DISSENTING OPINION OF JUDGE BASDEVANT

[*Translation*]

I greatly regret that I am able only to concur in part with the operative portion of the Judgment, and as I also disagree with the way in which the Court arrives at its decision, I think that I should indicate my main reasons for my view and the conclusions which I draw from those reasons.

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The United Kingdom filed an objection to the jurisdiction in answer to the Application submitted by the Hellenic Government on April 9th, 1951. This objection to the jurisdiction was expressed in brief terms, but in terms having a very wide scope, by the United Kingdom Agent at the hearing in Court on May 17th, 1952. The course of the arguments made it clear that this objection to the jurisdiction met a twofold claim by the Hellenic Government. The latter Government asked the Court, in the first place, to deal with the merits of a claim by that Government regarding the treatment of M. Ambatielos by the British authorities and, secondly, to decide as to the obligation to refer this claim to the arbitration provided for by the Protocol of November 10th, 1886.

It is in this order that the validity of the Preliminary Objection raised by the United Kingdom should be considered. If the Court should find that it has jurisdiction to deal itself with the Ambatielos claim and if it accordingly retains this claim for its consideration, the request for a declaration that the claim must be referred to the arbitration provided for in the Protocol of 1886 becomes devoid of object and therefore the challenge to the jurisdiction to which it gave rise need not be further considered.

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In accordance with the principle laid down by the Court in other cases (I.C.J. Reports 1949, pp. 177-178, and 1950, p. 71), which is not disputed in the present case, the jurisdiction of the Court depends upon the consent of the States parties to the dispute. Therefore, since no special agreement has been concluded, we are here concerned with Article 29 of the Treaty of July 16th, 1926, between Greece and the United Kingdom, the only text relied upon as conferring jurisdiction upon the Permanent Court of International Justice so far as these two States are concerned; such a conferring of jurisdiction has now been extended to the International Court of Justice by the operation of Article 37 of the Statute of the Court.

Article 29 of the Treaty of 1926 confers upon the Court jurisdiction to decide any disputes that may arise between the contracting parties "as to the proper interpretation or application of any of the provisions of the present Treaty". The facts which the Hellenic Government submits for the Court's decision as to their conformity, or otherwise, with the United Kingdom's international obligations, occurred before the conclusion of the Treaty of 1926. The complaints which the Hellenic Government seeks to base upon these facts cannot be judged upon the basis of obligations flowing from the Treaty of 1926. These complaints are therefore outside the sphere of applicability of Article 29 : this Article provides no ground entitling the Court to deal with them.

The fact that the Treaty of 1926 is said to contain provisions more or less similar to those of the Treaty of 1886 cannot make the provisions of the Treaty of 1926 applicable to facts which occurred before the coming into force of this Treaty, and thus extend to such facts the effect of Article 29, the only provision conferring jurisdiction on the Court.

The Declaration which follows the Treaty of 1926 shows the correctness of this conclusion. That Declaration refers to differences as to the validity of claims based on the Treaty of 1886. The Hellenic Government contends that the Ambatielos claim is one of the claims referred to in the Declaration of 1926 ; there is no need to decide as to the correctness of this contention, for it is sufficient to observe that the Declaration provides, for the settlement of differences relating to such claims, the arbitral procedure created by the Protocol of 1886 ; it does not substitute judicial proceedings before the Court for this procedure. Furthermore, the Greek Legation in London stated in a note of August 6th, 1940 : "The Arbitral Committee provided for by the final Protocol of the Greco-British Commercial Treaty of 1886 is the only competent authority in the matter."

The Court therefore has no jurisdiction to deal with the merits of the Ambatielos claim as formulated in paragraph 1 of the Conclusions presented on behalf of the Hellenic Government at the hearing of May 17th.

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Having no jurisdiction to deal with the Greek claim relating to the treatment of Ambatielos, the Court is confronted by another aspect of the dispute. The Hellenic Government asked that the Ambatielos case should be referred to the arbitral procedure established by the Protocol of 1886 ; the United Kingdom Government refused. The Hellenic Government then asked the Court to say that this arbitral procedure should be applied in this case. This second dispute, which thus relates to the existence in this

case of an obligation to have recourse to the arbitral procedure of the Protocol of 1886, has been described in different terms in the course of the proceedings, and the jurisdiction of the Court to deal with it is disputed by the United Kingdom. The Court must therefore decide whether it has jurisdiction to deal with this point.

