DISSENTING OPINION BY SIR ARNOLD McNAIR, PRESIDENT, AND JUDGES BASDEVANT, KLAESTAD AND READ

To our great regret we are unable to concur in the Judgment of the Court. We must therefore indicate the way in which we understand the task of the Court in the present case, the meaning of the question submitted to it, the answer which should be given, and the grounds on which we base our opinion.

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By the Judgment of July 1st, 1952, in which the Court defined the limits of its jurisdiction in the Ambatielos case, it is now called upon to "decide", in accordance with the terms of that Judgment, "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, in so far as this claim is based on the Treaty of 1886". The Court must say whether or not there is an obligation, as so defined, binding upon the United Kingdom. In their final Submissions the Parties clearly recognized that this was the object of the Judgment now to be given by the Court. The Court, having found that it has jurisdiction for this purpose, is called upon to adjudicate upon the merits of the difference between the Parties as to the existence or non-existence of this obligation. As to the difference between the same Parties with regard to the validity of the Ambatielos claim, the Court has declared, in the Judgment mentioned above, that it has no jurisdiction to decide upon the merits of that difference.

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Having been required by the Application of the Hellenic Government 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, the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" (Article 38, paragraph 1, of the Statute), must for this purpose examine and take into account all legal factors which it deems relevant. There is no rule of law which limits this examination. The Court indeed lacks jurisdiction to adjudicate upon the validity of the Ambatielos claim ; provided, however, that it confines itself to stating whether or not there exists an obligation to submit the difference as to the validity of that claim to arbitration, it will not trench upon the

question of validity itself. If it be found that there is any point of law which is relevant to the solution of both these differences—which were clearly distinguished by the Judgment of July 1st, 1952—this cannot constitute a valid ground for the Court's refraining from examining that point and forming an opinion as to its importance for the purpose of determining whether an obligation to have recourse to arbitration exists in this case.

The Court is called upon to say whether or not there exists an obligation to set up a Commission of Arbitration whose task it would then be to decide as to the validity of the Ambatielos claim. An affirmative reply to this question can be given only if the existence of this obligation can be established on a basis of law. Unless this can be established, it does not appear to us to be possible to give an affirmative answer to the question which the Court is required to decide. It is therefore necessary to examine all the factors susceptible of affecting the answer to be given to this question. It is only after such an examination, and in the light of what may emerge from it, that it will be possible to decide whether a Commission of Arbitration should be set up. It was in this way that the Court considered that the respective functions should be divided in a case—the *Interpretation of Peace Treaties*—which, apart from the fact that the Court had there before it a request for an advisory opinion, had much in common with the present case. The Court there pointed out that it had to give an opinion on the applicability to certain disputes of the procedure for settlement by means of Commissions instituted by the Peace Treaties, and not on the merits of these disputes. The same is true in the present case. The Court in that case itself considered the question whether the disputes which it found to exist "were among those for which" the Peace Treaties had provided a procedure for settlement. The Court found that the disputes in question related to the performance or non-performance of obligations arising from certain articles of the Peace Treaties. The Court made this finding without being hampered in any way by the jurisdiction of the Commissions charged with the duty of deciding as to the validity of the allegations forming the subject-matter of the disputes. Having made this finding, it deduced therefrom an obligation on the States concerned to co-operate in the procedure for settlement prescribed by the Treaties. In our opinion, the Court in the present case must make a similar investigation in order to ascertain whether the conditions necessary for establishing an obligation to arbitrate are present.

Similarly, in the Advisory Opinion relating to the *Interpretation of the Greco-Turk Agreement of December 1st, 1926*, the Permanent Court of International Justice, having been asked who was entitled to seise the President of the Greco-Turk Arbitral Tribunal of certain proceedings, gave its opinion on this question on the basis of the relevant provisions and did not leave it to the President of this Tribunal to deal with the point by deciding, in due course, whether

he had been properly seised. Yet what was involved in that case was a question of the capacity necessary for the seising of an authority which already existed. When, as in the present case, it is a question of adjudicating upon the obligation to co-operate in setting up a body which would be called upon to make a decision at a later stage, the arguments in favour of a decision in advance on the question whether all the necessary conditions are satisfied appear to be still more convincing.

