INDIVIDUAL OPINION OF M. SPIROPOULOS

[*Translation*]

Though I am one of the majority, I am unable, to my great regret, to agree with it on all the points considered in and settled by the Judgment. I will confine myself, in what follows, to stating the points on which I disagree with the wording of paragraph 2 of the operative part thereof, in which the Court establishes its jurisdiction to adjudicate on the merits.

The drafting of paragraph 2 of the operative part would seem to impose upon the applicant State the duty of establishing that the Ambatielos claim "is based on a provision of the Treaty of 1886".

I differ from the view of the majority for the following reasons :

The Declaration annexed to the Treaty of 1926 provides that differences between the Parties, as to the validity of claims based on the provisions of the Treaty of 1886, must be referred to arbitration as provided for by the Protocol of 1886.

This Protocol creates for the Parties concerned, in the event of differences between them, an obligation to nominate their arbitrators for the purpose of setting up a Commission of Arbitration as provided for by the Protocol of 1886. This is a case of compulsory arbitration.

If the United Kingdom had nominated an Arbitrator, as requested by the Hellenic Government, it would be for the Commission of Arbitration to decide as to the validity of the Ambatielos claim. And this Commission would be unable to consider the Ambatielos claim as valid unless, in fact, it were based on the Treaty of 1886.

But, in questions of arbitration, it is at the present time well recognized that if one of the parties should, for any reason, consider that the arbitral tribunal lacks jurisdiction to deal with the dispute, the question whether it in fact has jurisdiction is one that cannot be decided, as an exercise of sovereignty, by the party raising the objection to the jurisdiction, but it must be decided by the arbitral tribunal itself. The tribunal which adjudicates on the case must also adjudicate on the objection. This is a point on which, at the present time, no one can have any doubt.

If this principle is applied to the present case, it must follow that, if the United Kingdom Government had accepted recourse to arbitration as proposed by the Hellenic Government, it would have been for the Commission of Arbitration instituted under the Protocol of 1886 to decide whether the Ambatielos claim was, or was not, based on the provisions of the Treaty of 1886.

In the light of these observations, the Court ought not to require that the Hellenic Government should establish that the Ambatielos claim "is based on a provision of the Treaty of 1886", since the obligation of the United Kingdom to accept arbitration is independent of the question whether that claim is, in fact, based on the Treaty of 1886. This obligation would exist even if the claim were not, in fact, based on the Treaty in question. It is a different thing that—as has already been said—the Commission of Arbitration would only have been able to recognize the Ambatielos claim as valid to the extent that it was, in fact, based on the Treaty of 1886. And it was to secure a decision on the United Kingdom's obligation to accept arbitration that the Hellenic Government seised the Court (see the Hellenic Application and subsequent submissions).

Moreover, since the Court is at present called upon to decide only the objection to the jurisdiction raised by the United Kingdom, it cannot, for procedural reasons, at the present time pass upon the validity of the Hellenic claim that it should hold that the United Kingdom is under an obligation to accept arbitration, a decision necessarily pertaining to the merits. From a procedural point of view the Court cannot give a decision upon the substance of the Greek claim until it has held that it has jurisdiction to do so.

Since, however, in my opinion, the Court is not called on to enquire whether the Ambatielos claim "is based on the provisions of the Treaty of 1886", it may be asked whether, in deciding on the merits of this Hellenic claim (that is to say, on the question whether the United Kingdom is under an obligation to accept arbitration), the Court should confine itself, after hearing the Parties, to referring them to the arbitration provided for by the Protocol of 1886, without being able to consider any other matter.

In answering this question it is necessary to bear in mind that, when a State has bound itself by a compulsory arbitration clause—and the Protocol of 1886 is an example of such a provision—that State cannot, in principle, have any ground for refusing an offer of recourse to arbitration. It is only in quite exceptional cases, where the invitation to resort to arbitration is manifestly an abuse on the part of the State requesting it, that recourse to arbitration is not compulsory. An example of such abuse would be a case in which one of the parties demanded the setting-up of the arbitral tribunal where no real dispute existed. In such a case it is indeed necessary to admit the other party's right to refuse to nominate its arbitrator. Such an allegation, if made, could of course be considered by the Court, when deciding upon the validity of the claim of the Hellenic Government in this case.

In conclusion, the Court, in my opinion, might well have limited itself to a finding that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim without adding the words "in so far as this claim is based on the Treaty of 1886", since those words would appear to impose upon the applicant State the duty of establishing that the claim in question is, in fact, based on a provision of the Treaty of 1886.

(Signed) SPIROPOULOS.