treated in a manner which was in conflict with a certain provision of the Treaty of 1886, namely Article 15, paragraph 3. It further contends that the United Kingdom is obliged by this Declaration to arbitrate this claim in accordance with the provisions of the Protocol of 1886, and that the United Kingdom is committing a breach of this Declaration by refusing to arbitrate. In order, however, to argue that this

Court has jurisdiction to entertain this contention based on the Declaration, the Greek Government must establish that the Declaration, which I have just read, is so much a part of the Treaty of 1926 that a dispute relating to the application of this Declaration is a dispute relating to a provision of the Treaty itself within the meaning of Article 29, because you will remember that Article 29 only applies to provisions of the "present Treaty".

Now, this Court would have jurisdiction to decide whether the United Kingdom had committed a breach of the Declaration of 1926 in regard to the Ambatielos claim if : (1) the Declaration was a provision of the Treaty of 1926, and (2) the claim which the Greek Government is making in respect of M. Ambatielos was both a claim based on the Treaty of 1886, and a claim which that Declaration covers. If all these points were established, this Court would have jurisdiction to say, if it so found, that the United Kingdom was in breach of the Declaration of 1926 in refusing to go to arbitration, and possibly also have jurisdiction to make an order that the United Kingdom should go to arbitration in accordance with the provisions of the Protocol of 1886. Before I go further, I wish to repeat what we have said in the Counter-Memorial, that if, contrary to our contentions, the Court should hold (1) that the Declaration is a provision of the Treaty of 1926, and as such is covered by Article 29, and (2) that the claim in this case is a claim to which the Declaration applies, and (3) that the claim is one which the United Kingdom is legally obliged to arbitrate, then the United Kingdom is, at any rate to this extent, in accord with its opponents, that it will, in that event, agree that this Court should itself replace the arbitral tribunal provided for in the 1886 Treaty, and should deal with the merits of the case in the same manner and to the same extent that the arbitral tribunal would have had to deal with them if it had been constituted. However, the United Kingdom contends that the claim which the Greek Government is now making in respect of M. Ambatielos, is not covered by that Declaration at all, and secondly, that the Declaration is not part of the Treaty of 1926 and does not constitute a provision of the 1926 Treaty for the purposes of Article 29. And I now propose to develop the reasons already given in our Counter-Memorial why the United Kingdom contends that this is so.

I am now going to deal with the United Kingdom argument that the Declaration of 1926 does not cover the claim brought in this case in respect of M. Ambatielos. In July 1926, when the Declaration was signed, there were theoretically three classes of claims which might arise on the 1886 Treaty. The first class is claims already made, concerning which the two Governments were already at that date in dispute. Now the Declaration would cover this first class, but the parties had not got that class in mind when they signed the Declaration, because in fact it did not exist. There were in 1926 no such disputes.

The second class is claims already formulated on the basis of the 1886 Treaty but with regard to which at that date there was no dispute because the other Government had not at that date either admitted or denied the claim. It is this *second* class of claim which the United Kingdom says the contracting parties had in mind, when the Declaration of 1926 was signed and, so far as I can see from sub-

paragraph 6 of paragraph 10 of the Greek Observations, our opponents agree that that was the class of claims which the parties had in mind at that time. I will revert to this point again later.

The third possible class of claims was claims which, in July 1926, had never been formulated, though the facts which might give rise to them had already occurred. The United Kingdom contends that the Declaration does not cover this third class of claims and that it is into this third class that the present claim respecting M. Ambatielos falls, notwithstanding what our opponents say, in paragraph 16 of their Observations.

I submit this because in July 1926 the Greek Government had not formulated any legal claim—with regard to the treatment in 1922 and 1923 of M. Ambatielos—at all. It had indeed in 1925 made some representations, the purport of which was that M. Ambatielos had suffered hardship as a result of what had happened under the contract for the sale of the nine ships, and had requested the Government of the United Kingdom to look into the matter again and take some action to alleviate the financial losses which M. Ambatielos had suffered. But it was made absolutely clear in this communication, which was made to the Foreign Office by the Greek Government in 1925, that no legal claim was put forward on the basis of a breach of international law or treaty. There was then no suggestion of any denial of justice. On the contrary, the Greek communication stated—and I am now quoting from page 69 of the Greek Memorial—"the final judgment of a British court unappealed against closes the transaction from a legal point of view. Such a judgment would in normal circumstances be equally conclusive from a moral standpoint." And a little earlier, at the bottom of page 68, comes the following sentence: "The moral title of M. Ambatielos to some substantial redress at the hands of the British authorities would appear on the facts outlined above difficult to resist." I submit again that these words make it abundantly clear that the Greek Government was saying at that time that there was no *legal claim* but that there was a moral claim for compensation on an *ex gratia* basis. In fact, as I have already reminded the Court, no legal claim of any kind on behalf of M. Ambatielos was made till eight years later in 1933 and no claim on the basis of the 1886 Treaty —which would alone come under the Declaration of 1926, if (as the Greek Government contend) the Declaration covered claims which had not even been formulated in 1926—no claim on the basis of the 1886 Treaty was made till 1939.

Now in sub-paragraph 2 of paragraph 10 of their Observations, the Greek Government contend that the text of the Declaration is not capable of the interpretation which the United Kingdom puts upon it, because the Declaration refers to "disputes which may arise" and not to disputes which have arisen. But if, as the United Kingdom contends, the whole purpose of the Declaration was to cover claims which had been formulated under the 1886 Treaty but about which in July 1926 there was as yet no dispute, the text of the Declaration fits exactly the construction which the United Kingdom puts upon it and the point made in this sub-paragraph 2 falls to the ground.

Now it is quite true, as the Greek Government says, that the construction put upon the Declaration by the Government of the United Kingdom means that there was potentially a class of disputes con-

cerning the application of the 1886 Treaty in regard to which there would be no compulsory arbitration, namely, cases where acts had been done on one side or the other prior to July 1926 which might be thought later by the other party to conflict with the 1886 Treaty, but in regard to which in July 1926 no claim had been formulated. It is my submission, however, that the parties to the 1926 Declaration were content to dispense with the application of provisions for compulsory arbitration in respect of claims arising out of acts occurring before that date, when no claim at that date had even been formulated.

For that matter, this was not the only class of disputes which might arise in the future on the past performance of the 1886 Treaty, which the Declaration of 1926 does not cover. The Declaration of 1926 is confined to claims on behalf of private persons. It does not cover claims which one Government might wish to make against the other on its own behalf, and claims of this kind might have arisen under the Treaty of 1886, the provisions of which are by no means confined to provisions relating to the treatment of nationals of one party in the territory of the other, and I may add that the Arbitration Protocol of 1886 was *not* confined to disputes arising out of claims made on behalf of private persons. It covered claims of every sort for the violation of any of the provisions of 1886.

While, therefore, I agree with sub-paragraph 4 of paragraph 10 of the Greek Observations that our interpretation of the Declaration of 1926 leaves a vacuum in the sense that there is a category of claims for which compulsory arbitration could not be claimed, I do not agree with the Greek Government's description of what that category was. The vacuum was a wider one than the Greek Government here say, because it extends in addition to all claims which one Government might have against the other and which did not relate to the treatment of private persons.

I now come to the United Kingdom contention that its interpretation of the Declaration is borne out by the negotiations and discussions which took place prior to the signing of the Declaration, and I make no apology for referring to these negotiations for the purpose of interpreting this text, because, if the meaning of the text is clear, as the Greek Government say, the text certainly does not clearly bear the meaning which the Greek Government put upon it. It is not natural to read the words "does not prejudice claims on behalf of private persons" in the Declaration, as covering potential claims, the nature of which has never been mentioned up to that date and in particular a claim for a breach of the 1886 Treaty which was not made until 1939.

Now, it seems to be common ground that the Declaration was only signed because the United Kingdom had, in June 1926, raised an issue about a certain class of claims on the basis of the old Treaty. It is also, I think, common ground that what the parties then had in mind was the British claim that British subjects should be exempted from payments under a recent Greek forced loan on the ground that the levy of contributions to this forced loan would be contrary to Article 13 of the Treaty of 1886. The letter from the Foreign Office of 22nd June, which the Greek Government annexes to its Observations, makes this perfectly clear. It is also common ground that the British claim for exemption from this forced loan had been for-

mulated before July 1926, but that there was no dispute about it at that date because up to that date the Greek Government had not taken up any attitude contrary to the claim formulated by the United Kingdom Government. So to this extent I agree with sub-paragraph 6 of paragraph 10 of the Greek Observations. It is also true, though so far as I know it has no legal significance at all, that the Treaty of 1926 contained no article similar to Article 13 of the 1886 Treaty providing for exemption from forced loans. I say this is of no legal significance at all because, even if there had been such an article in the Treaty of 1926, it would not have been possible to rely on the article in the 1926 Treaty in regard to facts that occurred before that Treaty came into force. Now, in 1926 there was no difference of opinion between the two Governments about the substance of what they wanted to put in the Declaration, but it is true that the Greek Government put forward one text and the United Kingdom Government substituted another text—and it was this second one that was ultimately signed. The United Kingdom Government substituted another text on the ground that its text was more correct legally, although so far as the substance was concerned, there was really no difference between the two versions. The text which the Greek Government put forward was quoted in paragraph 13 (1) of the Counter-Memorial and reads:

> "It is well understood that in so far as—and I am here adopting the verbal amendment which the Greek Government themselves suggest in their Observations—that in so far as the new Treaty of Commerce between Great Britain and Greece does not cover anterior claims eventually deriving from the Anglo-Greek Commercial Treaty of 1886...."

Now, the United Kingdom Government did not think that this was quite the right way of putting it. The reason clearly was because the new Treaty of Commerce would not, whatever the nature of its provisions, cover any claims deriving from an older treaty and relating to events before the new Treaty came into operation. Thinking that the Greek proposed text did not put the position quite correctly from a legal point of view, the United Kingdom Government suggested a text which, if not perfect, at any rate avoided this error.

Perhaps, however, the Greek Government of 1926 did not mean "in so far as" as is suggested to-day, but "inasmuch as", in which case no criticism could be made, but their words, as transmitted to the Foreign Office, were at least ambiguous, so the Foreign Office suggested another version, the one which was adopted. Still, if the Greek Government of 1926 did mean "in so far as", its text was legally inappropriate, and incidentally, the Greek Government to-day before this Court are making the same error as the text proposed by it in 1926 for the Declaration, when they say that if a provision in the Treaty of 1926 is the same in substance as the provision in the old Treaty of 1886, then you can base your claim—wholly or partly—on the provision in the new Treaty, although the claim relates to events which occurred before the new Treaty came into force and when the old Treaty was still in operation. And that is the comment I wish to make on sub-paragraphs 7 and 8 of paragraph 10 of the Greek Observations.

Incidentally, the Court may notice that in the text for the Declaration proposed by the Greek Government, the expression "anterior claims" is used, and I do suggest that the words "anterior claims" are only apt to describe claims which had already been formulated and this shows that the Greek Government of 1926 only intended to cover such cases.

For the reasons which I have just summarized, the United Kingdom Government contends that the Declaration of 1926 only applies to claims already formulated at that date, and therefore it does not cover the claim in the present case.

I now come to the second main argument of the United Kingdom regarding the Declaration of 1926, namely that the Declaration is not part of the Treaty of that date, and does not constitute a provision of that Treaty for the purposes of Article 29. What are the facts with regard to the Declaration?

It was certainly signed on the same day as the Treaty, and by the same plenipotentiaries, but the two instruments bear separate signatures. I am in a position to file a certified photostat copy of the original text of the Treaty. My opponents have copies of this photostat—indeed I may say that it was prepared at my opponents' request, and the Foreign Office gave copies of the photostat copies to my opponents some time before they ever gave copies to me. From this photostat copy, it will be seen that the signatures at the foot of the Treaty come on page 28, and that the signatures at the foot of the Declaration come on page 44. There is nothing in the Declaration or in the Treaty saying that the Declaration is an integral part of the Treaty, and as a rule, where a separately signed instrument is intended to be an integral part of the Treaty, so that the provisions of the separate instrument are deemed to be revisions of the Treaty, this is stated in terms. Then the Declaration does not have in any sense the character of an interpretation of the provisions of the Treaty of 1926, nor indeed has it anything to do with the manner in which the provisions of the Treaty of 1926 are going to be applied by one party or the other. If it had that character, I should be prepared to admit that it would be regarded as an integral part of the Treaty, even if this had not been stated in terms. In fact, the Declaration does not relate to the Treaty of 1926 at all; it merely says that the Treaty of 1926 does not prejudice claims deriving from the old Treaty (and if it had been more accurately drafted, it would have said that the replacement of the old Treaty by the new Treaty did not prejudice these terms). In fact, the Declaration relates exclusively to the provisions of the Treaty of 1886, and keeps alive a certain category of claims made under the Treaty of 1886 and also the provisions of the Protocol of 1886 regarding the arbitration of those claims, provisions which are different from the provisions of the 1926 Treaty itself, with regard to the arbitration of claims arising out of the 1926 Treaty. Now, on these facts, is there any reason at all why this Declaration, which in fact has nothing to do with the 1926 Treaty, should be regarded as an integral part of that Treaty—or be regarded as forming a provision of that Treaty—when there is nothing in the text to say that it is? I would submit that there is no reason at all for this view, and indeed that the opposite view is clearly the right one.

By way of illustration of our argument that an instrument which is signed at the same time as a treaty, and by the same persons, is not for that reason alone to be regarded as an integral part of that treaty and that, whether it should be so regarded depends on the subject-matter of the two instruments and on whether there is or is not an express provision saying that one is part of the other, we quoted in our Counter-Memorial two other treaties signed by Greece at approximately the same time as the Treaty of 1926, being treaties to which other instruments were annexed, some of which were declared to be integral parts of the treaty and others were not. I will only refer now to the second of the two instances we quoted, namely, the Greek-Italian Commercial Treaty of November 14th, 1926, and I could hardly make the point I wish to make better than by quoting a portion of the Greek Observations, adopting it as my own and saying I think it completely makes my point. This is what the Greek Government says in the last two sub-paragraphs of paragraph 8 of its Observations of April:

> "The Greco-Italian Commercial Treaty of November 14th, 1926, was similarly accompanied by a final interpretative Protocol, by two Declarations, and by a second Protocol and two exchanges of letters. And it is true that, while the Final Protocol and one of the Declarations are expressed to be an integral part of the Commercial Treaty signed that day, this is not the case of the second Declaration, the second Protocol and the two exchanges of letters. Once again, the matter is easily explained: the Final Protocol is purely and simply for the interpretation of the Treaty (and of the Greek entry tariff annexed thereto); similarly one of the two Declarations is directly and exclusively applicable to the most-favoured-nation clause, the application of which it makes subject to the further condition of reciprocity in the case of its being relied upon in relation to coastwise trading. On the other hand the Protocol (and our opponents here are referring to the second Protocol) and the letters are concerned with purely political and moral questions of no legal importance—they involved promises to give favourable consideration to Italian wishes in respect of Italian artificial silks and wool, and Greek wishes in respect of Greek tobacco and wine; to have incorporated them in the Treaty of 1926 would not have been appropriate.
>
> As to the second Declaration, which is almost an exact reproduction of the Declaration accompanying the Greco-British Treaty of 1926, the absence of any formal statement that it formed part of the new treaty may be explained by hesitation to incorporate in the new treaty matters equally referable to the earlier treaty."

To take the last observation, which I have just quoted, it is our opponents' case that our Declaration of 1926 is "equally referable" to the earlier Treaty and, therefore, according to my opponents, the British and Greek Governments would have hesitated to incorporate this Declaration in the 1926 Treaty—and, of course, it is my case that they did not incorporate it. However, I, of course, put it higher still, because the Declaration of 1926 does not in any material sense relate to the 1926 Treaty at all but exclusively to the Treaty of 1886, and, that being so, our opponents' words that "the parties may have

hesitated to incorporate it in the new Treaty" in fact apply *a fortiori*. The parties to our Treaty of 1926 did not in terms incorporate the Declaration in the Treaty, and my contention is that they did not wish to make the Declaration part of the Treaty and it is not part of the Treaty.

Before we leave the matter, let us look at the explanation given by the Greek Government higher up, about the various other instruments which accompanied the Greco-Italian Treaty of 1926. This Treaty had a final interpretative protocol, and one declaration directly and exclusively applicable to the most-favoured-nation clause in the Treaty. These two instruments, therefore, were instruments interpreting the provisions of the Treaty itself or indicating the manner in which the provisions of the Treaty were to be operated, and these two instruments were by express words made integral parts of the Treaty as, I submit, it is perfectly natural that they should. This Treaty was also accompanied by another protocol and certain letters concerned with what the Greek Government now describes as matters of political and moral questions of no legal importance, and this second protocol and the letters were not stated to be integral parts of the Treaty, and I gather from the Greek Observations that the Greek Government does not consider that they were an integral part of the Treaty. In other words, if we look at this Greco-Italian Treaty of 1926, and all its annexed instruments, we reach the conclusion—and I gather that the Greek Government does not dispute this—that where the Greek and Italian Governments meant any annexed instruments to be integral parts of the Treaty they said so, and where they did not say so, the instruments were not meant to be and are not integral parts of the Treaty.