There is no rule of law nor anything contained in Article 29 of the Treaty of 1926 which restricts the Court in the exercise of its jurisdiction to decide upon the existence of the obligation to arbitrate. It follows from this Article, in accordance with the interpretation given in the Judgment of July 1st, 1952, that the Court has jurisdiction to deal with any dispute as to the interpretation or application of the Declaration of 1926 : this is the question which arises in ascertaining whether the arbitration clause contained in that Declaration is to be applied in the present case. Nothing contained in this Article or in the Declaration imposes any limitation on the power of the Court to consider any factor susceptible of affecting its judgment and, in particular, nothing therein contained directs it to surrender this examination to any other body. Provided the Court confines itself, in the operative part of its Judgment, to adjudicating upon the existence of the obligation to arbitrate, its power to consider the reasons determining its decision does not appear to us to be limited by the fact that a Commission of Arbitration may be constituted for the purpose of deciding as to the validity of the Ambatielos claim.

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By the Declaration of 1926, the United Kingdom consented to the submission to arbitration of any difference with the Hellenic Government "as to the validity" of "claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886". On the question whether this provision is applicable to the "difference as to the validity of the Ambatielos claim", the operative part of the Judgment of July 1st, 1952, added the following words : "in so far as this claim is based on the Treaty of 1886". This being the case, it is necessary to consider the meaning, which is in issue between the Parties, of the expression "claims .... based on the provisions of the Anglo-Greek Commercial Treaty of 1886", an expression which is contained in the Declaration and repeated in the Judgment.

It is not enough for the Hellenic Government to invoke a provision of the Treaty of 1886 for the Ambatielos claim to be considered as "based on the provisions of the .... Treaty of 1886" within the meaning of the Declaration of 1926. There is nothing in the

Declaration which authorizes either Party to the Treaty and Declaration of 1926 to impose its own subjective interpretation of this expression. The Declaration states it objectively, and the Court, which is empowered by Article 29 of the Treaty to interpret the expression, must determine in an objective way whether the claim presented under the Declaration is or is not based on the provisions of the Treaty of 1886.

The arbitration clause, in the form in which it appeared in the Protocol of 1886, was open to the risk of becoming ineffectual in cases where it was invoked by one State and the respondent State alleged that the difference existing between them lay outside the scope of the provisions of the clause. The negative view of the respondent State was then sufficient to prevent the practical application of the clause. By the combined effect of the Declaration of 1926 and Article 29 of the Treaty of the same date, a remedy was provided for this defect in the arbitration clause: by this remedy the Court is empowered to decide this preliminary difference. The effect of this is that the opinion which will prevail will be that formed by the Court itself as to the character of the difference and, in the present case, on the question whether the claim which has been presented is or is not a claim based on the provisions of the Treaty of 1886.

When the Permanent Court and the present Court have had to ascertain whether a dispute fell within the scope of an arbitration clause or a compulsory jurisdiction clause, these Courts have always considered that it was their duty first to determine the categories of disputes to which the clause in question was applicable and then to enquire whether the dispute in question fell within one of these categories.

This is the consequence of a principle of international law which forms the basis of Article 36 of the Statute of the Court. In the *Eastern Carelia* Opinion, the Permanent Court invoked this principle, and declared that "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement". This principle was thereafter applied on a number of occasions by the Permanent Court, in particular in the cases concerning the *Mavrommatis Palestine Concessions*, *German Interests in Polish Upper Silesia*, the *Factory at Chorzów*, and the *Rights of Minorities in Upper Silesia*. That Court applied the principle with particular care when it had to decide the scope of an exception *ratione temporis* contained in a compulsory jurisdiction clause invoked before it in the *Phosphates in Morocco* case. The principle was also applied by the International Court of Justice in the *Corfu Channel* case, the *Interpretation of Peace Treaties* case and the *Anglo-Iranian Oil Company* case.