In the Conclusions submitted in its Counter-Memorial, the United Kingdom has employed an abstract form for the statement of its objection to the jurisdiction. The Court cannot deal with a submission so formulated. It has before it a concrete claim that it should state whether the United Kingdom is under an obligation to accept the submission to arbitration of the Hellenic claim relating to the Ambatielos case. The Court has to determine whether it is competent to adjudicate upon the existence of such an obligation in the present case.

The obligation which the Hellenic Government asks the Court to find in this case derives from the Protocol of 1886, which provides for the submission to a Commission of Arbitration, constituted by the two Governments, in each case, for this purpose, of disputes arising between them respecting the interpretation or the execution of the Treaty of 1886, or the consequences of any violation thereof. The Hellenic Government requested that its claim in the Ambatielos case should be submitted to arbitration ; the United Kingdom Government refused, and the arbitration clause of the Protocol of 1886 therefore did not take effect.

There was thus an example of the gap existing in the machinery of an arbitration clause which, as is frequently the case, can only become effective as the result of the joint action of the two States in conflict : in this case such joint action was necessary for the constitution of the Commission of Arbitration. Where one of the States adopts the view that the case is not one calling for arbitration, the operation of the arbitration clause becomes impossible. This gap, which exists also in respect of other treaty provisions, has manifested itself in other cases besides the present one. Attempts have at times been made to fill this gap. One such attempt was made in Article 53 of The Hague Convention I of October 18th, 1907, a provision which has however been made inoperative, so far as they were concerned, by a number of States, including Greece, by means of a reservation.

The Protocol of 1886 left the gap unfilled. It does not itself provide any remedy for this defect. The Hellenic Government contends that a remedy is provided by Article 29 of the Treaty of 1926, and the Declaration following this Treaty, on the ground that the Court, by virtue of these texts, has jurisdiction to decide whether the Ambatielos claim should be submitted to arbitration in application of the Protocol of 1886. According to this argument, Article 29 and the Declaration of 1926 impliedly added to the undertaking to arbitrate given in 1886 a further clause conferring

jurisdiction on the Court to adjudicate upon disputes arising with regard to the interpretation or the application of the arbitration clause in the Protocol of 1886.

The Declaration of 1926 provides that any differences which may arise between the two Governments as to the validity of claims on behalf of private persons based on the provisions of the Treaty of 1886 "shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10th, 1886". Article 29 of the Treaty of 1926 confers jurisdiction on the Court to deal with disputes as to the interpretation or application "of any of the provisions of the present Treaty". It was contended, on behalf of the Hellenic Government, that the Declaration of 1926 was an integral part of the Treaty of the same date, that what was therein provided was to be regarded as a provision of that Treaty, that, consequently, a dispute as to the interpretation or application of the Declaration was within the jurisdictional clause contained in Article 29 and that thus a way was opened for the admission of the Court's jurisdiction to decide as to the interpretation or application of the arbitration clause contained in the Protocol of 1886 and referred to in the Declaration of 1926.

Underlying this argument is the idea that the Declaration is an integral part of the Treaty of 1926, that it is a provision of this Treaty. If this proposition be not accepted, the whole argument founded upon it falls to the ground, for the Declaration makes no reference to the Court and does not directly confer any jurisdiction upon it.

In order to determine whether the Declaration is or is not part of the Treaty, the Parties presented lengthy arguments concerning the external features of the Declaration in relation to the Treaty of 1926, the references that have been made to both of them, and the place attributed to them in the documents connected with them. For a proper appreciation of the significance which ought to be attributed to any factor of this nature a preliminary observation is called for.