In conclusion, let me remind the Court that if Article 29 of the 1926 Treaty is to be regarded as covering the Declaration, the Declaration has to be considered to be one of the provisions of the 1926 Treaty itself, or in other words, the Declaration must be incorporated in the 1926 Treaty. Article 29 would not apply to the Declaration if the facts are that it is "equally referable" to the two Treaties, as our opponents say it is, and that the parties had hesitated to incorporate it in the new Treaty. In fact, however, I repeat, the Declaration is not "equally referable" to the earlier Treaty, but relates entirely and exclusively to the earlier Treaty, and has nothing whatever to do with the new Treaty, and the Greek Government in its Observations, when it described the Declaration as "equally referable" to the earlier Treaty, is simply relying on what I hope I may describe as the ill-founded contention that where you have similar provisions in the old and the new Treaty, you could bring a claim under the provision in the new Treaty in respect of events which occurred when the old Treaty and not the new Treaty was in force.

I will now conclude by summing up in skeleton form the argument which I have submitted to-day to show that the Court has no jurisdiction to deal with the merits of the claim put forward by the Greek Government on behalf of M. Ambatielos.

(1) The jurisdiction of the Court, if it exists at all, must be derived from Article 29 of the Treaty of 1926.

(2) Article 29 of the Treaty of 1926 only confers jurisdiction on the Court to deal with disputes relating to the interpretation or application of the provisions of the Treaty of 1926 itself.

(3) The Treaty of 1926 only came into force in July 1926, and none of its provisions are applicable to events which took place, or acts which were committed, before that date. This is so whether or not the 1886 Treaty, which the Treaty of 1926 replaced, contained provisions similar to those of the Treaty of 1926.

(4) The acts on which the Greek Government's claim is based took place in 1922 and 1923, and therefore the provisions of the Treaty of 1926 are not applicable to them.

(5) The Declaration which was signed at the same time as the Treaty of 1926 was not a part of that Treaty, and the provisions of that Declaration are not provisions of that Treaty within the meaning of Article 29.

(6) The claim which the Greek Government is making on behalf of M. Ambatielos, in so far as it is based on any provision of the Treaty of 1886, is not a claim covered by the Declaration of 1926, because that Declaration only covered claims which had been formulated under that Treaty before the Declaration was signed, and the Greek Government did not formulate any legal claim in respect of M. Ambatielos until 1933, nor, indeed, any legal claim under the Treaty of 1886 till 1939.

(7) The Treaty of 1886 contains no provisions incorporating in the Treaty the general principles of international law with regard to the treatment of foreigners in courts of justice or otherwise, and in consequence it cannot be said that the alleged denial of justice in breach of the general principles of international law is a breach of the Treaty of 1886, merely because it is a breach of the general principles of international law.

That, Mr. President, concludes the remarks which I wish to address to the Court to-day on behalf of the Government of the United Kingdom.

2. OBSERVATIONS OF M. LÉLY

(AGENT OF THE HELLENIC GOVERNMENT)

AT THE PUBLIC SITTING OF MAY 16th, 1952, MORNING

It might well seem unusual indeed that my Government has resorted to your esteemed Court for a case involving the Government of the United Kingdom. The impression is not incorrect, as the happily existing, since time immemorial, friendly relations between the two countries, never were closer and friendlier than they are to-day.

I just wanted, Mr. President, to emphasize this point in order to stress the fact that my Government felt bound to protect the rights of one of its subjects, to whom it felt that justice had not been accorded. On the other hand, we thought that by resorting to your Court we are in a way rendering a service to the British Government, because in spite of its eventual willingness, they would be unable to re-examine a case which was considered as closed. No government could act differently.

Our distinguished Counsel will be given, I am sure, the opportunity to develop to the Court my Government's views in this case, but I feel that I am in duty bound, Mr. President, to express my regret for the last phrase of one paragraph contained in the Counter-Memorial of the British Government; I think it is page 165, paragraph 71.

I believe that this must be due to an oversight, and I wish to assure the Court that our own exposé will be confined purely to matters of fact and law.

Mr. President, may I ask to introduce to your Court, the Rt. Hon. Sir Hartley Shawcross.

3. ORAL ARGUMENT OF SIR HARTLEY SHAWCROSS

(COUNSEL FOR THE HELLENIC GOVERNMENT)

AT THE PUBLIC SITTING OF MAY 16th, 1952, MORNING

May it please the Court. The point involved in this Preliminary Objection by the United Kingdom Government is an extremely short one; indeed, I doubt whether there is more in it than the question whether the Declaration which was appended to the Treaty of 1926, in fact is to be regarded, for present purposes, as part of that Treaty. The whole argument is set out in considerable detail in the written Observations which the Greek Government have submitted to the Court in reply to the objections by the United Kingdom Government, and I am very conscious of the fact that before a high tribunal such as this, arguments do not gain in strength or in cogency simply by being repeated over and over again, and I shall try, therefore, in addressing you to be reasonably brief. Nor shall I follow my learned friend very far, although I shall have to follow him a little, in the quite unexpected excursion which he thought right to make into the merits and substance of the matter, but I cannot allow to pass entirely unchallenged the observations which he did address to the Court.

My learned friend said as to the merits that he would condense what he wanted to say into a nutshell; well, Mr. President, the construction of this interesting but not always edible fruit, occupied my learned friend for considerably over an hour, but I am fortunate, I hope, in being able to occupy rather less time because I shall try to go straight to the kernel of the matter, if I might pursue my learned friend's analogy.

On the merits of this case there really is no possibility of doubt that M. Ambatielos has suffered very grave damage owing to four facts—I think I can summarize them quite shortly under four headings—which are themselves incapable of dispute or doubt, and the first fact is this, that at the time when M. Ambatielos agreed to purchase the nine ships which were then building for the United Kingdom Government at Hong Kong, the appropriate official, the appropriate civil servant of the British Government concerned with the negotiations for the contract—a gentleman called Major Laing, apparently supported by another gentleman who was his superior officer, Sir John Maclay, who afterwards became Lord Maclay, a person of some importance in the hierarchy of the British Executive at that time—there is no doubt that Major Laing, as I say, supported by Sir John Maclay, orally promised M. Ambatielos that the ships which he was contracting to buy would be delivered between certain dates, various dates between August 1919 and March of 1920. That fact was made clear after the conclusion of the case in the English Court of trial by the fact that information came to M. Ambatielos of a letter written by this Major Laing to his superior, Sir John Maclay, and not disputed by the superior, and the text of that letter is set out in the Memorial of the Greek Government at page 32, Annex E, and what Major Bryan Laing, writing then during the course of the proceedings which were actually taking place in the English Court, said to his superior officer who had been

with him in the Civil Service at the time the contract was made was this:

> "With regard to the sale of the ships to Ambatielos, I have, as far as I can, with the help of my secretary, refreshed my memory as to what actually took place prior to the sale of the steamers then building in Hong Kong.
>
> As you will remember, I was a pessimist as to the future of shipping, and my one idea was to reduce the liability against the Ministry of Shipping as rapidly as possible.
>
> I was of the opinion that it was most essential to dispose of the ships building at Hong Kong, and I had cables sent to our agents who were responsible for the building and completion, and they cabled back dates which they considered quite safe, and it was on this information that I was enabled to put forward a proposition to you.
>
> The Eastern freight market at that time being very high, I came to the conclusion, and laid my deductions before yourself and the Committee of the Ministry of Shipping, that, provided these ships could be delivered at the times stated by our agents on behalf of the builders, they were worth, with their position, owing to the freight they could earn, another £500,000, and this I added to what I considered an outside price for the ships. It was only by this argument—and these are the words to which I attach great weight—it was only by this argument *that I induced* Ambatielos to purchase the ships. This figure worked out at £36 per ton D.W. for 8,000 tonners and over £40 per ton for 5,000 tonners.
>
> The Ministry of Shipping got a very large sum of money on account, and in addition were relieved of the expense of sending officers and engineers out to Hong Kong...."

Then he goes on to deal with similar transactions in the case of other people, and he points out how it was by stipulating fixed delivery dates that the British Ministry of Shipping at that time was able to secure for the ships they were seeking to sell a far higher price than would have been the case if no delivery date had been provided for. Indeed, the truth of what Major Laing said is confirmed by a telegram from another gentleman, a Sir John Esplen, who was an official in the Ministry of Shipping at that time, which is set out at page 30 of the Memorial. This was a telegram from the British Executive to Hong Kong, and it referred to one of the nine ships which M. Ambatielos was buying. I mention it simply as a corroboration from another source—"As the steamer was sold to buyers for delivery not later than November, it is of the utmost importance that she should be completed by that date. Cable immediately progress of construction."

Well now, that is the first fact, and it is beyond doubt that orally, for whatever an oral promise may be worth—that is another matter—but orally, M. Ambatielos was induced to pay £500,000 more for these nine ships by the promise that they would be delivered within certain fixed dates.

The second fact, also I think beyond dispute, is that the British Government, knowing at the time of the trial before the British Courts that this was the evidence which Major Laing and Sir John Maclay—Sir Joseph Maclay it was, not Sir John—could give, did not call either

of these two gentlemen as witnesses before the trial of the Court, or disclose to M. Ambatielos the evidence which they could give to the Court.

The third fact, which is also beyond dispute, is that when M. Ambatielos, on becoming aware independently of the existence of this evidence which could be given by Sir Joseph Maclay and Major Laing, sought leave to call it in the Court of Appeal—he could not call it in the Court below, but when he got to know of it he wanted to call it in the Court of Appeal—his application for leave to call it, to place it before the Court, was objected to by the United Kingdom Government on the grounds that the evidence ought to have been called in the Court below, although, as every advocate knows, it is an elementary rule of advocacy that a party does not call witnesses without first knowing what evidence they are going to give, a knowledge which was withheld from M. Ambatielos by the United Kingdom Government, which itself knew quite well what evidence they would be able to give. And the fourth point is this, that as a result, I will not say of the concealment of this vital evidence by the United Kingdom Government, but of their failure to make sure that it was placed before the Court of trial, the English Court was not in possession of facts which might, I cannot say more than that, which might have led it to a very different conclusion. It was said by my learned friend that M. Ambatielos had not exhausted all his legal remedies before the Municipal Courts of England, that he might have appealed still further to the House of Lords, and that that Supreme Court of Appeal in England might have allowed him to call this additional evidence. But that really is not so ; the decision of the Court of Appeal in England was in relation to a matter of procedure and it involved the exercise of a discretion by the Court of Appeal which the House of Lords would not upset. Here I think I must add, because my learned friend may possibly have had this in mind when addressing you about the possibility of an appeal to the House of Lords, that I do not in any way associate myself with the attack on the good faith and impartiality of the English Courts in this matter. One can understand that M. Ambatielos, having a real sense of injustice, perhaps attributed the result of the case to a lack of fairness on the part of the judges—I certainly do not associate myself with that view, and that is not, in my submission, the point at all. The gravamen of this case against the United Kingdom Government is this, that the United Kingdom Government having itself knowledge of evidence which might have had a vital bearing on the decision of the English Courts, failed to make that evidence known to the English Courts. It is one thing not to produce State documents, correspondence passing between different officials of the government, documents for which, as a class, State privilege may properly be claimed—I do not want to say a word to diminish the importance of the right of governments to withhold from disclosure State documents which are privileged in that way—that may be a very necessary and justifiable position, but it is quite another thing to conduct litigation on a basis which is wholly inconsistent with evidence available from the government officials most closely concerned with the matter, and to do so without making known to the other side—the opposite party—that this evidence exists. That is the complaint that is made in this case, and that is the matter which causes such grave anxiety. Whether the production of this evidence would have led the

Court to a different conclusion, nobody can of course say, but this at least is certain about this matter, that M. Ambatielos was induced to buy these nine ships, was induced to enter into a written contract to buy these nine ships, on the faith of oral representations, possibly what we call in our system of law in England a collateral oral warranty, that the ships would be delivered by certain dates. It is certain that the ships were not delivered by those dates, and that in the result M. Ambatielos suffered grave loss instead of earning a large profit.

Out of a total cost, a total in costs and charges of something like £2,500,000, M. Ambatielos paid all but about £600,000. In fact, the payments which he made, if you include with them the necessary disbursements in connection with the purchase, amounted to a total of about 80 % of the purchase price, a larger percentage of cash payment than was normal at the time and far larger than is customary now in the purchase of ships in such circumstances. What was left unpaid was left over on the assumption, which would have been correct if the United Kingdom Government had delivered the ships by the new dates, that the balance would have been earned by ships carrying freights long before the remainder of the ships were actually due for delivery. That is the transaction into which M. Ambatielos entered, and which was stigmatized by my learned friends.

Le PRÉSIDENT en exercice : J'aimerais vous rappeler ce que je vous ai dit hier matin, à savoir que vous devez éviter autant que possible de toucher le fond du différend. Je sais que, quelquefois, pour pouvoir plaider la compétence ou l'incompétence d'un tribunal, on est amené à effleurer le fond du différend, mais ce n'est pas le cas dans la présente affaire. D'ailleurs, dans l'exposé que vous venez de faire, vous êtes entré en plein sur le fond de la question du litige qui n'est pas en ce moment devant la Cour. Je sais aussi que vous avez été un peu entraîné par les remarques de sir Eric Beckett, mais je voudrais vous prier de rester, autant que possible, sur le seul plan de la compétence de la Cour.

Sir HARTLEY SHAWCROSS: Mr. President, I fully appreciate and accept the observations which you have addressed to me. When I came here yesterday, the plan of my speech did not involve one single word, not one, on the merits, but as my learned friend devoted nearly a third of his speech to merits in a way which may gain publicity—I don't know—I felt that I could not let the matter pass entirely without indicating to the Court and to the public that there was possibly another point of view. But I have now left the matter and I only wanted to add—and this is not really on the merits—two things : one is that it was said by my learned friend that M. Ambatielos engaged on a gamble. If he did, it was a gamble on the British Government carrying out the oral promise of one of its civil servants. I've not hitherto heard that described as a gamble.

The final thing that I should like to add is just this : that the circumstances relating to this Ambatielos affair have for a long time been a source of grievance and dispute and contention between the Governments of Greece and of the United Kingdom, whose relations have otherwise been, as the Greek Minister has just said, wholly friendly. The matter may not be of first-class importance—I should not suppose that the Security Council will ever be invited to intervene in regard to it—and yet it is a source of what many Greek citizens regard as an injustice inflicted on

them by the United Kingdom. Although the normal practice before this or any other court is that he who makes an objection to the jurisdiction of the court assumes against himself that he has no merits, I am quite prepared for the purpose of this argument to assume that M. Ambatielos has no merits at all. Let it be assumed that M. Ambatielos could not succeed in his claim ; let it be said that his claim is wholly unarguable and that it would be easy for the United Kingdom Government before this tribunal, or some other tribunal, to refute it. If that be so, it is perhaps all the more regrettable that the United Kingdom Government has not, consistently with its usual policy of submitting matters to arbitration, submitted this matter to arbitration. If this matter had been submitted to arbitration, whatever the merits on one side or the other, we should at least have removed for ever what has been, and what will otherwise continue to be, just a little running sore, debilitating the body of the otherwise excellent relations existing between the Government of the United Kingdom and the Government of Greece.

But, Mr. President, objections to the jurisdiction, although perhaps rarely taken by parties who have great confidence in the merits of their case, are legally admissible and they have to be dealt with, and I want first to state in a quite summary way the points—the main points, and there are five of them—on which the contentions of the Greek Government are based.

First of all we say that M. Ambatielos (this is the matter of merit which I do not discuss further), M. Ambatielos suffered damage owing to the action of the United Kingdom in not freely allowing—this is how I put my case and it goes to jurisdiction—in not freely allowing the whole of the available evidence to be presented to the English Court, and that thereby M. Ambatielos has been deprived of the effective right of free access to the Court and moreover has not had accorded to him, in a legal action relating to commerce (because this matter arises before this Court from treaties dealing with trade and commerce) the full justice and equity to which he is entitled under most-favoured-nation treatment, and I rely on Articles 15 (3) and 10 of the Treaty of 1886. That is M. Ambatielos's claim: whether it is a good claim or not, a valid claim or not, under these treaties is, of course, a matter of merit which would have to be considered by the Court hereafter, so I don't argue it any further at this stage. The precise construction of these articles of the various treaties—the question of most-favoured-nation treatment and so on—that will arise for consideration later.

Secondly, that the Treaty of 1886 had a protocol providing for arbitration in respect of disputes : that again is a matter about which I need say nothing more because it is beyond dispute.

Thirdly, that the Declaration which was appended to the Treaty of 1926 was in fact part of the Treaty of 1926 and thus entitles this Court to interpret the scope and nature of its provisions and to declare that a right to arbitration exists as between the Governments of Greece and the United Kingdom.

Fourthly, that the Declaration of 1926 kept the 1886 Protocol alive in relation to disputes, the subject-matter of which arose prior to 1926, whether or not the Permanent Court has jurisdiction to enforce compliance with the matter.

And, fifthly, I say further, or in the alternative, that in so far as the provisions of the 1926 Treaty replace and continue those of the Treaty of 1886, the arbitration clause, Article 29 of the 1926 Treaty, took the place of the 1886 Protocol and covers the present case.