In applying this principle for the purpose of deciding whether a given jurisdictional clause covered a given dispute which it was alleged could be submitted to it by virtue of the clause in question, the Permanent Court was not satisfied by a mere doubt resulting from weighty arguments presented before it, nor by *prima facie* considerations or considerations of a provisional character. In the *Mavrommatis Palestine Concessions* case, it invoked "the fact that its jurisdiction .... is invariably based on the consent of the respondent", and it expressly stated that it "cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate". In the case concerning the *Factory at Chorzów*, after repeating that its jurisdiction "is always a limited one, existing only in so far as States have accepted it", the Court added :

> "When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court."

Before declaring a State to be bound to submit a dispute to the decision of an international tribunal, the Permanent Court and the present Court have always considered it necessary to establish positively, and not merely on *prima facie* or provisional grounds, that the State in question had in some form given its consent to this procedure. No distinction in this connection has been drawn between cases where the jurisdiction of the Court was involved and cases where that of some other tribunal or authority was in question.

Since there is nothing in the Declaration of 1926 to indicate an intention that *prima facie* considerations should be regarded as sufficient, it is our opinion, based on the principle referred to above and the way in which this principle has been invariably applied, that the United Kingdom can only be held to be under an obligation to accept the arbitral procedure by application of the Declaration of 1926 if it can be established to the satisfaction of the Court that the difference as to the validity of the Ambatielos claim falls within the category of differences in respect of which the United Kingdom consented to arbitration in the Declaration of 1926.

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It is necessary therefore to examine the matter and, without prejudging the validity of the Ambatielos claim, to ascertain what claims the Declaration of 1926 was intended to refer to and whether the Ambatielos claim falls within the category of claims so determined.

The claims referred to by the Declaration of 1926 are claims "based on the provisions of the Treaty" of 1886. These words should be construed in their natural and ordinary meaning, as has been said over and over again and, in particular, in the Advisory Opinion of the Court on the *Competence of the General Assembly for the Admission of a State to the United Nations*. In our opinion, the natural and ordinary meaning of these words is limited to claims whose legal support is found in the provisions of the Treaty ; that is, claims whose validity should be appraised in the light of these provisions ; the natural and ordinary meaning of the words, in our opinion, excludes claims whose support must be sought elsewhere. In accordance with the method of interpretation adopted by the Court in the above-mentioned Opinion, we would add that nothing in the Declaration suggests that the Parties intended to confer any other meaning on these words.

A reading of the Declaration as a whole confirms the view that the natural meaning of the words used corresponds to the purpose which the Parties had in mind. The Declaration begins with a clause whose purpose is to keep alive, in spite of the lapse of the Treaty of 1886, claims on behalf of private persons based on the provisions of that Treaty. This clause can only have a meaning, and can only have effect, in respect of claims legally based on the Treaty of 1886. It cannot be extended to cover claims in respect of which those provisions might be invoked without being really applicable. It was in the nature of things that this saving clause could only safeguard claims that had a legal basis in the Treaty of 1886. The arbitration clause in the Declaration of 1926 mentions expressly the claims referred to in the saving clause. It cannot extend to other claims.

Thus, and by virtue of the express reference made by the Declaration to the Treaty of 1886, a difference concerning a claim on behalf of a private person comes within the scope of the arbitration clause of the Declaration of 1926 only if the examination of the claim demonstrates that it falls within the framework of the Treaty.

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In order to determine whether the arbitration clause in the Declaration of 1926 should be applied in the present case, we must ascertain whether the difference under consideration falls within the category of differences which the Parties have agreed to submit to arbitration.

The sphere of application of the arbitration clause in the Declaration of 1926 has been defined by reference to the relevant law, namely, the provisions of the Treaty of 1886. This method has been frequently adopted in the drafting of arbitral or jurisdictional clauses.