The drafting and the signature of an international agreement are the acts by means of which the will of the contracting States is expressed ; ratification is the act by which the will so expressed is confirmed by the competent authority, for the purpose of giving it binding force. All these acts are concerned with the substance itself of an international agreement. But the recording of these acts in the instruments which are designed to give them material existence involves the physical operations of writing, printing, transmission by one party to the other, etc., operations which do not contribute to the formation of the will of the contracting States ; those who have the task of forming, expressing or confirming this will, do not, as a rule, take part in these physical operations ; these operations commonly take a form deriving from

tradition, which is followed scrupulously, and therefore blindly, by the officials entrusted with this material task. It would be wrong to attribute to the details of form thus superimposed upon the juridical act of the conclusion of a treaty any determining influence, when it becomes necessary, in case of doubt, to ascertain the true meaning of the agreement which has been reached, the character which the parties intended to give to any given agreement concluded between them.

The scope to be given to a particular expression employed, or to a particular form which has been followed, should be considered in the light of these remarks when it is sought to determine whether the Declaration of 1926 is to be regarded as constituting a provision of the Treaty of the same date.

In this connection, it is of particular significance that it was the very persons who were responsible for expressing the will of the States who chose to use, in Article 29, the expression "provisions of the present Treaty", and not a more comprehensive expression. It was they who chose to give their agreement concerning claims based on the Treaty of 1886 the form of a separate provision, and not of an article in the Treaty of the same date ; it was they who gave it the title of Declaration and not that of an additional article, who saw fit to append their signatures to it, separately from the Treaty, and to make no reference to it in the Treaty, in contra-distinction to what they did in the case of the Schedule which precedes it. All this, for the reasons indicated above, is of greater importance in determining the character of the Declaration than the fact that the Declaration was printed after the Treaty and the Schedule, in one document with consecutive pagination, physical details which, like others of the same kind, are governed by the actions of officials who, unlike plenipotentiaries, were not responsible for elaborating and stating the will of the contracting Parties.

Similarly, when they signed the instruments of ratification—act by which they confirmed the agreement reached by their respective Plenipotentiaries and by which they gave the Declaration a definitive character of the will of the contracting States—the President of the Greek Republic and the British Monarch were merely confirming what had already been declared by their Plenipotentiaries. They did not direct their minds to details, often superfluous or incorrect, which officials, unqualified to interpret, complete or correct the intentions of their Sovereigns, borrowed from forms which they traditionally and blindly followed.

An examination of the various factors relied upon on either side—if undertaken with care to attribute importance only to those considerations which throw light on the intentions of those who alone were qualified to declare the will of their respective Governments and not to considerations which do not relate to

the formation of this will—should lead to the view that the Declaration is distinct from the Treaty, and not a clause or provision of the Treaty itself ; such an examination should also lead to the reading of Article 29 as it is written—that is to say, as giving the Court jurisdiction in respect of disputes as to the interpretation or application of the "provisions of the present Treaty"—and not to the substitution, for these perfectly clear words, by means of interpretation, of the words "provisions upon which agreement was reached by the Parties to-day", or some such words of lesser precision.

This independent character of the Declaration also clearly appears if, putting aside particularities of form and details of presentation, one has regard to the substance of the matter, with a view to considering whether the Declaration, in spite of its separate presentation, does not constitute a sort of supplementary provision of the Treaty, which it would have been proper to describe as an additional article : that was the method adopted by Max Huber in his Report on the British claims against Spain, when he had to decide as to the independent character of an agreement which he was called upon to interpret (*Reports of International Arbitral Awards*, II, pp. 632-633).

The Declaration does not explain any clause of the Treaty. Nor does it explain its general effect, which has been said to be the abrogation of the Treaty of 1886 by the Treaty of 1926. In fact, not only did the Treaty of 1926 contain no provision abrogating the Treaty of 1886, but it did not effect any tacit abrogation of the Treaty of 1886. The Treaty of 1886 did not cease to be in force as the result of any express or implied abrogation by the Treaty of 1926, but as a result of its denunciation by the Hellenic Government on March 3rd, 1919. The date upon which this denunciation was to take effect was the subject of a number of postponements, and it was finally fixed as at the date of the coming into force of the new Treaty. The coming into force of the Treaty of 1926 thus provided a date adopted by both Parties on which the earlier denunciation would have legal effect ; it is not itself the juridical source of the extinguishment of the Treaty of 1886 : this extinguishment resulted from the denunciation of the Treaty.