Mr. President, I might have added a sixth point, based upon the Charter of the United Nations and referred to, I think, in paragraph 5 of the Conclusions of the Greek Government's Memorial. That paragraph—I think I'm right that it is contained in that paragraph—yes—that paragraph was put in because of the frequent protestations of the English Government, made with absolute sincerity and made last in the Persian case which is still before the Court, of its adherence to the principles of the rule of law and international adjudication. It may, no doubt, be true that the Charter of the United Nations, in requiring matters to be submitted to the International Court, is dealing with those which otherwise might lead to a breach of the peace. But surely, the United Kingdom Government is not saying that its support of the rule of law in international affairs and its devotion to the principle of international arbitration before this Court or before some other independent tribunal, is limited to cases in which otherwise wars might occur. I can't think that is the contention of the United Kingdom Government. But I'm not going to pursue that point now because five good points are good enough for me without exploring the possibilities of a sixth point which perhaps is not so good.

I want first to say something in general terms about the position apparently taken up by the United Kingdom Government. I may perhaps put that position in language less diplomatic—less euphemistic—than was employed by my learned friend; but the position is this: since 1886 to the present time, the United Kingdom Government has reciprocally agreed to extend to the citizens of Greece a most-favoured-nation treatment and other privileges, at least in matters relating to commerce, which must, in my submission, include matters arising out of commercial transactions, such as litigation resulting from commercial contracts. Moreover, the Governments have agreed that any dispute between the respective Governments as to whether that most-favoured-nation treatment or those rights have, in fact, been accorded in a particular case, should be the subject of one kind or another of international arbitration. Before the 16th July 1926, it was arbitration by arbitrators who were selected *ad hoc*. After the 16th July 1926, it was arbitration by the Permanent Court.

Mr. President, that being the general background, the position taken up by the United Kingdom Government now is the remarkable one that by accident—for it cannot seriously be argued that it was by intention or design—there is a gap in this consistent policy of arbitration in commercial disputes which has been pursued by both Governments. And the United Kingdom Government apparently say this:

> "At the very moment when we were re-asserting and perhaps extending the privileges of most-favoured-nation treatment in commercial matters which we mutually accorded to each other's citizens; at the very moment when we were strengthening the principle of compulsory arbitration by substituting the International Court for *ad hoc* arbitrators, the principle which had distinguished our relations for over forty years [at that time] our treaty

arrangements resulted in this: That wrongs suffered by Greek citizens in contravention of the 1886 Treaty before the coming into operation of the Treaty of 1926, could not be the subject of arbitration under the earlier Treaty, unless prior to the 16th July 1926 the Greek Government had intervened, and made formal claims on behalf of its citizens;

and on the other hand, they could not be the subject of arbitration under the 1926 Treaty, because although the Government of Greece might have intervened and made formal claims in respect of them after the 1926 Treaty came into operation, the facts and the circumstances on which the claims were based arose during the period of the Treaty of 1886 and not during the period of that of 1926."

That is the proposition—less euphemistically expressed—but that is, in fact, the proposition which the United Kingdom Government put before this Court, and I would respectfully submit that this proposition would seem to offend common sense, and that it can be shown to demonstration that it involves a denial of justice to which one would regret the United Kindgom Government being a party.

Mr. President, I want as an example to that, outside the merits of this case altogether, to take a hypothetical case. Take, for instance, Article I of the two Treaties; the two articles—Article I in each case—are in almost indentical language, and they are set out side by side with each other for the purpose of ease of comparison in the Greek Government's Counter-Memorial. And under those articles, amongst other things, Greek subjects were to be entitled to come freely with their ships and their cargoes to all ports open to citizens of the United Kingdom. Imagine the no-doubt-unlikely case of a refusal of the United Kingdom authorities to permit the entry of Greek cargoes through—for instance—the port of Southampton. Any other case arising under the article, which contemplates all sorts of different possibilities, would be just as good, but I am taking that unlikely case as an example on which to base an argument. The refusal of the right of entry to Greek vessels to the port of Southampton would obviously be a gross violation of Article I of each of the two Treaties, and suppose that it had occurred just a few days before the signing of the 1926 Treaty in July of 1926. Perhaps the Greek shipowner, being told that he could not go to Southampton, made his protest to the port authorities there; perhaps his consignee, of the cargoes which he wanted to deliver, made representations to the English Board of Trade. But at that stage the Greek Government had no knowledge of the matter at all; there is no reason why they should have done; it had only just occurred. And consequently it did not intervene, and it made no formal claim on behalf of its citizens. Then came, two or three days later, the signing of the Treaty of July 1926. And the following week, the Greek Government was apprised of the fact that its shipowner had been denied access to the port of Southampton, and immediately intervened on behalf of its citizen and made a formal energetic claim.

The United Kingdom Government apparently ask this Court to accept the view that in such a case they might not only refuse to admit the claim made by the Greek Government, but they could also deny the right to any arbitration at all about it. No arbitration under the 1886 Treaty,

they say, because the claim was not made until the 1926 Treaty had come into operation, and no arbitration under the 1926 Treaty, they say, although its articles were in identical terms, because the facts on which the claim was based arose during the currency of the 1886 Treaty; and in that way, the United Kingdom Government seek to claim what apparently they regard as the best of both worlds; and there is a kind of interregnum during which the rule of arbitrary and partisan decision takes the place of the rule of law and independent international adjudication.

Well, Mr. President, this deplorable argument in my submission cannot possibly be right. It is, I would submit, quite untenable. In the case that I have put—the hypothetical case—one would imagine that it really could not possibly be seriously raised: a case where the wrong occurs a day or two before the signing of the Treaty, and the claim is made a day or two after the signing of the 1926 Treaty. But if the argument is untenable in that case, how can it be maintained in any other case, although the dates may be longer spaced apart. An attempt has been made by the United Kingdom Government to say that in any event claims on account of the two Governments themselves were not kept alive by the Declaration of 1926, which only refers to claims by private citizens. Well, be it so. The Governments were no doubt aware on 16th July 1926 that there were no such claims, and therefore there was no need to arbitrate on them and no purpose in keeping the provisions alive. But they could not have had that knowledge as to claims by private citizens, and the right to arbitrate eventually on those had therefore to be kept alive; that was the purpose of the Declaration, but it is sought by my learned friend to suggest that whilst the Declaration of 1926 might have kept the arbitration machinery alive, for matters, disputes, in which claims had already been made, or which perhaps were made soon after the signing of the 1926 Treaty, it could hardly reasonably have done so in respect of claims which were long delayed.

Now, in regard to that I say only this, that if the 1926 Treaty is effective, or rather the 1926 Declaration is effective, to cover a claim made, say ten days after its date, it must equally be effective to cover a claim made, say ten years after its date; there is no doctrine of prescription excluding claims operating here. But, as a matter of fact, a diplomatic claim was in fact indicated in the present case on 12th September 1925, before the 1926 Treaty came into operation at all, and you will find the letter on page 66 of the Memorial. It was wholly wrong to suggest, as my learned friend did, that that letter abandoned any international legal claim; it did nothing of the kind. My learned friend read, not from the letter sent by the Greek Embassy, but from a document accompanying that letter, and which was in fact M. Ambatielos's memorandum to the Greek Government, in which he was asking for the intervention of the Greek Government. The statement which he made in that memorandum to the Greek Government that he was "precluded from obtaining legal relief", obviously had reference and could only have reference to legal relief under English municipal law. Being precluded, as he then was, from further relief under English municipal law, he was asking for the protection of the Greek Government, and the Greek Government, according him that protection, took as its first step in making a claim, the frank course,

and no doubt you will think the proper course, of sending to the United Kingdom Government the very statement which M. Ambatielos had made to them. Well, now, no doubt the letter of 25th September was a very diplomatic document, and diplomatic language in 1925 was, I dare say, even more diplomatic than diplomatic language in 1952 ; certainly it was not couched in the language that Prosecuting Counsel indicting a criminal before a Criminal Court might be expected to use. But it is no more necessary in diplomatic correspondence than it is in municipal law, when perhaps the question of whether a claim has been made in due time, in proper time, may arise, formally to specify the article and the treaty, or the section and the statute under which the particular claim is made ; it is enough in making a claim that the subject-matter of the claim is stated, and if that subject-matter is such as to come within a particular treaty or a particular statute, although no reference is made to the treaty or the statute, the claim is good. One must apply a little common sense to correspondence of this kind and perhaps it is not always very easy or very diplomatic for a government like the Greek Government to challenge a much more powerful State in language of any violence ; this was a claim which was made diplomatically but in which I suggest the position was made perfectly clear. Indeed, when my learned friend Sir Eric Beckett spoke about "reviving a stale claim", he selected his language, as he always does, with great accuracy and care ; it was a claim, as Sir Eric said, which was later revived, and by no means simply a request for some *ex gratia* payment.

It has further been contended by the United Kingdom Government that the Declaration of the 16th July 1926 was not part of the Treaty of 1926, and I come to the third point of the five that I mentioned. But as to that, my learned friend admitted that he would accept the Declaration as part of the 1926 Treaty if it "had anything to do with the 1926 Treaty"—and I attach very great significance to that admission which my learned friend very properly made.

Well, now, the question is : has the Declaration of 1926 "got anything to do with" the Treaty to which it was appended? If it has, that is an end to the matter and the Greek Government is entitled to go on. My learned friend agrees that that is the position.

Now, how it can be said that the Declaration of 1926 has nothing to do with the Treaty, it is a little difficult to understand. It is really only necessary to read the first words of the Declaration itself, and the first words of the Declaration are these :

> "It is well understood that the Treaty of Commerce and Navigation between Britain and Greece of to-day's date does not, etc."

How it can be said that that has nothing to do with the Treaty, when the very words say in fact that it does, I don't altogether follow, but the fact is, that the Declaration was necessary in order to explain the effect of the 1926 Treaty itself. The position was this, although it is not, I think, expressly stated in the Treaty itself. One of the effects of the 1926 Treaty was, as Sir Eric Beckett said, that it would replace the old Treaty—those were the words he used and they were accurate words. The 1926 Treaty replaced the old Treaty. If there had been no declaration attached to the 1926 Treaty, the replacement of the old Treaty would have wiped out, and taken the place of, all the provisions of the 1886 Treaty, and on that view it could have been argued all the

more strongly that the arbitration clause, 29, of the 1926 Treaty had replaced the Arbitration Protocol of the Treaty of 1886. The truth is that it was desired to modify the extent to which the 1926 Treaty replaced the Treaty of 1886 by restricting the effect of the 1926 Treaty upon the 1886 Arbitration Protocol. That was the purpose of this Declaration.

Of course, this argument of the United Kingdom Government is really a very technical one. It may not be the worse for that, but it is highly technical. If this Declaration is not part of the 1926 Treaty, then it is a separate treaty in itself. Nobody has ever so regarded it, nobody has ever so published it. It is true that the Declaration is not contained in the main body of the Treaty, but, of course, that is not necessary. There is an interesting example of a declaration appended to a treaty and accepted as part of the treaty, in an Anglo-French treaty of 1824 which is referred to in Sir Arnold McNair's book on treaties, and no doubt many similar examples could be found if one occupied time in going through the precedents. This Declaration was in fact appended to a treaty, it was part of the same document, it was signed at the same time, it was ratified by the Greek Government—not by the United Kingdom Government, it is true, although of course it is clear that no ratification of such a declaration is necessary—it was published in the same British State Paper as the rest of the Treaty, and by its opening words it showed, as I suggest, that it had to do, that its objects was to have to do, with the application of the 1926 Treaty.

Now, Mr. President, if that is correct, if it is an integral part of the 1926 Treaty, this Court has jurisdiction under Article 29 of that Treaty to say what in fact the Declaration means.

What, then, Mr. President, does the Declaration mean ? It was laid down as a principle of interpretation by the Permanent Court in the *Lotus* case that there is no occasion to have regard to *travaux préparatoires* if the text of a convention is sufficiently clear in itself. The terms used in the document are clear in their ordinary meaning, and it really is no use attempting, as my learned friend Sir Eric Beckett did, to make some assumption as to what one of the parties meant or intended to mean and then to say that the words cannot mean anything else. That is not a method of legal interpretation. The question is : what do these words mean on their face, in their ordinary sense, and if you can give a sensible meaning to them in that way, then there is no need to go behind them and to enter into a controversial field as to what particular parties may have meant or thought they meant, or wanted to mean at the time. The answer here in this Declaration, in my submission, is clear and certainly the *travaux préparatoires* do not afford any indication of a meaning different from the ordinary meaning of the words which have in fact been employed. This Treaty of 1926, it is declared, does not prejudice claims on behalf of private persons based on—and let it be noted well that the words are "based on", not "brought under", but "based on"—the provisions of the Treaty of 1886. These words mean no more, and certainly they mean no less, than they say. If claims arose in relation to facts arising before the 16th July of 1926, but as to which the contracting parties would have been, or might have been, wholly ignorant at that time, the fact that the Governments were contracting a new treaty would not prejudice such claims, if any there were, and the following words, which are part of the same sentence, make the meaning

abundantly clear: "Any difference which may arise between the two Governments", it is declared, "as to the validity of such claims"—that is to say, claims based on, but not made under, the Treaty of 1886—"shall be referred to arbitration", and the words used are: "Any difference which *may* arise", in the French text *"qui pourraient s'élever"*. Those words don't mean and they cannot mean claims which have already arisen prior to the 16th July 1926. They can only mean what they say, "which may arise"—that is to say, which may arise in the future, and if, therefore, the facts were that the dispute between the United Kingdom Government and the Greek Government, although based on the provisions of the 1886 Treaty, only arose as a dispute after the signing of the 1926 Treaty [and that is what the United Kingdom contend], if the facts were that the dispute only arose after the signing of the 1926 Treaty, this Declaration in the 1926 Treaty would clearly apply to it as being a dispute which on the 16th July 1926 "might arise": might arise thereafter and did, in fact, according to the United Kingdom, arise thereafter, although it was based on the 1886 Treaty.

The Declaration of 1926 is either part of that Treaty, in which case, as I say, clause 29 applies to it, or otherwise it is a separate treaty with the plain meaning that I have attributed to it, and in that case, the United Kingdom Government is in the unenviable position of having failed to carry out its terms by submitting this matter to arbitration, although I agree that on that view the obligation might not be enforceable within the jurisdiction of this Court. That is really what the United Kingdom Government is forced to say; either it is part of the 1926 Treaty, in which case this Court has jurisdiction, or it is a separate treaty in itself, in which case the United Kingdom Government is apparently claiming to tear it up like a scrap of paper.

There is another point which may have some bearing on the matter, although I submit it with a good deal less confidence. Under the Protocol to the 1886 Treaty, what could be submitted to arbitration there was, firstly, any controversy respecting the interpretation or the execution of the Treaty—presumably meaning by that its formal execution as a treaty and its validity. And secondly, the consequences of any violation of it. Clause 29 of the 1926 Treaty provided for arbitration as to the proper interpretation of the Treaty in the first place, and in the second place as to its application. But the Declaration appended to the 1926 Treaty involved what is possibly a significant departure in language. Arbitration was to be retained, not in regard to the interpretation or execution of the Treaty, but in respect of claims based upon the 1886 Treaty, and the purpose of the 1926 Declaration was therefore to keep the 1886 Protocol alive so far as the arbitration was one which related to a claim based upon the 1886 Treaty—in other words, the 1886 Arbitration Protocol was to be kept alive in regard to the same subject-matter and for the same purpose as was covered by Article 29 of the 1926 Treaty in respect of matters falling within the scope of the second treaty, namely, disputes as to the application of the Treaty—not as to its execution or validity; all that has now long since passed. That was a purpose directly associated with, and indeed necessitated by, the 1926 Treaty itself. Had it not been for that Treaty, the 1886 procedures would presumably have continued.

It would in my submission be taking a really over-technical view of this matter, an over-legalistic view of this matter, to hold that the

Declaration was a separate treaty in itself. The logical view and certainly the reasonable view, the only view which would avoid the extraordinary gap or vacuum in the arbitral machinery which had been established in 1886 and which was in effect continued in 1926, would be to regard the Declaration as part of the 1926 Treaty. And if the Declaration is part of the 1926 Treaty, well then it follows, of course, that its interpretation and its application is within the jurisdiction of the Court under Article 29. On that view we asked the Court in our original Counter-Memorial to the British Objection to give a judgment affirming that since this claim by M. Ambatielos is based on the 1886 Treaty and has been adopted by the Greek Government, the United Kingdom Government, having failed to satisfy the claim by amicable agreement, is under an obligation to submit the matter to arbitration, and we thought perhaps that that was all the Court could do—that it could not take cognizance of the substance of the matter itself but that it could declare that under the Treaty there was an obligation on the United Kingdom Government to submit the matter to *ad hoc* arbitration. Fortunately my learned friend has agreed that if you consider that there is an obligation to submit the matter to arbitration, this Court should be the arbitrators. Therefore, if you think that the effect of the Declaration as part of the Treaty of 1926 is to maintain the right to arbitration, this Court will have jurisdiction to deal with the substance of the whole matter.

Mr. President, I am submitting that the better view about this case is that the Declaration of 1926 is part of the Treaty of 1926 ; that you therefore have jurisdiction to pass upon the meaning of the Declaration, and that the meaning of the Declaration is that claims based upon the 1886 Treaty—that is to say based upon facts arising in point of time whilst the 1886 Treaty was still in operation, although the formal claim was made thereafter—that is to say, after the signing of the Treaty of 1926—should still be subject to arbitration. I am submitting that this is the better view, and it is indeed a simple view, of the position in this case ; but in saying that I do not want to be taken as abandoning the alternative way in which the matter has been put, and which I summarized in the fifth of the five points which I mentioned.