The method to be followed must therefore be to enquire whether the dispute as to the validity of the Ambatielos claim falls to be decided by the application of the provisions of the Treaty of 1886. This method was described by the Permanent Court in the *Mavrommatis Palestine Concessions* case as follows :

> "For this reason the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the prosivional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes."

The same method was adopted by the Permanent Court in the *Phosphates in Morocco* case and by the present Court in its Advisory Opinion concerning the *Interpretation of Peace Treaties*. Having to decide whether the disputes under consideration were among those which were subject to the provisions of the Peace Treaties for the settlement of disputes by means of Commissions, the Court examined the subject-matter of the differences. It found that the disputes related "to the question of the performance or non-performance of the obligations provided in" certain articles of the Treaty, and it deduced from this finding that these disputes "are clearly disputes concerning the interpretation or execution of the Peace Treaties", and that furthermore the Governments concerned were bound to carry out the provisions of those articles in the treaties relating to the settlement of disputes by means of Commissions.

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We therefore have to consider whether the Ambatielos claim falls within the framework of the Treaty of 1886. In order to do this, it is necessary to examine the claim as it has been put forward, without enquiring whether the facts alleged are true or not, and to consider the provisions of the Treaty of 1886 which the Hellenic Government has invoked.

The origin of the claim is to be found in a contract between Mr. Ambatielos and the British Ministry of Shipping for the sale of nine ships then under construction. Mr. Ambatielos has contended that this contract was not properly carried out by the seller, but this question of the breach of the contract is not one which has to be decided by international arbitration. It was sub-

mitted to English Courts by common accord of the Parties, as is stated in the British Note of 29th May 1933, and not disputed in the Hellenic answer of 3rd August 1933. The Admiralty Court gave judgment against Mr. Ambatielos, who appealed against this decision to the Court of Appeal but subsequently abandoned his appeal.

The present claim, as formulated by the Hellenic Government, relates to the way in which justice was administered in the proceedings in the English Courts between Mr. Ambatielos and the Board of Trade as the successor to the Ministry of Shipping. It has been alleged, on behalf of the Hellenic Government, that officials of the Board of Trade wrongly failed to produce in the Admiralty Court all the evidence available and that this resulted in damage to Mr. Ambatielos. The Hellenic Government also complains of the refusal by the Court of Appeal of leave to Mr. Ambatielos to adduce new evidence. The difference existing between the Hellenic Government and the United Kingdom Government is therefore concerned with a claim based on alleged improper administration of justice, in particular with regard to the production of evidence in proceedings in the English Courts. The question for this Court is to decide whether the matter of complaint thus relied upon falls within the provisions of the Treaty of 1886. Without passing upon the truth of the facts relied on, and assuming them to be established, without moreover passing on the legal or illegal character of these facts, it is possible to determine whether this legal or illegal character is or is not dependent on the application of the provisions of the Treaty of 1886, and to decide, as a result of the view formed on this point, whether the claim based on these facts is or is not one which should be referred to arbitration in application of the Declaration of 1926. Such a decision, relating solely to the obligation to resort to arbitration, will not prejudge any decision to be given as to the validity of the Ambatielos claim, which is not within the jurisdiction of the Court.

Is the claim of the Hellenic Government against the United Kingdom, the object of which has been thus defined, within the framework of the Treaty of 1886 ? The reply to this question must be in the affirmative before there can arise an obligation, in accordance with the Declaration of 1926, to submit the claim to arbitration. The provisions of the Treaty of 1886 invoked by the Hellenic Government must now be considered.

The Hellenic Government invokes Article XV, paragraph 3, of the Treaty of 1886. This Article provides :

> "The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the

persons admitted to the exercise of those professions according to the laws of the country."