Consequently the Declaration of 1926, considered from the point of view of its content, is not an instrument which explains the Treaty of 1926, but an agreement relating to one of the effects of the lapsing of the Treaty of 1886, this lapsing being itself the result of the denunciation of this Treaty. From the point of view of its substance, even more clearly than from the point of view of its form, the Declaration must be regarded as separate from the Treaty. It cannot be regarded as, or even assimilated to, a provision of the Treaty. It follows that the jurisdictional clause of Article 29 of the Treaty is not applicable to it.

The Declaration of 1926 was designed to preserve, in respect of the claims therein referred to, the earlier régime resulting, so far as the merits were concerned, from the Treaty of 1886, and, so far as the procedure for the settlement of disputes was concerned, from the Protocol of 1886, to which it specifically refers. The earlier régime was preserved as it stood, with its advantages and disadvantages. Its disadvantages (the possibility of frustration of the arbitration procedure) only became apparent later. There is nothing to suggest that in 1926 there was any thought of remedying this defect with regard to claims arising falling within the Treaty of 1886. If this had been thought of, the system adopted would not have been to entrust to the Court the settlement of a dispute which might arise as to whether, in any given case, there was an obligation to resort to arbitration, while at the same time preserving the arbitral procedure before a Commission of Arbitration appointed *ad hoc* to deal with the principal dispute, that relating to the validity of the claim ; rather would there have been a complete substitution of the Court's jurisdiction for the arbitral procedure provided for in 1886. This was not the course adopted. It is impossible to attribute to the framers of the Declaration an intention which they never expressed, namely to create a system of such complexity, and one which, at the present time, neither of the Parties would wish to be applied.

It is therefore necessary to recognize that the Declaration leaves the claims which a party seeks to base upon the Treaty of 1886 legally in the same position as they occupied formerly. It leaves unaffected the gap in the operation of the arbitration clause of the Protocol of 1886. If we have regard to the stage of development of international law at that period, and to the fact that in 1926 neither of the two States had subscribed to the Declaration relating to the compulsory jurisdiction of the Court, there is nothing surprising about this. The Court therefore has no jurisdiction to deal with a dispute concerning the existence, in a given case, of an obligation to resort to arbitration pursuant to the Protocol of 1886. In other words, Article 29 of the Treaty of 1926 does not appear to me to be applicable to such a dispute.

Furthermore, if it be accepted that the Declaration is a provision of the Treaty of 1926, that would mean that the Court has jurisdiction to deal with a dispute concerning the interpretation and application of the Declaration : that would authorize the Court, in the present case, to adjudicate upon the British contention that it is entitled to refuse to the Ambatielos claim the benefits of the Declaration, on the ground that it was not presented prior to the Declaration.

But a decision on this point is not sufficient to resolve the question whether there exists any obligation to refer the Ambatielos claim to arbitration. Such an obligation, if it exists, arises from the Treaty and the Protocol of 1886 : the dispute as to the

existence, in this case, of such an obligation is a dispute concerning the interpretation and application of that Treaty and that Protocol. But Article 29 did not confer on the Court jurisdiction to deal with a dispute which, in the way now contemplated, relates exclusively to the interpretation and the application of the Treaty and Protocol of 1886 : it has never been contended—and it is manifestly impossible to say—that the provisions of that Treaty and Protocol are provisions of the Treaty of 1926.

In conclusion, the Court ought in this case simply to observe that the Declaration of 1926 left the Parties with the régime created by the Treaty and the Protocol of 1886, a régime which remained completely unchanged by the Declaration, and that it is therefore for the Parties to take such action as they deem proper in pursuance of the provisions of the Treaty of 1886, and that the Court has not been invested by the Parties with any power to substitute itself for them in determining the action which ought to be taken in pursuance of those provisions in the present case.

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The foregoing considerations lead me to the conclusion that the Court has not been given jurisdiction either to deal with the merits of the claim presented by the Hellenic Government in the Ambatielos case, or to consider and decide whether there is an obligation binding the States at issue to submit this claim to the arbitration provided for by the Protocol of 1886.

(Signed) BASDEVANT.