I do not propose to embark here upon any discussion as to whether, for instance, unjust enrichment, in this case obtaining an excessive price for these ships, by an unfulfilled representation as to delivery dates—unjust enrichment in that sense at the expense of a Greek citizen in a commercial matter would involve a discrimination between a Greek citizen, and therefore less-favoured-nation treatment, than has to be accorded, for instance, to the citizens of Spain or of Denmark or of Sweden, under the seventeenth-century treaties which are referred to in the Counter-Memorial of the Greek Government. I am not going to go into that matter now, nor shall I discuss the no doubt interesting point whether most-favoured-nation treatment articles, covering rights of access to Courts in matters arising out of commercial transactions, can be tested by the standards set up towards other nations in establishment treaties. That was a point raised by my learned friend ; it is all very interesting, but that is for consideration hereafter, when we come to discuss [if this Court accepts jurisdiction over the case] whether there was in fact a breach of the most-favoured-nation treatment which under the 1886 Treaty had to be accorded to the nationals of Greece

at least in regard to commercial matters. But whilst I am not going to discuss those matters, it is clear that the Treaties of 1886 and 1926 on matters which are relevant to the present dispute cover the same ground and are often in identical language, and the articles on which I particularly rely, I mentioned before (Articles 15 (3) and 10 of the 1886 Treaty) ; and those are analogous, I think, most to Article 4 of the Treaty of 1926. It may be said therefore (this is the fifth point), that in respect of such matters—that is to say matters which are covered in corresponding terms by both Treaties—Article 29 of the 1926 Treaty is purely procedural and that its procedure in respect of disputes in regard to matters common to both Treaties, although those matters arose before the execution of the second Treaty, may be applied. In other words, what I am saying is that where you have a series of consecutive treaties covering exactly the same ground, the latter one replacing the former and the latter one setting up procedural machinery, matters which arose during the currency of the first agreement may be submitted to the procedural machinery set up under the second agreement. That would of course be a perfectly reasonable arrangement, and the more the United Kingdom Government seek to divorce the Declaration of 1926 from the Treaty of 1926, the more attractive that alternative view—that Section 29 of the Treaty applies *ipso facto* in any case—becomes.

There is really of course no difference in principle between the procedures for the settlement of disputes laid down under the 1886 Treaty and the procedure laid down under the Treaty of 1926. Both are based on the principle of international arbitration, and there would be nothing astonishing in the two Governments having decided in 1926 that procedures before the Permanent Court should be substituted for procedures before *ad hoc* arbitration.

Having agreed to do that, there would be nothing astonishing in their deciding at the same time that the latter procedure—the procedure before the Permanent Court—should be adopted in respect to disputes which are in every way identical with disputes which might arise under the second Treaty, although in fact they happened to be based upon matters which had arisen during the currency of the earlier Treaty. And certainly in the municipal law of England (I do not know what the position is in the municipal law of other countries), procedural provisions—and punishment, of course, is a more remarkable case—but certainly as a matter of English municipal law, procedural provisions and laws as to punishment are quite normally applied retroactively to acts which, when they were committed, may have been within the terms of different statutes laying down different forms of procedure. Indeed, I go further and say that in so far as any presumption arises in the matter at all in English law, the presumption in English law as to procedural statutes is in favour of retroactive application. And if, as the Permanent Court emphasize in the *Phosphates in Morocco* case, it is usual for States in agreeing to accept a compulsory jurisdiction to declare expressly in the act by which they accept that compulsory jurisdiction that it is not to be of retroactive effect, then the significant absence of any such declaration in the present case might be thought to support the view that a procedural provision of this kind may, in the absence of express limitation, embrace antecedent disputes.

Moreover, my learned friend—if I may say so with great respect to so distinguished an international lawyer—did really misinterpret the effect of the *Phosphates in Morocco* judgment. The principle underlying the *ratione tempore* limitation was quite correctly stated by my learned friend. The principle is, as I understand, this : that the State in question might have guided its conduct differently at the time if it had known at the time that its conduct might later be the subject of legal proceedings. That is an understandable principle, though it is one we do not accept in our municipal law in England. But that principle has no application whatever to the facts of the present case.

Under the Treaty of 1886, the United Kingdom Government knew all along that its conduct might be the subject of international adjudication. It certainly knew that in 1919, when it sold these ships to M. Ambatielos, and the United Kingdom Government by agreeing to accept the adjudication by this Court—if it is obliged to accept arbitration at all—has shown that there is no significant change in the fact that under the original Treaty it was arbitration *ad hoc* and under the later Treaty it was arbitration before the Permanent Court. The fact is that when Article 29 was agreed to, the principle underlying the *ratione tempore* limitation did not exist at all in regard to disputes which would come within the scope of Article 29, because those disputes had always been capable of being submitted to legal arbitration and therefore, when the Governments of the two countries had earlier engaged in transactions, they knew that those transactions might be the subject of legal arbitration thereafter, and all that Article 29 of the 1926 Treaty did was to lay down a slightly different form of procedure by which those disputes might be settled.

I started by saying that the mere oral repetition of arguments which are already set out and submitted in writing does not add to their strength or cogency, so I will content myself now by saying in conclusion that the interpretation placed—I emphasize this in conclusion—that the interpretation placed by the United Kingdom Government upon the relevant provisions of the two Treaties and the Declaration, involve a hiatus, a gap, in the system of compulsory arbitration which otherwise has existed continuously since 1886 to the present time in these commercial matters. That interpretation gives rise to that kind of vacuum which, above all, the law most abhors, a vacuum involving a denial of justice during the period of the gap or hiatus, and this Court will, and it is entitled in interpreting the provisions of written documents of this kind, to assume that it was not intended that there should be a gap and a denial of justice and so to construe the documents as to avoid that result arising.

And so I summarize what I have had to say in this way : (1) the dispute is based on the provisions of the 1886 Treaty with its protocol as to arbitration ; (2) the 1926 Declaration as to the protocol "had to do with"—and I use the language of my learned friend—the Treaty of 1926, and is therefore admittedly—admittedly by my learned friend—part of that Treaty ; (3) under Article 29 of the Treaty of 1926, this Court is entitled to interpret the meaning of the Declaration ; (4) the Declaration means that the 1886 Protocol is kept alive for dealing with claims whenever made, based on the 1886 Treaty, that is to say, claims based on, in the sense of arising from facts occurring when the 1886

Treaty was in operation, and alleged to involve a breach of the provisions of that Treaty ; and (5) this is such a case.

Mr. President, that concludes what I have the honour to address to this Court, save that I want to make two requests to it, the first is that my personal presence may be excused in any subsequent proceedings, because unfortunately I have a public engagement in London opening some new public institution, which I cannot very well escape, to-morrow. The second is that if my learned friend should wish to reply, my friend and colleague Professor Rolin may thereafter be heard in reply to him. I do not know, Sir, what your intentions are as to sitting or what my learned friend Sir Eric Beckett desires to do in regard to his reply, or indeed whether he wishes to make any reply, but I understand that if the Court felt it possible, it would be for the convenience of both Parties if the Court could sit to-morrow ; I am not saying whether the Court should sit this afternoon or not, but assuming that the matter were not finished this afternoon, and it may well be finished, that in that event it would be convenient if the Court could sit to-morrow.

4. REPLY OF SIR ERIC BECKETT

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)

AT THE PUBLIC SITTING OF MAY 17th, 1952, MORNING

Le PRÉSIDENT EN EXERCICE : L'audience est ouverte. Avant de donner la parole à sir Eric Beckett pour présenter la réponse de son Gouvernement, je donnerai la parole à M. Hsu Mo, juge, qui désire poser une question aux agents.

Judge HSU MO : According to the protocol of exchange of ratifications, a photostatic copy of which has been presented to the Court, the ratifications of the United Kingdom Government and of the Hellenic Government were carefully compared and found to be exactly conformable to each other. Yesterday morning Sir Hartley Shawcross said that the Declaration was ratified by the Greek Government but that it was not ratified by the United Kingdom Government because it was not necessary to do so, and according to the photostat copy of the ratification of the Greek Government, the Declaration was ratified by the Greek Government. Now I want to know very clearly whether or not the United Kingdom Government did, or did not, ratify the Declaration as well as the text of the Treaty itself. I wish that the Agents of the two Governments could make that point very clear.

Le PRÉSIDENT EN EXERCICE : Je précise que les agents ne sont pas tenus de répondre immédiatement, ils peuvent le faire à l'audience de ce jour ou à tout autre moment.

Mr. EVANS : Mr. President, I regret that I am not able to answer that question at present on behalf of the United Kingdom Government, but we will look into the matter and give the Court a reply as soon as possible.

Le PRÉSIDENT EN EXERCICE : Je donne la parole à sir Eric Beckett.

Sir ERIC BECKETT : May it please the Court.

Sir Hartley Shawcross began his address to the Court yesterday with the following words :

> "The point involved in this Preliminary Objection by the United Kingdom Government is an extremely short one. Indeed, I doubt whether there is more in it than the question whether the Declaration appended to the Treaty of 1926 is to be regarded as a part of that Treaty."

I agree with this observation of Sir Hartley that this is really the point which arises for decision on the issue of jurisdiction and that, if the Greek Government fail to establish that the Declaration is a provision of the 1926 Treaty within the meaning of Article 29 of that Treaty, the whole of the Greek Government's case that the Court has jurisdiction, fails. It is true that my learned friend, Sir Hartley, kept alive an alternative argument which he formulated in his fifth point ; he kept it alive I think in rather a half-hearted way. Sir Hartley formulated his fifth point in this way :

"Further, or in the alternative, that in so far as the provisions of the 1926 Treaty replace and continue those of the 1886 Treaty, the arbitration provisions of Article 29 take the place of the 1886 Protocol and cover the present case."

I shall, therefore, say something, but not, I hope, very much, on this subsidiary contention which Sir Hartley maintained rather half-heartedly. Now, for convenience I am going to refer to this Greek subsidiary contention as the "similar clauses theory". There is also the subsidiary contention of the Government of the United Kingdom that, even if, contrary to its principal contention, the Declaration is to be regarded as an integral part of the 1926 Treaty, the claim now brought in respect of M. Ambatielos does not fall within the scope of that Declaration because that Declaration, when it uses the word "claims", only covered claims which had been formulated under the 1886 Treaty before the date of the signature of the Declaration, and on this point too I will make a few comments on the observations made by my learned friend yesterday.

These three points, therefore, consisting of one main point and two subsidiary points, appear to be really the only legal issues in the case.

Before I come to them there are just one or two things I should like to say. In the first place we warmly appreciate and reciprocate the reference made by His Excellency the Greek Agent to the old and continuing friendly relations between the United Kingdom and Greece, and this case is not going to disturb those relations whichever way the decision goes. The Greek Agent then said that there was only one thing which he regretted in the case and that was the last sentence of paragraph 71 of the United Kingdom's Counter-Memorial. There we said this :

"The United Kingdom Government considers this contention false and scandalous."

Now the contention which the United Kingdom called "false and scandalous" was the contention that the decision of the English Court of Appeal in 1923, refusing M. Ambatielos's application to call two witnesses, was not in accordance with English law and practice, was influenced by anti-foreign prejudice and was a decision so wrong that in giving it, the Court of Appeal fell below the minimum standard of justice required by international law. We were very happy to see that Sir Hartley Shawcross, on behalf of the Greek Government, withdrew altogether these aspersions on the English Court of Appeal, and that there is now only one denial of justice which it is alleged was committed, and that is in connection with the conduct of the case for the Crown at the hearing in the Admiralty Division in 1922 in the matter of two witnesses and two letters. Now we have reached the happy position where something which we regretted and something which the Greek Agent regretted, both disappear altogether from the case.

Then, Sir Hartley did not contend that any provision in the Charter of the United Nations invested this Court with jurisdiction in this case, and as jurisdiction is the sole issue, I shall not comment on the remarks he made on the conduct of the United Kingdom in this case in connection with certain provisions of the Charter, because in the circumstances these observations were irrelevant, and I leave it with the comment that if they had not been irrelevant, I might be able to say a good deal on the other side. I do not mean to say one word about the merits of the case.

Sir Hartley Shawcross, before you stopped him, Mr. President, on the ground that he was going too far into the merits of the case, had stated that there were four points which he thought were beyond dispute, and I will only say that the Counter-Memorial shows that the United Kingdom does dispute the facts as he stated them.

Having briefly disposed of these matters, which are not of much—if any—relevance, it remains for me to make my submissions to the Court on the three arguments with which it really has to deal. As I said just now, two of them are really subsidiary and one is the real issue in the case. Like Sir Hartley, I will say what I have to say on the subsidiary arguments first and close with my submissions upon the really vital point in the case.

There is, however, one theme—which I call the "vacuum theme"—on which our opponents harp and which they use in one way and another to support their views on all the three questions which I have just enumerated, and for this reason I say a word or two about it separately.

The vacuum theme crops up here and there in Sir Hartley's address in the same way as what I have called the "similar clauses theory" keeps cropping up in the Greek Observations of April. The vacuum theme is advanced, I think, as a reason why the Court should take our opponents' view on any one of the three questions, because, as I understand it, our opponents say that their view produces the result which common sense demands or the result which is most desirable.

Our opponents point out—correctly—that there was a Treaty of 1886, under which the United Kingdom and Greece accorded to each other and their nationals certain privileges and rights, and that under that Treaty any dispute as to whether the rights specified in the Treaty had been accorded in a particular case could be referred to arbitration at the will of one party only. They then point out—equally correctly—that when the Treaty of 1886 came to an end and was replaced by the Treaty of 1926, a treaty which accorded rights and privileges, some of which were the same (or substantially the same) as those accorded in the earlier Treaty and others were not the same, the 1926 Treaty also provided for disputes arising out of it to be submitted to arbitration at the will of one party only. From this our opponents say that common sense or expediency requires that there should be no arbitral vacuum of any kind at the time of the change-over from the old Treaty to the new one—that is to say, that there should be no claims in respect of which arbitration is not compulsory.

Now I think that our opponents admit that if there had been no Declaration in 1926 at all, there *would* have been a gap, there would have been a vacuum. They do not argue, as I understand it, that in the absence of this Declaration the arbitral provisions of the old Treaty could be invoked by either party after the old Treaty had ceased to be in force in *any dispute at all*, or that Article 29 of the new Treaty would in this event (when there is no Declaration) have applied to *all* disputes after July 1926 on facts occurring during the period of the old Treaty. But for the Declaration, therefore, there would certainly have been a vacuum.

Now there certainly would never have been any Declaration, if just before the new Treaty was signed, the United Kingdom had not formulated to Greece a claim that British subjects should be exempt from the payment of contributions to a Greek Forced Loan, a loan which

had been decreed at the beginning of the year 1926. But for this fact there would have been no Declaration at all and the two Governments would apparently have been perfectly content that this vacuum, which our opponents find so deplorable, should exist. Our opponents are attributing to the two Governments of 1926 an abhorrence of an arbitral vacuum for which there is no contemporary evidence. Sir Hartley, when he described the Declaration as being—and I here quote—"desired to modify the extent to which the 1926 Treaty replaced the Treaty of 1886 by restricting the effect of the 1926 Treaty on the 1886 Arbitration Protocol", is simply inventing a supposed desire for which there is no evidence at all in the contemporary records. I took my quotation from Sir Hartley from the top of page 310.

The contemporary records show that the purpose of the Declaration in the minds of those who drew it up was to cover the British claim with regard to the Greek Forced Loan. The United Kingdom stated that this was so in its Counter-Memorial and the Greek Observations of April, so far from contesting this, admit it in paragraph 10, sub-paragraph 6, and the letter of June which the Greek Government annexes to its Observations of April completely proves that this was so.

Undoubtedly the Declaration does partially fill this arbitral vacuum, but even so, our opponents do not argue that the Declaration filled this vacuum completely. Even on our opponents' case, there is not a perfect and complete continuity of compulsory arbitration. Altogether there is an unreality in our opponents' case that the two Governments in 1926 must be taken to have abhorred any arbitral vacuum. In fact, the two Governments seemed perfectly indifferent to an arbitral vacuum, providing that certain particular cases, which were actual, were covered. The "vacuum theory" finds no support in the contemporary records of 1926 at all.

I now come to the contention of our opponents which Sir Hartley maintained in a subsidiary way, which I call, for convenience, the "similar clauses theory". The "similar clauses theory" is the contention that when you find in the 1926 Treaty substantive provisions which are similar in effect to substantive provisions of the 1886 Treaty, then Article 29 can be invoked in respect of an alleged breach of an article which is similar in the two Treaties ; a breach which occurred before the new Treaty came into operation. Sir Hartley did not say, and the Greek Government has not said in its written pleadings, that Article 29 could be invoked in respect of acts occurring before the 1926 Treaty came into force, unless it could be alleged that the act complained of infringed a provision which was similar in both Treaties.