This Article promises free access to the Courts ; it says nothing with regard to the production of evidence. Questions as to the production of evidence are by their nature within the province of the law of the Court dealing with the case *(lex fori)*. The Treaty could have laid down certain requirements in this connection, but it did not do so. The free access clause frequently found in treaties, more commonly in the past than at the present, has as its purpose the removal, for its beneficiaries, of the obstructions, which existed in certain countries as the result of old traditions, to the right of foreigners to have recourse to the Courts. Its object is, as it states, to ensure free access to the Courts, not to regulate the different question of the production of evidence. An extensive interpretation of the free access clause which would have the effect of including in it the requirements of the proper administration of justice, in particular with regard to the production of evidence, would go beyond the words and the purpose of Article XV, paragraph 3. Free access to the Courts is one thing ; the proper administration of justice is another. A distinction is traditionally drawn between the two as is shown, in particular, by the preparatory work of the 1930 Conference for the Codification of International Law (see in particular the Report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law, League of Nations, C. 196. M. 70. 1927. V, pages 96-100 and 104 ; Observations of the Hellenic Government on this Report, pages 167-168, and Bases of Discussion Nos. 5 and 6 by the Preparatory Committee, League of Nations, C. 75. M. 69. 1929. V, Vol. III, pages 48 and 51).

Finally, it is necessary not to lose sight of the fact that in this case the Court has to decide, on the basis of the meaning to be attributed to the free access clause, what is the extent of the obligation to arbitrate arising from the Declaration of 1926. With two interpretations of Article XV, paragraph 3, before us, we cannot subscribe to the one which would extend it to the production of evidence and thereby enlarge the obligation to submit to arbitration. It is particularly difficult to accept an interpretative extension of an obligation of a State to have recourse to arbitration. The Permanent Court in the *Phosphates in Morocco* case stated that a jurisdictional clause must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it. It went on to say with regard to the scope to be attributed to an exception *ratione temporis* contained in the compulsory jurisdiction clause invoked before it :

"it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction

disputes having actually arisen from situations or facts subsequent to its acceptance".

The free access clause does not do more than provide for free access and for national treatment as regards conditions, restrictions, taxes and the employment of counsel. The complaint, as put before the Court in this case, does not allege that Mr. Ambatielos was refused access to the English Courts, or that he was denied national treatment as regards conditions, restrictions, taxes or the employment of counsel. The Hellenic Government merely alleges that the production of evidence was effected in a manner which in its opinion was defective and detrimental to its national. Article XV, paragraph 3, is unconnected with this complaint. If any legal rule has been broken, it is not a rule contained in this Article.

In fact, when the Hellenic Government complains that the executive or judicial authorities of the United Kingdom have not acted according to the requirements of the proper administration of justice, it is alleging a violation of general international law. Can such a claim be considered to be based on a provision of the Treaty of 1886 ? At this stage we meet Article X of the Treaty of 1886 which has been invoked by the Hellenic Government. This Article contains a most-favoured-nation clause which, in its opinion, embodies certain references to the requirements of the proper administration of justice. But, having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment. The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.

The Hellenic Government has also invoked Articles I and XII of the Treaty of 1886 as a basis for its claim, but these Articles, like Article X, are unconnected with the administration of justice. They throw no light on the question whether the evidence was properly or improperly produced in the English Courts. Nor do they permit an opinion to be formed as regards the complaint of improper performance of the contract or of unjust enrichment, even assuming that these complaints fall to be considered by an international tribunal.

The difference as to the validity of the Ambatielos claim, in respect of which the Court has been asked to say whether it should be referred to arbitration in accordance with the Declaration of 1926, does not, therefore, appear to us to fall within the provisions of the Treaty of 1886 which have been invoked. A comparison between the object of the claim and the provisions of the Treaty thus leads us to the conclusion that the claim—whether it be justified or not—falls outside the scope of the arbitration clause in the Declaration of 1926.

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For these reasons, we consider that the Ambatielos claim does not fall within the category of claims in respect of which the United Kingdom has agreed to arbitration by the Declaration of 1926. Consequently the United Kingdom, in our opinion, is not under an obligation to submit this claim to the arbitral procedure provided for in that Declaration.

(Signed) Arnold D. McNAIR.
(Signed) BASDEVANT.
(Signed) Helge KLAESTAD.
(Signed) J. E. READ.