DISSENTING OPINION OF JUDGE KLAESTAD

The Hellenic Government, which has not made any declaration under Article 36 (2) of the Court's Statute, contends that the jurisdiction of the Court can be derived from Article 29 of the Treaty of Commerce and Navigation of 1926 between Great Britain and Greece. The text of this Article is as follows :

> "The two Contracting Parties agree in principle that any dispute that 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."

The facts invoked by the Hellenic Government relate to the period from 1919 to 1923. Such facts can hardly involve an interpretation or application of provisions of a treaty which did not exist at the time when the acts complained of were done. One cannot commit a breach of non-existing treaty provisions, and it cannot make any difference if such provisions in a future treaty might become more or less similar to some of the provisions of the Anglo-Greek Commercial Treaty of 1886 actually existing at the time when the alleged breaches of those provisions were committed. The two Treaties were independent legal instruments, governed by different arbitration clauses.

The Hellenic Government further contends that the jurisdiction of the Court can be derived from the Declaration attached to the Treaty of 1926. The text of this Declaration is as follows :

> "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 differences 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."

As the Declaration itself does not refer any dispute to the Permanent Court of International Justice, the contention of the Hellenic Government is that the Declaration is a part of the 1926 Treaty and as such is covered by the arbitration clause in Article 29. The

appreciation of this contention depends on considerations of form as well as of substance.

As to matters of form, it should be noted that the Treaty and the Declaration were treated as two separate instruments, in so far as they were drafted and issued as separate documents and signed separately. On the other hand, they were signed at the same time by the same signatories, and the Declaration was ratified by both Governments, together with the Treaty. That the two instruments were ratified together and covered by the ancient routine formula for ratifications does not necessarily mean that the one is to be regarded as a part of the other. As this point is developed in the Dissenting Opinion of President Sir Arnold McNair, I shall not deal further with it.

As to matters of substance, it should be taken into consideration that nothing in the Treaty or Declaration indicates that the Declaration shall be regarded as a part of the Treaty. The Declaration does not present itself as an interpretation of any of the Treaty provisions, nor does it appear as an application of any of those provisions. It does not in any way modify the Treaty. It adds nothing to its provisions, nor does it subtract anything from them.

It has been argued that the Declaration affects the interpretation of certain articles of the 1926 Treaty in the sense that it prevents the coming into force of the Treaty from extinguishing claims which have accrued out of facts governed by the 1886 Treaty. The real and only scope of the Declaration is, however, in my opinion, that it provides what is to be done with certain claims accrued under the 1886 Treaty when that Treaty disappears. It keeps such claims alive, together with the arbitral procedure prescribed by the Protocol attached to the 1886 Treaty. It relates to the 1886 Treaty, and to that Treaty only.

Having regard to these various considerations, I am inclined to hold that the Declaration cannot be regarded as a part of the 1926 Treaty, and that Article 29 therefore does not apply to it. I shall limit myself to these brief remarks with regard to this aspect of the matter, since the following considerations are, in my opinion, more conclusive. I shall now examine this preliminary dispute on the hypothesis that, contrary to my view, the Declaration does form a part of the Treaty.

Article 29 contains a general arbitration clause by which the Parties "agree in principle that any dispute that 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"—arbitration by the Permanent Court of International Justice (or now by the International Court of Justice by the operation of Article 37 of the Court's Statute).

The Declaration contains a special arbitration clause which refers disputes as to certain particular claims based on the 1886 Treaty to arbitration in accordance with the provisions of the 1886 Protocol. This special arbitration clause must, in accordance with general principles of interpretation, prevail over the general arbitration clause.

In fact, the Parties agreed "in principle" that disputes as to the interpretation or application of the provisions of the 1926 Treaty should be referred to the Court. But when they considered the particular claims based on the 1886 Treaty, they expressly provided that disputes as to such claims should be referred to the Arbitral Commission. They maintained for such disputes the arbitral procedure of the 1886 Protocol. The Parties agreed, in other words, that these two different methods of arbitration should exist side by side. Even if the Declaration is to be regarded as a part of the Treaty of 1926, the method of arbitration prescribed by Article 29 could not therefore be applied in the case of disputes concerning claims based on the Treaty of 1886. For such disputes the other method of arbitration was expressly maintained.