Now on the basis of the "similar clauses theory", it is one of the two alleged effects of the Declaration that the Declaration removed these pre-1926 claims on behalf of private persons based on similar articles from the jurisdiction of this Court as the arbitral body, in order to leave these disputes within the jurisdiction of an arbitral body composed according to the 1886 Protocol. The other effect of the Declaration on the "similar clauses theory" was to provide a tribunal for pre-1926 claims based on articles in the 1886 Treaty, which had no article similar to them in the 1926 Treaty. Now, the second effect is intelligible enough, but as for the first effect, it falls to those who put forward the "similar clauses theory" to explain—because I cannot—why the parties to the 1926 Declaration should have wanted to take away from the Hague

Court the cases based on similar clauses and keep them for an arbitral body constituted according to the 1886 Protocol. The fact that this is one of the effects of the Declaration, if our opponents' theory about similar clauses is correct, is of course only one of many arguments against the whole "similar clauses theory". Now, as I have already indicated, the contemporary records show that the Governments in 1926 had no ideas of this kind in their minds at all but were concerned to find suitable general words to cover the Forced Loan cases, and for natural reasons of prestige, to express what they wanted to say in a reciprocal form. Now that is what the Governments were really thinking about in 1926.

Sir Hartley Shawcross, while maintaining in a secondary way the "similar clauses theory", only contributed one new argument in support of it, and that argument was— if I may say so with the greatest respect— the production of a completely false analogy. He said, and said rightly, that in municipal law, when the code of procedure which the Courts apply is changed, the new procedure applies to actions brought after the change, though the actions may relate to events which took place long before the change of procedure was made (and I have no doubt that is right). If Sir Hartley had been dealing here with the change in the rules of procedure of this Court as applied to a case relating to facts which had occurred before the rules were changed, his analogy would have been a good one ; but since the present case relates to one bilateral treaty, replacing another, perhaps a closer analogy in municipal law would have been—if he had been able to invoke it on his side—the case where two companies conclude a contract with an arbitral clause in it, and then conclude a later contract with a different procedure for arbitration. If Sir Hartley had been able to say that in such a case the arbitral procedure in the second contract could be invoked for breaches of the first contract, when, apart from the different periods to which they apply, the substantive clauses of the second were substantially the same as those of the first, then his municipal analogy might have helped it. But of course that is not the case in municipal law at all, and I contend that it is not the case with regard to bilateral treaties in international law. Apart from this, Sir Hartley produced no argument to show how Article 29, which refers to the interpretation and application of the provisions of the present Treaty, could apply to breaches of articles of the old Treaty similar to those of the new Treaty, though the period of time to which the two Treaties relate is different.

At the moment, therefore, when the United Kingdom is speaking for the last time, the Court has before it no argument in support of the "similar clauses theory" except the assertion that it is the position in this case, backed up by a completely false analogy from municipal law. In fact, if our opponents fail on their contention that the Declaration is part of the Treaty—a point of course to which I am coming later—the "similar clauses theory" no doubt appeals to them as something on which they can still seize as a sort of *tabula in naufragio*. Now this *tabula* is constructed of entirely novel material, and I think our opponents' Advocate can claim credit for a most ingenious new invention. For the rest, I will not repeat to-day all that I said on Thursday on the "similar clauses theory". The Court has heard it, and my words are now on the minutes.

I now come to the subsidiary argument of the United Kingdom, and that is our argument that the Declaration of 1926 does not cover the

Ambatielos claim, because in the 1926 Declaration the words "claims on behalf of private persons" only referred to claims which had been formulated before the relevant date in July 1926 and not to claims which might be formulated later in respect of events taking place before July 1926.

Sir Hartley's argument in the first place was that the United Kingdom interpretation of the Declaration made the arbitral vacuum wider; I have already said that the Governments of 1926 were not much concerned with the elimination of an arbitral vacuum, but Sir Hartley also stated that on his interpretation of the Declaration, the arbitral vacuum was closed, in fact if not in theory, because though the Governments in July 1926 might well not know what private claims could be made in respect of acts already committed, they would inevitably know whether or not there were any governmental claims. Perhaps the difference in this respect between governmental and private claims is a bit exaggerated, because in the first place it is not certain that the Governments would know, on 16th July, when they signed the Declaration, of acts committed a day or two before which might give rise to governmental claims. In the second place, private grievances and claims are generally reported to Foreign Offices pretty quickly. However, as I said on Thursday, on our interpretation of the Declaration, the Governments were content not to provide for compulsory arbitration for claims which had not then been formulated, and if that involved a risk, and it was not a big risk.

Moreover, how indifferent the two Governments of that time really were to the risk of not having compulsory arbitration for claims under the 1886 Treaty not yet formulated, is shown by the fact that but for the British Forced Loan claims, which only arose when the negotiations for the new Treaty were at a late stage, there would have been no Declaration at all.

In this case it cannot be said that the Greek Government in 1926 knew nothing about M. Ambatielos; yet, but for this British initiative there would have been no Declaration of 1926, and then there would have certainly been no question at all of any right to compulsory arbitration in connection with the Ambatielos claim.

In brief, our interpretation of the Declaration reposes on the solid ground of contemporary facts. The Greek Government's explanation of the purpose of the Declaration rests on nothing more than the most ingenious and fertile imagination of our opponents' Advocates.

Sir Hartley's other observation was to dispute my contention that the Ambatielos claim had not been formulated before July 1926 and he pointed out that the passages in Annex R. 1. of the Greek Memorial, on which I had relied to show that in 1925 there was only an appeal *ex gratia* and no legal claim, were to be found in the Memorandum prepared by M. Ambatielos himself, which the Greek Minister had merely forwarded to the Foreign Office under cover of a short letter. That is true, but then just look at the Greek Minister's letter of September 1925. If the Greek Minister did not actually say in his letter that there was no legal claim, he certainly did not make one; he merely transmitted to the Foreign Office M. Ambatielos's Memorandum, and requested His Majesty's Government to study the matter and consider if they could see their way to review the case. There was no legal claim in this letter, and there was no reference in it to the 1886 Treaty. The Declaration, however, refers to claims based on the 1886 Treaty.

Now, those are our reasons, coupled with those I gave to the Court on Thursday, why the United Kingdom says that its interpretation of the Declaration is the correct one.

I now conclude by dealing with what appears to be accepted now by both sides as being the principal point in the case, namely : is the Declaration of 1926 an integral part of the Treaty of 1926 in the sense that it is a provision of that Treaty within the meaning of Article 29 ? I must emphasize that our opponents, if they are to succeed on this point, must show that the Declaration is a provision of the 1926 Treaty within the meaning of Article 29.

It is common ground that it is nowhere said, either in the Declaration or in the Treaty, that the Declaration was an integral part of the Treaty. I do not think it is disputed that when more than one instrument is signed by the same plenipotentiaries at the same time and it is intended that one should be an integral part of the other, this is usually (and I venture to say, almost invariably) stated. This was the case in connection with the Greco-Italian Commercial Treaty and its annexed Instruments which were signed in November of the same year. Then the Parties signed at the same time a treaty, two protocols, two declarations and a number of letters, and the Parties expressly declared that one protocol and one declaration were integral parts of the Treaty and did not say so with regard to any of the other instruments signed at that time. And I think it follows clearly from the passage in the Greek Observations of April last, which I read to the Court on Thursday, that the Greek Government agree that, in the case of the Greco-Italian Treaty, the only separately signed instruments which are integral parts of the Treaty are those which the Parties expressly and in writing declared to be such, and that the other Declaration which, as our opponents say, is almost exactly the same as the Declaration in this case, was not declared to be an integral part of the Treaty, and in fact was *not* so because, in the words of our opponents, this Declaration "equally referred to the earlier Treaty" and therefore the Parties "hesitated" to make it an integral part of the Treaty.

My learned friend's principal argument seemed to be to quote—a little incorrectly—an alleged admission by myself on Thursday, and then try and base his case on what he said that I said. Now, what were the words I used in what Sir Hartley calls my admission ; they come on page 296, and this is what I said :

> "Then the Declaration does not have in any sense the character of an interpretation of the provisions of 1926, nor indeed has it anything to do with the manner in which the provisions of the Treaty of 1926 are going to be applied by one Party or the other. If it had that character, I should be prepared to admit that it would be regarded as an integral part of the Treaty, even if this had not been stated in terms."

Now, what did I mean when I referred to an instrument "having the character of an interpretation of the provisions of the Treaty, or having something to do with the manner in which the provisions of the Treaty are going to be applied by one Party or the other" ? I can best explain this by once again referring to what our opponents have said about the Greco-Italian Commercial Treaty, and now I quote from my opponent :

"The final Protocol—that is the one that was an integral part of the Treaty—is purely and simply for the interpretation of the Treaty and of the Greek Entry Tariff annexed thereto. Similarly, one of the Declarations—and again, the one that was made an integral part—is directly and exclusively applicable to the most-favoured-nation clause, the application of which it makes subject to the further condition of reciprocity in the case of its being relied upon in relation to coastwise trade."

In other words, if you find a protocol or a declaration saying that article this or article that of the treaty means x or y, or that article z is in certain conditions to be dependent on reciprocity, this protocol or declaration gives an interpretation of the treaty which cannot be separated from the treaty, and therefore must form an integral part of the treaty even if the parties have not actually, in writing, declared it to be a part of the treaty, though in fact they usually do so declare it. Now, that is what I meant and that is, I think, the sense which my words should convey. Let us try my test—which, after all, is the Greek Government's own test—to the Declaration we are now talking about. What the Declaration says is that the 1926 Treaty "does not prejudice claims on behalf of private persons based on the provisions of the Treaty of 1886". Now this Declaration does not interpret a single one of the articles of the Treaty of 1926. It does not impose any conditions for the enjoyment by one party or the other of the benefits of any of its articles. The words I used, I hope advisedly, do not cover this Declaration at all.

Sir Hartley argues mainly on the verbal point that the Treaty of 1926 is mentioned in the first line of the Declaration. So it is, though I twice pointed out on Thursday that what the Parties really meant was that the abrogation of the Treaty of 1886 or the replacement of the old Treaty by the new one, did not prejudice claims based on the 1886 Treaty. While I admit that I am criticizing a drafting which emanated from the Foreign Office, it is clear that none of the provisions which we find in the new Treaty could possibly prejudice the bringing of claims on the basis of the old Treaty, and that the only thing which could or would prejudice the bringing of claims on the basis of the old Treaty would be the disappearance of the old Treaty itself. That I should have thought was obvious. My opponents therefore make a purely verbal point on the basis of what is perhaps a piece of imperfect drafting.

I did say, and I still say, that the Declaration does not really relate in *any material sense* to the Treaty of 1926 at all, but what it was doing was keeping alive the Arbitration Protocol of the old Treaty for the purposes of a certain class of claims which had arisen on the old Treaty. The only means by which our opponents can really maintain that the Declaration had any effect on any article of the new Treaty is by means of their "similar clauses theory", which they say would, but for the Declaration, have produced the result that certain claims based on the old Treaty could be arbitrated under Article 29 of the new Treaty, and they say it is the Declaration which prevents this result.

I have already dealt with the "similar clauses theory", and I hope I shall have convinced the Court that it is completely ill-founded and therefore I say no more on that.

For the rest, Sir Hartley Shawcross's arguments are simply statements that the Declaration was not regarded as a separate treaty,

that the Declaration was not published as a separate treaty, that it appeared with the Treaty in British State Papers and that it was ratified at the same time as the Treaty, although he admits that it was not necessary to ratify it at all. But I wonder if all these observations do not equally apply to that Protocol and that Declaration, and those letters which were appended to the Greco-Italian Commercial Treaty of November 1926 and which, on the Greek Government's own admission, were not part of that Treaty. All those instruments are certainly published together in the League of Nations *Treaty Series*, which is the only place where we can find them. Clearly, the mere fact that instruments are signed at the same time by the same plenipotentiaries and are published together does not decide one way or another whether one instrument is an integral part of the other.

For all these reasons, together with those which I gave on Thursday, I submit it is clear that the Declaration is not a provision of the Treaty of 1926 within the meaning of Article 29 of that Treaty.

I can now conclude my remarks to the Court. At the end of my address last Thursday, I gave in skeleton form the argument of the Government of the United Kingdom on the question of jurisdiction. I maintain unchanged that summary of my argument.

The formal conclusion of the United Kingdom is that the International Court of Justice has no jurisdiction to deal with the claim brought against the Government of the United Kingdom by the Hellenic Government in respect of the treatment of M. Ambatielos.

Before I sit down, Mr. President, I should like to say that the whole of this case has been conducted on both sides in the spirit mentioned by His Excellency the Greek Agent yesterday, and that if the compression of the oral hearing into so short a space of time has involved both sides in strenuous work, the spirit in which the matter has been dealt with in Court by our opponents has made our labours pleasurable.

5. DUPLIQUE DE M. LE PROFESSEUR HENRI ROLIN

(CONSEIL DU GOUVERNEMENT HELLÉNIQUE)

AUX SÉANCES PUBLIQUES DU 17 MAI 1952

[Séance publique du 17 mai 1952, matin]

Monsieur le Président, Messieurs de la Cour,

Permettez-moi tout d'abord de vous donner lecture des conclusions que M. l'agent du Gouvernement hellénique a l'honneur de prendre comme suite à l'invitation qui lui a été adressée hier. Ces conclusions ont été communiquées hier soir à sir Eric Beckett, le premier conseil du Royaume-Uni :

Revu les conclusions des Parties,

vu l'article 29 du traité de commerce entre le Royaume-Uni et la Grèce, signé à Londres, le 16 juillet 1926, et pour autant que de besoin la déclaration du même jour,

PLAISE A LA COUR,

donner acte au Gouvernement hellénique :

1) que les griefs formulés par lui dans son mémoire relativement à l'inobservation du contrat de vente des navires, à l'enrichissement indu, à la non-production au procès de certains documents ignorés de M. Ambatielos et à une mauvaise administration de la justice (déni de justice *stricto sensu*), ont tous suivant lui pour fondement juridique les articles I, X, XV, paragraphe 3, du traité de commerce et navigation du 10 novembre 1886, également les articles 1 et 3 [1] du traité du 16 juillet 1926, identiques ou équivalents aux deux premières dispositions précitées ;

2) que le Gouvernement britannique a, par la voix de son conseil, sir Eric Beckett, exprimé son accord pour que la Cour exerce des fonctions arbitrales en cas où elle estimerait avoir compétence pour déclarer si la demande hellénique doit être soumise à la procédure arbitrale prévue au protocole annexé au traité de 1886 et où la Cour donnerait une réponse affirmative à cette question.

CE FAIT, pour les raisons indiquées dans les observations helléniques, est développé par ses conseils :

se déclarer compétente pour l'examen au fond de la demande hellénique et, en conséquence, fixer aux Parties les délais pour le dépôt de la réplique et de la contre-réplique, visant le fond du différend ;

subsidiairement, pour le cas où la Cour estimerait ne pouvoir se prononcer sur sa compétence sans aborder le fond, faisant application de l'article 62 de son Règlement, joindre l'incident au fond.

Monsieur le Président, Messieurs de la Cour,

Mon premier devoir est de remercier l'agent du Gouvernement britannique et ses conseils de la simplification qu'ils ont apportée à notre tâche

[1] Ce texte a été modifié par l'agent du Gouvernement hellénique : voir *Correspondance*, nos 84 et 87.

et à celle de la Cour en supprimant l'alternative devant laquelle nous pensions que la Cour pourrait se trouver placée d'avoir à choisir, non pas sans doute arbitrairement, mais après audition des Parties, entre une procédure éventuellement obligatoire devant la Cour poursuivie, en vertu de l'article 29 du traité de 1926, ou une procédure arbitrale comme prévue dans le protocole. On pourrait même hésiter quant à l'option qu'il y aurait lieu éventuellement de laisser préalablement aux Parties, car on pourrait imaginer que la procédure obligatoire fût déclarée être celle de la Cour, sauf accord sur la procédure arbitrale ou la procédure arbitrale sauf accord en ce qui concerne la Cour. Il y avait là un chevauchement, une complexité qui explique la complication des conclusions que nous avions prises dans nos observations en réponse à l'exception préliminaire. Aujourd'hui cela se trouve considérablement simplifié, puisqu'il a été admis que, dans le cas où la Cour, contrairement aux conclusions britanniques, estimerait avoir compétence pour décider que le protocole de 1886 devait recevoir application, et que le différend entrait bien dans ceux prévus par la déclaration, le Gouvernement britannique était d'accord pour que cette procédure arbitrale soit confiée à la Cour, conformément à ce qui était prévu à l'article 29 du traité de 1926.

Et, Monsieur le Président, ayant ainsi rendu justice à cette déclaration, inspirée assurément par, à la fois, le bon sens et la bonne volonté, je ne puis me dispenser de marquer tout de même mon désappointement de ne pas voir le Gouvernement britannique persévérer dans cette voie jusqu'à accepter d'emblée cette procédure à laquelle, nous le pensons, il sera tout de même tenu de se conformer lorsque vous aurez prononcé votre arrêt. Car, en réalité, l'attitude britannique d'aujourd'hui demeure, après les explications de sir Eric Beckett, très difficilement conciliable avec la politique générale du Gouvernement britannique en cette matière. En effet, celle-ci, toute de fidélité à la Charte, ne vise pas seulement, comme il a été dit, le règlement des différends susceptibles de mener à une rupture de la paix ; suivant une autre disposition de la Charte, l'article 36, paragraphe 3, les différends d'ordre juridique doivent, d'une manière générale, être soumis par les parties à la Cour internationale de Justice, et c'est le Gouvernement britannique lui-même qui, rappelant récemment dans une requête dont la Cour aura prochainement à connaître l'une et l'autre de ces dispositions, exprimait le vœu que le Gouvernement défendeur accepte de se présenter volontairement devant la Cour afin que les arguments du Gouvernement du Royaume-Uni puissent faire l'objet sur le fond d'un examen contradictoire. Le Gouvernement britannique ne doit pas s'étonner si, dans ces conditions, nous lui avons exprimé un vœu semblable.

Il est vrai que mon estimé contradicteur nous a dit qu'en ce qui concerne la compétence obligatoire de la Cour, le Gouvernement britannique, quelque favorable qu'il y soit, avait en 1929, lorsqu'il avait signé la déclaration, marqué une réserve imposée par la prudence, la réserve excluant *ratione temporis* les différends qui avaient une origine dans des faits antérieurs à la déclaration. Mais je me permets de rappeler que sir Hartley a déjà répondu à cette explication que: s'il était fort raisonnable en 1929-1930 de prendre une précaution semblable parce que, comme il nous était expliqué, un gouvernement pouvait avoir agi avec plus de nonchalance, moins de scrupules dans l'observation du droit lorsqu'il n'envisageait pas le contrôle judiciaire que, postérieure-

ment à l'acceptation de ce contrôle, en l'espèce, cette réserve *ratione temporis* manquait totalement de sens, puisque, depuis 40 ans — 1926 — la compétence arbitrale, le contrôle du règlement arbitral avait été accepté.

Je constate au surplus que l'objection du Royaume-Uni n'est pas seulement dirigée en l'espèce contre la compétence de la Cour, mais qu'elle tend à voir écarter également la procédure arbitrale prévue déjà pourtant dans le protocole de 1886 et qu'on essaie vraiment bien singulièrement d'arriver à ce résultat en tirant argument ou profit de l'entrée en vigueur du nouveau traité de 1926. Étrange raisonnement vraiment : s'il n'y avait pas eu de traité de 1926, le traité de 1886 demeurant en vigueur, le Gouvernement britannique, j'imagine, n'aurait fait aucune difficulté pour soumettre le différend au protocole de 1886, mais on soutient paradoxalement qu'il a suffi qu'en 1926 on procède à une revision du traité, car c'est bien d'une revision qu'il s'agit, et qu'on y introduise une clause renforçant la compétence arbitrale pour que le protocole de 1886 soit brusquement privé de toute vertu et de toute force obligatoire quelconque, même pour les différends qui auraient puisé leur origine à cette époque, même pour ceux qui s'appuieraient sur des dispositions non modifiées dans le traité revisé. Pour tous ces différends les procédures de règlement seraient supprimées.

J'ajoute, Messieurs, que le Gouvernement britannique a lui-même si peu confiance dans cette thèse relative au champ d'application du protocole de 1886 qu'il ne vous demande pas en plaidoirie et qu'il ne conclut pas à ce que vous déclariez que le protocole de 1886 n'était pas applicable et que ce différend n'est pas susceptible de solution arbitrale — même à titre subsidiaire il ne vous le demande pas — ; il vous demande, au contraire, de ne pas vous prononcer sur ce point, de ne pas vous borner à vous déclarer incompétents pour connaître du fond du différend mais de vous déclarer incompétents également sur cette question de savoir si le différend relève de la procédure prévue dans le protocole de 1886, en sorte que le litige se trouvera sans juge. Un tel résultat, je me permets de l'indiquer, ne serait pas seulement décevant pour le Gouvernement hellénique, mais également pour l'opinion publique, car, assurément, lorsque le principe de l'arbitrage a été accepté par les parties, mais que l'organe arbitral primitif se trouve remplacé par la Cour, l'on conçoit que la Cour puisse avoir certains scrupules à savoir si, en l'espèce, la disposition qui lui a directement conféré compétence ne doit pas céder devant la disposition qui était seule en vigueur à l'époque des faits, mais ce que nous pouvons attendre c'est qu'en présence de ce conflit de compétence, la Cour dise quel est l'organe compétent. L'article 37 du Statut, en vertu duquel la Cour peut se prononcer sur sa compétence, implique à mon avis que lorsque le principe du règlement arbitral ou judiciaire paraît admis par les parties pour le différend soumis à la Cour, celle-ci ne se borne pas à se déclarer incompétente, mais reconnaisse le caractère relatif de cette incompétence et indique l'organe au profit duquel elle se dessaisit. Je rappelle au surplus qu'en l'espèce, après la déclaration du conseil du Royaume-Uni, pareille décision écartant le différend de la compétence directe de la Cour pour le soumettre à une procédure arbitrale aboutirait à ramener indirectement l'affaire devant la Cour, et aurait ainsi les mêmes effets qu'une déclaration de compétence.

C'est sous le bénéfice de ces observations, Monsieur le Président, que j'aborderai l'examen des arguments techniques par lesquels le Gouvernement britannique s'efforce de vous gagner à sa thèse.

Messieurs, un point sur lequel les Parties sont d'accord, c'est que le point de départ de votre compétence doit nécessairement se trouver dans l'article 29 du traité de 1926, seule disposition dans laquelle la compétence obligatoire de votre Cour ou, tout au moins, de la Cour permanente à laquelle vous succédez, se trouve directement acceptée par les Parties. Je vous relis cet article, qui est très bref :

> « Les deux Parties contractantes sont d'accord en principe que tout différend qui peut s'élever entre elles quant à la juste interprétation ou l'application d'une quelconque des stipulations du présent traité sera, à la requête de l'une des Parties contractantes, soumis à l'arbitrage. La Cour d'arbitrage à laquelle les différends seront soumis sera la Cour permanente de Justice internationale, à moins que, par une convention particulière, les deux Parties n'en décident autrement. »

L'objection faite à l'application de cette disposition à la requête du Gouvernement hellénique paraît à première vue impressionnante. L'on nous dit : « le traité vise très directement les différends relatifs à l'interprétation ou à l'application d'une stipulation du présent traité — c'est-à-dire du traité de 1926. Or, les faits que vous dénoncez remontent à 1919, 1921, 1922, 1923.; ils sont donc antérieurs au traité de 1926 ; il est impossible dès lors que le différend ait trait à l'application de ce traité, et donc la Cour n'est pas compétente. »

A ce raisonnement, à première vue convaincant, le Gouvernement hellénique oppose deux objections. La première objection, c'est que l'interprétation ou l'application « d'une quelconque des stipulations » du traité de 1926 visent également et *a fortiori* l'interprétation et l'application du traité de 1926 dans son ensemble, c'est-à-dire les effets de son entrée en vigueur. La question qui se pose et qui a été longuement débattue par l'agent du Gouvernement britannique, comme par sir Hartley Shawcross, est essentiellement celle de savoir quelle est l'incidence de l'entrée en vigueur de ce traité de 1926 sur les différends antérieurs au traité de 1926 qui trouvent leur origine dans des faits survenus pendant que le traité de 1886 était seul en vigueur. Nous soutenons que l'article 29 s'applique également à ces différends — tout au moins dans toute la mesure où les règles de droit invoquées se retrouvent en substance dans le traité de 1926 ; donc l'article 29 n'a pas d'autre portée que la substitution d'un organe de règlement judiciaire à un organe de règlement arbitral, l'un et l'autre étant du reste appelés « arbitrage *lato sensu* », ce qui, vous vous en souvenez, fut usuel pendant les premières années de la Société des Nations.

La deuxième objection est celle que sir Hartley Shawcross a principalement défendue, sans du reste abandonner la première, comme le signalait très exactement sir Eric Beckett dans sa réplique tout à l'heure. Cette préférence s'explique par la circonstance que cette argumentation conduisait plus simplement la Cour à un résultat qui, pratiquement, était devenu identique à celui auquel conduisait l'autre objection. Dans ce dernier système, le présent différend tombe sous l'application du protocole de 1886, mais à la suite de la déclaration du Gouvernement

britannique, cette procédure du protocole de 1886 ramène le différend à l'accord commun devant votre propre juridiction.

Voyons tout d'abord l'objection qui dans notre réponse aussi occupait la première place. Dans ce système, nous n'avons pas besoin de la déclaration de 1926. Celle-ci joue un rôle auxiliaire mais non essentiel dans l'application qu'il vous est proposé de donner à l'article 29 du traité de 1926.

Sir Eric Beckett vous a dit qu'en réalité le traité de 1926 avait remplacé le traité de 1886, et ce mot « replacement » lui a paru être le terme exact qu'il a regretté ne pas avoir vu employé dans la déclaration. Je veux bien, Messieurs, que le traité de 1926 ait remplacé le traité de 1886, mais tout de même c'est une expression trop sommaire pour exprimer l'effet juridique exact de l'entrée en vigueur du traité de 1926 ; et j'attire votre attention sur une circonstance singulière, c'est qu'alors que le traité de 1886 prévoyait très expressément l'abrogation du traité de commerce antérieurement en vigueur, qui remontait aux années 1830 ou 1850, le traité de 1926 ne contient pas de clause semblable, et c'est par des échanges de lettres qu'il a été convenu (un échange de lettres du 16 juillet 1926 qui se trouvent citées par nos estimés contradicteurs) que l'on n'attendrait même pas l'entrée en vigueur du traité, qui se situe au mois de décembre 1926, mais qu'à partir du 26 juillet l'on était d'accord pour substituer le nouveau traité à l'ancien.

Mais, Messieurs, substituant ainsi le nouveau traité à l'ancien traité, il n'en demeure pas moins vrai que certaines règles sont demeurées inchangées, celles relatives au traitement national et celles relatives à l'application de la clause de la nation la plus favorisée, et que, dans ces conditions, nous sommes en droit de considérer que c'est la même règle qui est demeurée en vigueur au point que le nouveau traité aurait pu être rédigé comme un avenant au premier traité contenant une série d'articles, ajoutant un mot ou supprimant un mot à l'article premier, à l'article X ; l'on a trouvé beaucoup plus simple de refaire un traité d'ensemble, mais cela ne change rien à la réalité juridique et à la persistance de deux des principes des clauses sur lesquelles nous nous appuyons — celle relative au traitement national et celles relatives au traitement de la nation la plus favorisée. Assurément, l'article 29 du traité de 1926 a modifié le protocole. Mais sir Hartley Shawcross vous a dit — et il n'a pas été contredit — que, en matière de procédure et aussi en matière de compétence, il est conforme aux principes du droit anglais que les lois de procédure et de compétence s'appliquent rétroactivement.

En réalité, il en est ainsi aussi en droit américain et en droit belge. Et je crois pouvoir dire dans les divers systèmes de droit interne des nations civilisées, ce qui en fait un de ces principes généraux de droit que la Cour applique rétroactivement.

J'ai sous les yeux, Messieurs, un extrait du *Halsbury Statutes of England* (vol. 24, édit. de 1950, p. 158) :

> « La règle générale est que là où un statut a rapport à une matière de procédure, il peut opérer rétroactivement, mais cet acte ne pourra pas intervenir dans des cas déjà décidés, et les Cours n'auront pas la permission de rouvrir des jugements qu'elles ont donnés antérieurement sous des actes antérieurs.... »

Cela va de soi.

Kent, en ce qui concerne le droit américain, dans ses *Commentaires du Droit américain*, déclare de même (à la p. 632 du premier volume de

1896) que des actes déclaratoires opèrent généralement rétrospectivement, qu'il en est ainsi notamment des actes relatifs à la procédure et des actes ayant pour objet de remédier à un mal existant ou de donner un nouveau remède aux parties qui ont été lésées.

Et voici un bref extrait de notre meilleur civiliste belge, *Henri Depage*, qui, dans un ouvrage récent, son *Traité de Droit civil* (vol. I, p. 220), déclare que les lois de compétence et de procédure doivent, sauf dispositions contraires expresses, être considérées comme s'appliquant aux procès en cours ; et il cite en ce sens divers arrêts de Liége et de Bruxelles.

Sir Eric Beckett, confronté par cet argument, n'a pas contesté la rétroactivité des lois de procédure, mais il nous a fait à ce sujet un curieux grief. D'après lui, cela ne s'appliquait qu'aux lois de procédure ; par exemple, si vous aviez modifié votre règlement, il admettrait l'application immédiate et générale du texte nouveau. Par contre, il a paru mettre en doute ou ignorer que cela s'appliquait *a fortiori* au droit sur la compétence, et il a imaginé une hypothèse qui me paraît tout à fait dénuée de pertinence, celle de deux procédures arbitrales différentes prévues dans deux conventions successives de droit privé. Imaginerait-on, s'est-il écrié, que l'organe arbitral de la deuxième convention soit prétendu compétent pour les différends survenant sous l'empire de la première ? Messieurs, la réponse est aisée : cela dépend du rapport entre les conventions. Si ces conventions présentent entre elles la parenté étroite que nous avons constatée entre les traités de 1886 et 1926, réglant le même objet et contenant en partie les mêmes règles — une convention apparaissant comme l'avenant de l'autre —, je répondrai sans aucun doute affirmativement.

Au surplus, ce que je dis à cet égard est confirmé par la législation, puisque — et les traités que vous appliquez me semblent avoir plus de relation avec la législation qu'avec les conventions de droit privé — il n'est pas contesté que la législation sur la compétence s'applique à tous les différends nouveaux, même s'ils ont une origine antérieure à l'entrée en vigueur de la loi nouvelle.

J'ajoute, Messieurs, que mon estimé contradicteur vous a, à trois reprises, cité le traité gréco-italien ; or, j'ai eu la curiosité de m'en faire apporter le texte tandis qu'il plaidait, et je constate que les signataires du traité gréco-italien de 1926 ont fait très exactement et expressément ce que l'on s'étonne de nous voir supposer avoir été voulu entre la Grèce et la Grande-Bretagne ; en effet, la déclaration du traité italien du 24 novembre 1926 prévoit qu'il reste entendu que la convention de commerce signée aujourd'hui entre la Grèce et l'Italie ne préjudicie en aucune manière aux réclamations en faveur des particuliers, qui sont basées sur les clauses du traité de commerce et de navigation italo-hellénique signé en 1889, et que tout différend qui viendrait à surgir entre les deux gouvernements en ce qui concerne la validité desdites réclamations (vous verrez, ce sont les mêmes mots que notre déclaration, sauf la fin) sera déféré, à la requête de l'un ou de l'autre, à la décision du tribunal arbitral prévu par l'article 24 de la susdite convention de commerce et de navigation d'aujourd'hui.

Enfin, Messieurs, l'interprétation que je défends me paraît trouver un appui précieux dans la jurisprudence de la Cour dans l'arrêt Mavrommatis (p. 35), où la Cour fut d'avis que, dans le doute, une juridiction basée sur un accord international s'étend à tous les différends qui lui sont soumis après son établissement. Certes, il est exact que, comme

le signalait sir Eric, la plupart des gouvernements, dont le britannique, ont excepté de la compétence obligatoire antérieure de la Cour non seulement les différends antérieurs (ce qui allait de soi), mais les différends qui auraient une origine dans les faits antérieurs. Mais les auteurs, dont Dolleman dans un ouvrage néerlandais, *Preliminaire Excepties voor het Internationale Gerechtshof* (Leiden, 1949, p. 89), qui cite l'arrêt Mavrommatis (p. 35), déclarent que ces réserves montrent la nécessité d'une limitation expresse de la juridiction de la Cour à cet égard, sans exclusion expresse du différend né antérieurement, ou de différends basés sur des faits anciens. La Cour pourra donc connaître de l'affaire.

Voilà les conclusions que déjà nous paraît autoriser l'article 29 du traité de 1926. Mais elle me paraît trouver une confirmation très nette dans la déclaration de 1926.

Si on en compare le texte avec celui de l'article 29, on constate tout de suite le soin qui a été pris de le rédiger autrement que l'article 29 du traité de 1926 signé le même jour. L'article 29 vise les différends qui s'élèvent au sujet de « l'interprétation ou de l'application d'une quelconque des stipulations du traité ». 1926 prévoit les réclamations faites au nom de particuliers « qui sont basées sur les dispositions du traité de commerce » et tous différends qui peuvent s'élever « quant à la validité de ces réclamations ». Il semble donc que les parties aient eu en quelque sorte un souci d'employer des mots différents, sans doute dans le but d'indiquer qu'il n'était pas exclu qu'un traité puisse d'une part être basé sur les dispositions du traité de commerce anglo-grec de 1886 et, néanmoins, être relatif à l'interprétation ou l'application d'une quelconque des stipulations du nouveau traité, ce qui se produira effectivement au cas où les stipulations visées de l'ancien traité se retrouvent identiques ou équivalentes dans le nouveau.