I shall now take a step further and assume that, contrary to my view, Article 29 does apply to the Declaration, and that the Court has jurisdiction to interpret and apply this Declaration and to decide whether the United Kingdom Government is under an obligation to submit the present dispute to the Arbitral Commission.

The Declaration contains various conditions for the submission of a dispute to that Commission. The claim must be "based on the provisions of the Anglo-Greek Commercial Treaty of 1886". It must be made "on behalf of private persons". The difference must have arisen "between our two Governments". It must relate "to the validity of such claims". In this connection should also be mentioned the contention of the United Kingdom Government that the claim must have been formulated before the Declaration was signed. This alleged condition invoked by the United Kingdom Government relates, in my opinion, as do all the other above-mentioned conditions, to the question of the interpretation or application of the Declaration and not to the question, now under consideration, as to whether the Court has jurisdiction to interpret and apply the Declaration. Further conditions are contained in the 1886 Protocol to which the Declaration refers.

Before the Court could decide whether the United Kingdom Government is under an obligation to submit the dispute to the Arbitral Commission, it would have to determine the conditions prescribed for such a submission and to ascertain whether these conditions are fulfilled.

On the other hand, the merits of the dispute could not in any case, by virtue of the Declaration, be referred to the Court, since it is expressly provided in that Declaration that differences as to the validity of claims based on the 1886 Treaty shall, at the request of either Government, be referred to the Arbitral Commission.

On the hypothesis that the Court has jurisdiction to interpret and apply the Declaration, there would thus be established a duality of jurisdiction with regard to disputes relating to such claims. For one and the same dispute there would be two different processes of arbitration. Questions relating to the interpretation or application of the Declaration and to a part of the 1886 Protocol, including the question of the competence of the Arbitral Commission, would have to be referred to the Court, while other questions arising out of the same dispute, including the appreciation of the merits, would have to be submitted to the Arbitral Commission. While, for instance, a difference as to the validity of a claim would have to be referred to that Commission, as expressly prescribed by the Declaration, the question whether the difference, in fact, does relate to the validity of the claim would have to be referred to the Court, since this is a condition for submission to arbitration and involves an interpretation or application of the Declaration.

Such a dual arbitral procedure for one and the same dispute would be so complicated and artificial, so time-wasting and unusual, that it can hardly be believed to have been contemplated and accepted by the Parties to the Treaty and Declaration of 1926. In fact, they prescribed nothing of the kind, as far as I can see. They simply referred disputes concerning claims based on the 1886 Treaty to arbitration in accordance with the 1886 Protocol. They did not refer any question relating to such disputes to the Court. They did not prescribe that these disputes, or parts thereof, shall be settled by the method of arbitration provided for by Article 29 of the 1926 Treaty, though they could easily have done so if it had been their intention.

It should, moreover, be taken into consideration that, according to a recognized principle of international law, an international tribunal has the power to determine its own competence. It would accordingly be for the Arbitral Commission itself to decide whether it is competent to deal with a dispute referred to it. The Commission could be excluded from exercising such a competence only by an express and clear provision to that effect ; but no such provision limiting the competence of the Commission is contained in Article 29 of the 1926 Treaty or in the Declaration. It is difficult to believe that the Parties, by the provisions of Article 29, intended to confer also on the Permanent Court of International Justice the competence to decide whether a dispute is within the competence of the

Arbitral Commission, thereby exposing themselves to the risk that the two tribunals might arrive at opposite results.

For these reasons, I have arrived at the conclusion that the Court lacks jurisdiction in the matter. This conforms with the view expressed by the Greek Government in a note to the Foreign Secretary of the United Kingdom, dated 6th August 1940, in which it declared : "From the enclosed Memorandum it clearly appears, in the opinion of the Royal Hellenic Government, that 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...." This interpretation by the Greek Government itself as to the exclusive competence of the Arbitral Commission confirms the conclusion that the Court has no jurisdiction in the present case.

(Signed) Helge KLAESTAD.