Et les travaux préparatoires de la déclaration confirment que telle a bien été la pensée des gouvernements des parties. On vous a dit, vous vous en souvenez, que la déclaration a pour origine une initiative hellénique provoquée par une demande britannique. Or, le Gouvernement hellénique proposa une rédaction qui me paraît particulièrement significative : il proposa « as far as ».... Nous avons cru devoir rectifier en « in so far as » ...., et notre estimé contradicteur propose de dire « in so much », « for so much as », ou une expression analogue. J'avoue que je ne suis pas assez expert en langage britannique pour choisir entre ces diverses rédactions, mais ce qui me paraît certain, c'est que dans la pensée du Gouvernement hellénique il y avait des différends basés sur 1886 qui étaient couverts par le traité de 1926, et il y avait d'autres différends basés sur 1886 qui n'étaient pas couverts par le traité de 1926. Et nous savons qu'effectivement celui qui préoccupait les Britanniques était l'éventuel différend qui pourrait surgir en cas d'application aux sujets britanniques de la loi sur l'emprunt forcé. Une telle mesure violerait une disposition du traité de 1886 qui interdisait de frapper les sujets britanniques d'une emprunt forcé — disposition non maintenue en 1926. Et le Gouvernement hellénique propose donc de prévoir expressément que l'ancienne procédure de 1886 demeurera d'application dans la mesure où les différends basés sur le traité de 1886 ne sont pas couverts par le traité de 1926. La rédaction finale fut différente, mais le Gouvernement britannique qui l'avait proposée déclara expressément qu'elle avait la même portée. On peut donc en déduire les mêmes conséquences.

Je sais, Messieurs, que l'on a prétendu tirer argument du fait que les gouvernements avaient eu en vue le différend éventuel relatif à l'emprunt forcé, ajoutant qu'ils n'auraient pas eu connaissance d'autres et que, dès lors, la déclaration ne pouvait s'appliquer à d'autres. Mais je crois qu'il y a là une contradiction qui vous aura frappés, car dans la même réplique sir Eric Beckett vous a dit à un moment donné que, bien entendu, le Gouvernement grec avait déjà, en 1926, connaissance de l'affaire Ambatielos. Et il est certain qu'il en avait connaissance et qu'il est dès lors téméraire d'affirmer qu'il n'y a pas songé.

Supposons même que le différend Ambatielos n'ait pas été prévu en 1926. Cela ne vous interdirait en aucune façon de constater que ce différend tombe sous l'application de la déclaration. Car il est raisonnable d'admettre que si les parties ont cru devoir conserver la procédure arbitrale pour le règlement de différends basés sur des dispositions abrogées, *a fortiori* ne peut-on leur attribuer l'intention de renoncer à toute procédure pour l'application de dispositions maintenues.

J'ajoute, pour répondre à une observation que j'ai entendue tantôt relativement à la déclaration gréco-italienne de 1926, que l'existence certaine de certains différends basés sur le traité de 1886, qui ne pourraient plus être invoqués sous l'empire du traité de 1926, fournit probablement l'explication de la différence entre les deux solutions admises dans le traité gréco-italien et dans le traité gréco-britannique : dans un cas l'on vous dit (traité gréco-italien) : « nous allons appliquer la procédure de 1926 à tous les différends anciens » ; dans le cas gréco-britannique, l'on semble vous dire, au contraire, « nous allons appliquer l'ancienne procédure arbitrale ». Pourquoi dans ce cas-ci l'ancienne procédure arbitrale ? Certainement à raison de la difficulté qu'il y avait à étendre la compétence de la Cour prévue dans un traité à l'application de dispositions que ce même traité abrogeait ! Le bon sens paraissait commander de se rabattre sur l'ancienne procédure et peut-être a-t-on voulu, par voie de simplification, maintenir celle-ci pour tous les différends antérieurs à juillet 1926.

En résumé, il apparaît que l'article 29, sainement interprété conformément aux principes généraux du droit, doit conduire la Cour à considérer que la procédure qui y est prévue s'applique également aux différends basés sur le traité de 1886 pour autant que les dispositions invoquées se retrouvent dans le nouveau traité. Et je crois avoir démontré que cette interprétation de 1926 est pleinement confirmée par la déclaration de 1926 dont assurément la Cour doit tenir compte comme elle tient compte de l'échange de lettres qui a décidé de l'abrogation du traité de 1886.

[Séance publique du 17 mai 1952, après-midi]

Monsieur le Président, Messieurs de la Cour,

Au cours de l'audience de ce matin, je vous ai indiqué que les deux Parties étaient d'accord pour estimer que de toute façon l'origine de votre compétence, la source première, devait être recherchée dans l'article 29 ; que nos adversaires voyaient un obstacle insurmontable dans le fait que dans l'article 29 figuraient les mots « différends relatifs à l'interprétation ou à l'application d'une disposition quelconque du présent traité », tandis que le Gouvernement hellénique estimait que

l'argument n'était d'aucune façon irréfutable, car des différends pouvaient être considérés comme relatifs à l'interprétation ou à l'application d'une disposition du présent traité, alors même que les faits dénoncés étaient antérieurs audit traité, du moment que la règle invoquée était, elle aussi, antérieure audit traité et maintenue dans le traité nouveau, en sorte que le différend tombait sous l'application d'une seule et même règle maintenue après 1926.

Je n'ai pas l'intention de passer un temps aussi long à la démonstration du deuxième point, parce que sir Hartley Shawcross s'y est longuement attardé et que la question de savoir — car c'est en réalité notre thèse subsidiaire bien que pour des raisons pratiques, comme je vous l'ai dit, elle ait occupé la place principale dans l'exposé de sir Hartley Shawcross — notre thèse subsidiaire est que si même la Cour hésitait à se déclarer compétente à la faveur de cette construction de l'article 29 du traité de 1926, elle devrait se déclarer compétente par application de la déclaration de 1926, parce que celle-ci est partie intégrante du traité.

Qu'est-ce qui nous autorise à dire que la déclaration est partie intégrante du traité ? Des considérations à la fois matérielles et intellectuelles tirées de la substance de la déclaration. Et tout d'abord, les éléments matériels.

Les éléments matériels, nous les avons déjà en partie remis à M. le Greffier de la Cour ; nous avons ici une photocopie de l'original du traité de 1926. Il est à la fois rédigé en langue anglaise et en langue grecque. Il comprend, dans un même document, avec une même pagination, le texte du traité proprement dit et le texte de la déclaration, et il ne comprend pas, contrairement à ce que l'on supposait, le texte des lettres échangées le même jour, 16 juillet 1926, et qui décidaient que le traité de 1886 allait cesser d'être en vigueur à partir du 26 juillet, date à laquelle on convenait de mettre provisoirement en vigueur le traité non encore ratifié.

Deuxième élément, c'est que le *White Paper* soumis au Parlement, ou plus exactement présenté au Parlement — car, sauf erreur, il ne fallait pas d'approbation parlementaire suivant le droit constitutionnel britannique — contient, dans un même document, le traité et, dit le texte, « la déclaration qui l'accompagne ». Nous en tenons également un exemplaire à la disposition de la Cour.

Le troisième élément est celui que nous avons remis en photocopie à M. le Greffier. Nous le devons à la courtoisie et à la loyauté du Foreign Office auquel nous avons demandé l'instrument de ratification hellénique, car nous avions cru — et c'est l'explication d'une erreur matérielle commise dans notre mémoire en réponse —, nous avions cru, sur le vu du Journal officiel hellénique, qu'il n'y avait eu qu'une seule signature, parce que le Journal officiel hellénique mentionnait les noms des plénipotentiaires exclusivement à la fin de la déclaration, la déclaration suivant le traité. Il n'en est pas ainsi. Nous avons donc commis une erreur. Mais, d'autre part, il résulte du document qui nous est produit par le Gouvernement britannique que l'instrument de ratification que nous lui avons remis en décembre 1926 et dont nous n'avions pas copie à Athènes parce que les archives grecques ont été brûlées pendant la guerre, visait expressément le traité et la déclaration du même jour. Sur ce point, il n'y a aucun doute possible, et ainsi il est

répondu, en ce qui nous concerne, à la demande posée par M. le juge Hsu Mo.

Nous ne pouvons pas à l'heure actuelle compléter cette réponse en ce qui concerne la ratification britannique, parce que nous ne l'avons plus en original et que nous avons omis de nous informer du point de savoir s'il en existait une copie au Foreign Office et ce qu'elle contenait. De deux choses l'une, ou bien cette ratification couvre, elle aussi, la déclaration en même temps que le traité. Ce serait assurément un argument de poids en notre faveur. Ou bien la ratification couvrira seulement le traité et ne fera pas mention de la déclaration. En ce cas, Messieurs, nous nous trouvons devant cette situation assurément curieuse qu'au Foreign Office, à Londres, on aura procédé à l'échange des ratifications, à la remise d'une ratification par le Gouvernement hellénique contre une ratification du Gouvernement britannique, que l'une de ces ratifications aurait porté sur le traité et la déclaration et l'autre seulement sur le traité. Peut-être les deux Parties ne s'en sont-elles pas aperçues. Si, ce qui me paraît plus probable, les deux Parties s'en sont aperçues, il faut admettre qu'elles auront considéré que cela n'avait aucune importance parce que l'accessoire suivait le principal et que la ratification britannique du traité s'étendait nécessairement, elle aussi, à la ratification de la déclaration. Ce que je suis en tout cas en droit de conclure, c'est que vraiment les Parties ont considéré que les deux actes formaient un tout.

Au surplus, encore une fois, cet exemple qu'avec obstination, je crois pour sa perte, le délégué de la Grande-Bretagne a tiré du traité gréco-italien, nous montre que, contrairement à ce qu'il pensait, il est parfaitement possible qu'une déclaration soit partie intégrante d'un traité et tombe sous l'application de ce traité, alors même qu'elle ne soit pas mentionnée comme partie intégrante. Et en effet, Messieurs, vérification faite, je constate que cette déclaration gréco-italienne de 1926, que je m'excuse d'avoir examinée de trop loin lorsque nous avons préparé nos observations écrites, fait très exactement entrer sous l'application de l'article 24 de la nouvelle convention les différends qui se trouvaient nés sous l'empire de l'ancienne convention de 1889 maintenue en vigueur en 1899. Vous avez donc là un cas d'intégration flagrante que n'accompagne aucune stipulation d'intégration. Exemple d'autant plus frappant qu'il a été reconnu dans la procédure écrite britannique que cette déclaration était tout à fait semblable et quasi identique à la nôtre, et c'est exact sauf pour les termes finaux. Je crois donc que l'on ne peut vraiment pas tirer un argument *a silentio* de l'absence d'une mention « partie intégrante » pour dire que la déclaration de 1926 n'est pas partie intégrante du traité de 1926.

Et mon deuxième argument est un argument intellectuel. C'est le contenu de cette déclaration. Sir Eric Beckett, ce matin, a critiqué sir Hartley Shawcross pour la façon dont il avait, suivant lui, sollicité le sens de ses déclarations, en lui faisant dire qu'il suffisait qu'une déclaration ait quelque rapport avec un traité pour être considérée comme partie intégrante de ce traité. Ce qu'il avait déclaré, c'est qu'une déclaration qui serait interprétative d'une convention devrait être considérée comme faisant corps avec elle.

J'accepte cette rectification de sir Eric Beckett, mais je vous demande vraiment de vous poser la question : quelle est la portée de cette déclaration de 1926 ? On nous a dit : cette déclaration change les effets de

l'abrogation de la convention de 1886. Mais je demande à mes adversaires : d'où résultait cette abrogation ? A toute évidence de l'entrée en vigueur du traité de 1926. C'est donc bien d'une interprétation ou d'une application du traité qu'il s'agit, et ce n'est donc pas du tout de façon inexacte, mais de façon tout à fait exacte, que la déclaration commence par les mots : « Le traité de commerce en date d'aujourd'hui ne porte pas préjudice », ce qui est synonyme du « présent traité ».

Car la question qui se posait était très exactement de savoir si l'entrée en vigueur de ce nouveau traité qui produisait une sorte de novation juridique allait oui ou non étouffer et éteindre les derniers effets juridiques du traité ancien, ou si au contraire il allait les laisser survivre. Eh bien! nos adversaires ont paru dire que s'il n'y avait pas eu de déclaration, *tous les effets du traité de 1886 étaient supprimés par l'entrée en vigueur* du traité de 1926. Je crois, quant à moi, qu'ils exagèrent, et dans notre thèse principale nous vous avons dit que nous pensions qu'il n'en était pas ainsi et qu'il n'en était pas ainsi pour les dispositions qui étaient demeurées en vigueur dans le traité de 1926. Mais je reconnais, je reconnais très volontiers, que sans la déclaration il y avait tout au moins certains effets du traité de 1886 qui étaient définitivement supprimés par l'entrée en vigueur du traité de 1926, *et spécialement la loi sur* l'emprunt obligatoire, réputée, dans la mesure où elle aurait été étendue aux sujets britanniques, constituer une violation d'une disposition du traité de 1886, n'aurait plus pu donner, après le 28 juillet 1926, lieu à une réclamation quelconque, puisque la règle substantielle sur laquelle se serait appuyée cette réclamation était éteinte en même temp que la disposition créant une procédure arbitrale, et qu'il était tout à fait impossible d'aller placer *cette règle d'une convention, règle éteinte* d'une convention éteinte, sous l'empire d'une procédure prévue pour des règles nouvelles.

Mais, Messieurs, s'il en est ainsi, c'est bien la démonstration qu'en réalité, malgré ses termes lénifiants, la déclaration est non seulement interprétative, bien plutôt un correctif, un amendement, en quelque sorte, tout au moins une réserve accompagnant le traité de 1926 et *modifiant, limitant ses effets de remplacement.*

Et alors je vous pose la question : est-ce que vraiment, de bonne foi, on peut considérer que lorsque l'article 29 du traité considère que la Cour est compétente pour les différends relatifs à l'application et à l'interprétation d'une quelconque des stipulations du présent traité il y a lieu d'écarter cette compétence pour l'interprétation ou l'application de l'ensemble du présent traité, pour la détermination de l'effet *du présent traité ? Est-ce qu'il n'est pas également inévitable d'admettre* que la déclaration qui résout cette question, qui règle toute la question des effets de l'entrée en vigueur du traité de 1926, est assimilable pleinement à une disposition quelconque des stipulations du traité de 1926 et doit donc être considérée comme entrant dans la compétence de la Cour ?

Reste maintenant à démontrer — et j'en aurai fini quand j'aurai fait cette démonstration — que du moment que la Cour est compétente pour interpréter la déclaration, la Cour est également compétente pour connaître du présent différend, parce que, contrairement à la thèse de mon distingué contradicteur, ce différend entre dans les termes de la déclaration.

Monsieur le Président, relativement à l'interprétation de la déclaration, sir Eric Beckett vous a *proposé un distinguo*. Il vous a dit : en réalité, la déclaration ne vise pas toutes les réclamations mais seulement certaines réclamations ; les autres, n'étant visées ni dans la déclaration ni dans le traité de 1926, ne sont soumises à aucune procédure obligatoire.

Quels sont les différends visés ? Dans la procédure écrite nous avions compris que dans sa pensée la déclaration visait seulement les réclamations antérieures à 1926. Aujourd'hui, il nous a dit, non, plutôt hier, ce ne sont pas les réclamations nécessairement formulées antérieurement, mais ce sont les réclamations en puissance, les réclamations potentielles, les réclamations qui étaient conçues mais pas encore nées.

Monsieur le Président, je lis et relis la déclaration et je ne parviens pas à comprendre comment il est possible, dans ce texte qui paraît vraiment tout à fait général, de découvrir la distinction et la restriction que l'on prétend y trouver. En effet, le texte dit très clairement que le traité de commerce ne porte pas préjudice aux réclamations basées sur le traité de 1886 et que *tous différends* qui *peuvent s'élever* — le texte original est en anglais : *all disputes which may arise*, ce qui semble bien indiquer les différends —, tous les différends qui vont pouvoir s'élever à l'avenir doivent être soumis à l'arbitrage conformément aux dispositions du protocole de 1886.

Alors, on vous propose, en présence de ce texte clair, de recourir aux travaux préparatoires. Je sais bien, Messieurs, qu'à la suite notamment de la discussion de l'Institut de droit international qui a eu lieu à Sienne le mois dernier, nous avons été amenés à considérer qu'en réalité on ne pouvait jamais interdire à une partie de recourir aux travaux préparatoires, mais que l'interprète, le juge, l'autorité, ne pouvaient leur accorder de valeur qu'en proportion inverse du degré de clarté du texte qu'on prétendait ainsi éclairer. Si c'est un texte en apparence fort clair, il faudra des travaux préparatoires d'une évidence éclatante pour en modifier la portée. Tandis que s'il s'agit d'un texte douteux, laissant la place à plusieurs interprétations, il est raisonnable que, dans une hésitation complète, on cherche fût-ce un signe dans les travaux préparatoires quant à l'interprétation qui correspond à l'intention des parties.

Or, dans le cas présent, nous avons un texte très clair. Voyons donc ce que l'on va tirer des travaux préparatoires : eh bien ! Messieurs, le maximum qu'on tire des travaux préparatoires est que les Parties n'auraient pas envisagé d'autres différends que les différends qui étaient sur le point de naître. Je crois, Messieurs, que cela est improbable ; je constate du reste que cela est en partie contredit par ce que disent nos adversaires ailleurs, lorsqu'ils relèvent que le Gouvernement hellénique avait déjà connaissance en juillet 1926 du cas Ambatielos. Mais je vous pose la question, à supposer qu'il n'y ait pas songé, est-ce que vous seriez autorisés, en présence de ce texte-ci, à le construire restrictivement et à décider qu'il était conforme à l'intention des Parties d'établir entre les différends la distinction proposée et de retenir exclusivement la procédure arbitrale de 1886 pour quelque différend qui apparaissait comme pouvant encore surgir alors qu'ils auraient entendu tacitement exclure cette réglementation pour des différends sur la valeur, la légitimité desquels ils ne pouvaient pas, par hypothèse, se prononcer puisque, par hypothèse, il ne les aurait pas connus ? Une telle espèce de pari sur l'inconnu me paraît, je l'avoue, tout à fait déraisonnable et contraire à la pratique générale des gouvernements.

Encore une fois, ce malheureux traité gréco-italien revient à mon aide puisque, là aussi, je trouve cette déclaration formelle que tous les différends, basés sur le traité de 1889, remis en vigueur en 1899, demeureront réglés ou seront réglés par la procédure arbitrale — cette fois suivant le nouveau système de 1926 pour le cas gréco-italien. A moins que là aussi on introduise une construction restrictive, mais j'ignore sur quelle base, il faut y voir l'expression du désir des gouvernements d'assurer à tous *les différends relatifs à l'ancien traité de commerce un règlement arbitral* soit sur base de l'ancien protocole, soit sur base de l'article 29 nouveau.

Cependant, nos adversaires prétendent trouver la preuve que leur interprétation restrictive est raisonnable dans le fait qu'elle serait tout au moins amorcée dans la déclaration. Ils soulignent que la déclaration prévoit que les anciennes dispositions seront d'application seulement pour les réclamations faites au nom des particuliers. Or, disent-ils, il y a bien autre chose que les réclamations faites au nom des particuliers ; il y a les réclamations faites au nom des gouvernements pour des intérêts politiques étatiques. Il serait donc démontré que le Gouvernement britannique et le Gouvernement grec ont décidé de passer l'éponge sur tous les différends interétatiques, et dès lors il faudrait admettre qu'ils ont pu écarter aussi les différends inconnus qui pourraient s'élever plus tard sur la base de l'ancien traité.

Ce raisonnement ne résiste pas à l'examen. Comme sir Hartley Shawcross, tout d'abord, j'ai imaginé que, à vrai dire, les États avaient pu sans inconvénient et sans risque éliminer de leurs préoccupations de règlement les éventuels conflits étatiques parce qu'ils pourraient raisonnablement écarter cette éventualité. En effet, si des gouvernements peuvent ignorer, le 16 juillet 1926, la lésion dont a été victime un particulier grec ou britannique, celle dont aurait été victime leur État leur serait, semble-t-il, suffisamment connue au moment où ils rédigent la déclaration, et ils peuvent déduire de leur ignorance à l'inexistence de pareils griefs.

Mais j'ajoute, Messieurs, que j'ai en vain cherché dans le traité de 1886 quels étaient ces engagements relatifs à des intérêts étatiques auxquels il était fait allusion. Assurément, à un moment donné, je me suis dit : mais, peut-être tout de même, puisque toutes les dispositions sont au profit des personnes et des biens des sujets réciproques, peut-être que dans la pensée de sir Eric Beckett il y a lieu de considérer comme une réclamation étatique une réclamation qui ne serait pas faite au profit d'un ressortissant déterminé mais au profit de l'ensemble des ressortissants éventuels, britanniques en Grèce, ou helléniques en Grande-Bretagne ; par exemple, serait considérée comme interétatique une réclamation dirigée contre une mesure législative avant qu'elle n'ait été effectivement appliquée à des ressortissants étrangers déterminés. Ce sont ces réclamations dont les gouvernements auraient fait abandon réciproque. Mais non, Messieurs, ce n'est pas dans ce sens-là que nos adversaires emploient l'expression, car ils nous donnent un exemple. Quel exemple ? Ils nous disent que la réclamation que la Grande-Bretagne avait en vue était celle que provoquerait de sa part la loi sur l'emprunt forcé au cas où il s'avérerait que cette loi était appliquée aux ressortissants britanniques, avant même qu'elle ne frappe des ressortissants déterminés. Mais si de telles réclamations sont considérées comme faites au nom de particuliers, que reste-t-il d'autre comme différends interéta-

tiques et que reste-t-il de l'argument tiré de leur prétendue exclusion du champ de la déclaration?

Pour le surplus, je m'en réfère à la démonstration que vous a faite sir Hartley Shawcross de la portée de la déclaration d'après son texte et d'après l'intention des Parties. C'est le moment de faire application de la règle de l'effet utile. A supposer qu'il y eût eu un doute quelconque dans le texte — ce qui n'est pas le cas —, il y a lieu de rechercher ce qui raisonnablement peut être supposé avoir été l'intention générale des gouvernements signataires, cette intention était certainement d'assurer la continuation de la sauvegarde assurée déjà par le protocole de 1886, d'empêcher que les anciens différends ne tombent dans cette lacune — ce vacuum, cette trappe — qui vous a été indiquée et non pas simplement d'en limiter les dimensions.

J'en aurai terminé sur ce point par une dernière considération, celle-ci de pur fait. Nous avons quelque mérite à avoir réfuté avec autant de soin la thèse de sir Eric Beckett, car en fait, à supposer même que vous la reteniez, elle ne ferait pas obstacle à ce que vous vous déclariez compétents pour connaître de la présente réclamation hellénique. En effet, comme on vous l'a dit, la première démarche du Gouvernement hellénique est une démarche de 1925. Assurément, cette démarche est présentée avec des gants, avec une modération, une mesure, une timidité qui font que l'on y chercherait en vain l'indication d'une base juridique, mais comme vous le disait également mon confrère et collègue sir Hartley Shawcross, en réalité il n'est pas du tout sans précédent et la Cour a déjà eu à connaître de négociations amorcées dans des conditions semblables. Pour qu'une note diplomatique ait la portée d'une réclamation, il suffit qu'elle ait un objet certain et témoigne de la volonté d'un gouvernement de faire acte de protection à l'égard de son ressortissant. En l'espèce, cette réclamation — ce *claim* — était antérieure à 1926, et à supposer donc même que vous puissiez introduire dans la déclaration de 1926 une restriction que je n'y ai pas trouvée, encore la réclamation présentée au nom de M. Ambatielos devait-elle être considérée comme recevable et comme tombant sous l'application de la déclaration.

Avant que j'aborde le point suivant, à vrai dire le dernier de mon exposé, je considère comme un devoir de loyauté de faire part à la Cour d'une petite rectification que me fait parvenir à l'instant sir Eric Beckett. Il me dit que je l'ai mal compris lorsque tantôt je lui ai fait dire que la déclaration de 1926 visait exclusivement des réclamations qui avaient été pensées mais non formulées et qu'il ne connaît pas l'origine de mon malentendu. Messieurs, je m'excuse si j'ai mal compris, la Cour verra le compte rendu de l'exposé de sir Eric Beckett. J'ai exposé, sans reproduire les mots mêmes, ce que j'avais compris comme désigné par lui sous le terme de réclamations potentielles. Si je me suis trompé, je m'en excuse, mais j'avoue être encore maintenant dans le vague, et ne pas comprendre par quel artifice nos estimés contradicteurs en arrivent à déclarer que la note du Gouvernement britannique de 1925 relative à l'affaire Ambatielos n'est pas un « *claim* », mais que la simple intention manifestée par le Gouvernement britannique de « peut-être soulever la question » de l'emprunt forcé de 1926 est un « *claim* », en sorte que la note de 1925 et le différend ainsi amorcé ne tomberaient pas sous le coup du protocole de la déclaration de 1926, tandis que celui-ci couvrirait au contraire le différend qui aurait pu naître des préoccupations britanniques relatives à l'emprunt forcé.

Mais j'en arrive maintenant au dernier point de mon exposé, et je serai fort bref. Je l'aborde, je dirai par acquit de conscience et parce que nous l'avons mentionné dans nos Conclusions, à titre très subsidiaire ; il s'agit de notre demande de jonction de l'exception d'incompétence au fond. A première vue, rien n'est plus facile que la distinction entre l'examen de la compétence de la Cour et l'examen au fond d'un différend. Dans l'examen de sa compétence, le juge international vérifie si la demande qui lui est soumise a trait à une prétendue violation d'obligations internationales dont le respect est soumis à son contrôle. Dans l'examen de fond, la Cour vérifie si cette violation est réelle, si elle est démontrée, et quels en sont éventuellement les effets au point de vue de la réparation. Aussi votre Règlement vous impose-t-il d'aborder séparément et d'abord l'examen de la question de compétence. Mais en même temps votre Règlement prévoit la possibilité d'une jonction. Et M. Hambro, Greffier de la Cour, a, dans une série de leçons données ici à l'Académie, cité, rappelé, un certain nombre assez considérable de cas où la Cour a été amenée à joindre l'incident de compétence au fond.

Je crois, Messieurs, que cela est souvent inévitable, parce que dans la vérification de votre compétence vous êtes amenés à vérifier si *prima facie* la demande qui vous est soumise a trait à la règle de droit que l'on prétend invoquer. Il est tout à fait certain qu'il ne suffirait pas par exemple que j'invoque à titre purement formel un traité sur la navigation aérienne dans un différend qui aurait trait à un incident de frontière pour que la Cour retienne sa compétence. La Cour a souvent estimé qu'elle devait dans l'examen de sa compétence vérifier *prima facie* l'existence de ce rapport. C'est tout à fait légitime.

Mais la Cour devra-t-elle également vérifier à cette occasion si l'obligation qu'on invoque est réelle et interprétée exactement ? Je crois que si cette obligation relève d'une règle de droit général ou d'une convention générale, la Cour peut considérer que cette question appartient entièrement au domaine de la compétence. Mais il ne me paraît pas douteux que si l'obligation invoquée relève d'une convention particulière, dont l'interprétation est discutée, la Cour va considérer que l'interprétation de cette convention particulière relève à la fois de la compétence et du fond et va être alors amenée à faire ce qu'elle a déjà fait dans un certain nombre de cas, à savoir joindre l'incident au fond, sauf à décider que, si dans l'examen au fond elle constate que la règle de droit n'est éventuellement pas établie ou mal interprétée, que l'obligation invoquée est inexistante, à se déclarer incompétente sans aborder le domaine du fait.

Messieurs, je pense qu'en l'espèce vous ne devrez pas joindre l'incident au fond, parce qu'il m'a semblé que même nos adversaires étaient d'accord pour estimer que parmi nos bases juridiques il y en avait une au moins dont ils reconnaissaient la pertinence : c'était l'article 15, paragraphe 3, du traité de 1886, et que cela suffit, à mon sens, pour que vous vous déclariez compétents. Je reconnais, par contre, qu'en ce qui concerne les articles I et X du traité de 1886, reproduits aux articles 1 et 3 du traité de 1926, il y a divergence d'interprétation entre les Gouvernements britannique et hellénique quant au contenu de l'obligation d'accorder aux sujets helléniques le traitement national, et le traitement de la nation la plus favorisée dépassait ce que le Gouvernement britannique comprit par cette disposition. Il est donc possible, Messieurs, bien que je ne le comprendrais pas, que vous déclariez que notre première base juridique de la demande n'est pas à elle seule suffi-

sante pour vous déclarer compétents et que vous désiriez vérifier également, avant de vous prononcer, quelle est la portée à attribuer aux deux dispositions de 1886 maintenues en 1926, que je viens de vous rappeler. Dans cette hypothèse, vous joindriez l'incident aux « *merits of the case* ». J'ai cru devoir, pour être complet, vous rappeler cette possibilité.

Me voici ainsi enfin arrivé à la conclusion de cette réplique qui, je m'excuse, a été quelque peu plus longue que je ne l'avais prévu.

Je me résume.

Ainsi que je vous l'ai dit au début, si nous avons cité des articles de la Charte, ce n'était pas — et sur ce point il n'y a plus de malentendu — pour vous demander de baser sur eux votre compétence obligatoire, mais c'était, je dirai, à l'usage de notre adversaire, comme un rappel d'un air qui lui est familier et qu'il affectionne parfois de faire entendre, non que nous ayons eu un grand espoir à cette heure tardive de le voir revenir à de meilleurs sentiments, mais parce que nous avons pensé qu'éventuellement ce rappel d'une musique qui lui est chère serait pour lui un réconfort aux heures d'affliction si, comme nous le pensons, la Cour ne fait pas droit à ses conclusions.

Quant à votre compétence obligatoire, comme je vous l'ai dit, nous la basons sur l'article 29 du traité de 1926, et je n'ai plus besoin de rappeler à la Cour que nous avons essayé d'en faire la démonstration de deux façons : d'une part, en vous demandant de considérer que vous étiez directement compétents sur la base de 1926, par une interprétation de l'article 29 qui en étendrait l'application à tous les différends relatifs au traité de 1926, même si supplémentairement ces différends étaient également basés sur le traité de 1886, parce qu'ayant pour origine des faits antérieurs à l'entrée en vigueur du texte revisé des règles anciennes invoquées. D'autre part, nous vous avons exposé que vous trouverez dans l'article 29 également une base directe de compétence, en tant que notre demande basée sur des articles du traité de 1886 fait surgir une contestation relative aux effets du traité de 1926 par rapport aux différends nés sous l'ancien traité et que pareille contestation est comprise dans le champ d'application de l'article 29 de ce traité. Mais, et surtout, sur ce point nous avons une conviction dont sir Hartley Shawcross s'est fait l'interprète : la réclamation du Gouvernement hellénique relative à Ambatielos nous a paru tomber en tout cas dans le champ de la déclaration, laquelle est inséparable du traité de 1926, en sorte qu'un différend relatif à son interprétation doit être réglé suivant l'article 29 du traité de 1926.

Ainsi la Cour est en tout cas compétente pour déterminer par interprétation de la déclaration quelle est la juridiction compétente au fond. Quant à celle-ci, la Cour se trouve placée devant le dilemme suivant : ou bien reconnaître que ce différend tombe directement sous sa compétence, ou qu'il tombe sous la compétence de la procédure arbitrale de 1886 et que, par raccroc, il lui revient à la suite de la déclaration qui lui a été faite, suivant laquelle le Gouvernement britannique est disposé, comme le Gouvernement hellénique, à voir la Cour fonctionner, conformément au traité de 1926, comme instance arbitrale.

Je désire terminer, Messieurs, par une dernière considération. Sir Eric Beckett dans sa première plaidoirie a cité avec complaisance un adage latin *non dormientibus sed vigilantibus subvenit lex*. Je ne sais pas s'il y attachait une portée juridique. Je ne le crois pas. La prescrip-

tion est une notion agitée parfois de façon théorique, mais dont à ma connaissance il n'y a pas d'application en jurisprudence. Au surplus, quelle que soit l'importance ou l'interprétation qu'on attache aux notes successives du Gouvernement hellénique, notes qui ont été d'une précision croissante, qui se sont succédé à deux ou trois années d'intervalle, pratiquement depuis 1925, sauf la période de la guerre, nous pouvons dire qu'elles ont au moins suffi à interrompre une éventuelle prescription et que nous ne sommes pas du tout dans la situation d'un Gouvernement hellénique qui viendrait pour la première fois en 1951 ou 1952 porter devant la Cour un différend relatif à un M. Ambatielos dont le Gouvernement britannique n'aurait jamais entendu parler, lequel, il y a plus de trente ans, aurait subi un prétendu dommage dans des conditions devenues invérifiables. Peut-être aurait-on pu parler en pareil cas d'abandon ou de renonciation. Telle n'est pas du tout la situation devant laquelle nous nous trouvons ; le mot d'abandon n'a du reste pas été prononcé.

Mais, Messieurs, le reproche d'inaction et d'avoir dormi a un sens ironique qui m'a frappé : *dormientibus, dormiens*. Assurément, Messieurs, cette expression ne peut pas s'appliquer au protégé, à la principale victime des actes dénoncés, à M. Ambatielos, qui, sans aucun doute, n'a pas connu beaucoup de nuits excellentes depuis qu'il a subi son étrange aventure d'avoir payé en 1919-1920 environ deux millions de livres sterling et de s'être trouvé au bout de moins de deux ans, alors que son vendeur était le Gouvernement britannique, à la fois dépouillé de son argent et des navires. Certes, en ce qui le concerne, le temps passé et la prolongation de sa privation de la jouissance et de la disposition de la somme qu'il avait dépensée n'ont pas été de nature à compenser ou à éteindre quelque peu son dommage.

Je me rends bien compte que son infortune est peu de chose en comparaison des calamités dans lesquelles se débattent tant de millions d'êtres humains que la Cour est impuissante à soulager. Je pense pourtant que, si modeste que soit l'enjeu, ce n'est pas chose indifférente pour le climat, même international, que la réparation, fût-ce d'une seule injustice, et le rappel à une plus claire conception de ses obligations d'un grand pays dont la bonne volonté n'est pas en cause.

Au surplus, Messieurs, vous n'en êtes pas encore là.

Il ne s'agit aujourd'hui que d'apprécier votre compétence ; mais lorsqu'il s'agit de compétence, il s'agit toujours d'un intérêt général, d'une question d'ordre public, d'ordre public international, et cela suffit assurément à expliquer la patience et la bienveillance dont la Cour a fait preuve à l'égard des deux Parties. Je crois être l'interprète de sir Eric Beckett comme de sir Hartley Shawcross en vous disant toute notre gratitude à cet égard.