

DISSENTING OPINION OF PRESIDENT McNAIR

I have voted in favour of the first finding of the Court, namely, "that it is without jurisdiction to decide on the merits of the *Ambatielos* claim", though I go further than that and consider that the Court has no jurisdiction at all in this case. I regret that I am not able to concur in the second finding of the Court.

The question before the Court is whether or not the Court has jurisdiction to deal with a certain claim made upon the United Kingdom by the Hellenic Government on behalf of one of its nationals, *M. Ambatielos*. The United Kingdom Government has accepted the compulsory jurisdiction of this Court by making the Declaration specified in Article 36 of the Court's Statute, but the Hellenic Government has not done so, with the result that the Court is not invested with compulsory jurisdiction under this Article. The Hellenic Government, however, claims that Article 29 of the Anglo-Greek Commercial Treaty of 1926, coupled with Article 37 of the Statute of the Court which substituted this Court for the Permanent Court of International Justice, confers compulsory jurisdiction in this case.

Article 29 of the Treaty above mentioned 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 Treaty is accompanied by the following Declaration :

"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."

The claim is said to be based upon an Anglo-Greek Commercial Treaty of 1886 and thus to fall within the scope of this Declaration.

Both in the British Treaty Series, 1927, and in the League of Nations Treaty Series, Vol. LXI, p. 16, the title is "Treaty of Commerce and Navigation between the United Kingdom and Greece and accompanying Declaration signed at London, July 16th, 1926." The Treaty is followed by a Schedule and, below the Schedule, by the Declaration quoted above. The Schedule is specifically incorporated in the Treaty by Article 8 of the Treaty which contains the following sentence :

"The articles enumerated in the schedule to this Treaty, produced or manufactured in Great Britain and Northern Ireland, shall not on importation into Greece be subjected to higher duties than those specified in the schedule."

There is no such specific incorporation of the Declaration in the Treaty.

The Treaty ends as follows :

"In the event of doubt hereafter arising as to the proper interpretation of the English or Greek text, the English text shall be considered authoritative.

In witness whereof the respective plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done in duplicate at London in the English and Greek languages this 16th day of July 1926.

AUSTEN CHAMBERLAIN.
D. CACLAMANOS.
A. VOUIROS."

The accompanying Declaration ends as follows :

"Done at London the 16th July, 1926.

AUSTEN CHAMBERLAIN
D. CACLAMANOS.
A. VOUIROS."

The Schedule, for obvious reasons, contains no date and no signatures.

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Three questions arise in regard to ratification.

(a) Article 32 of the Treaty of 1926 provides that "The present Treaty shall be ratified...." There is no corresponding provision in the accompanying Declaration. In fact, what appears to have happened is that a printed text of the Treaty, Schedule and accompanying Declaration was sandwiched into the middle of the traditional standard printed form of the United Kingdom

Instrument of Ratification (for a copy see Satow, *Guide to Diplomatic Practice*, 3rd ed., pp. 408, 409), that is to say, between the formal introductory part and the formal concluding part, and then the Instrument was tied up with ribbon, dated, sealed, and exchanged for the Greek Instrument of Ratification.

There has been some controversy on the question whether or not the Declaration was also ratified by the United Kingdom, though, according to the practice of the United Kingdom, the Declaration did not require ratification, and the United Kingdom Government does not contend that the Declaration is not binding upon it. It appears that owing to the destruction of the Greek archives during the recent war, the United Kingdom Instrument of Ratification could not be found in Athens. The explanation given to the Court by the United Kingdom Agent is as follows:

“I have, however, found in the Foreign Office records a copy of the United Kingdom’s instrument of ratification, which was printed, and from this it appears that the United Kingdom did not ratify the Declaration. A certified photostat copy of this document is enclosed herewith. It is true that the Declaration is printed on the back of the copy of the Treaty contained in the ratification, but this is only because the printed edition of the Treaty prepared for signature (which had the Declaration printed on the back) was also used, as is customary, for the instrument of ratification, and it should not be inferred that the ratification was intended to cover the Declaration as well as the Treaty.”

Nevertheless, I consider that the fact that the United Kingdom Government handed to the Hellenic Government, by way of exchange, an Instrument of Ratification duly sealed and embodying the text of the Treaty, the Schedule and the accompanying Declaration, makes it necessary to hold that the Declaration was ratified at the same time, and by the same instrument, as the Treaty with its Schedule.

(b) There arises a different question, namely, whether a global ratification has the effect of making all the documents comprised in it parts of the Treaty which was the main subject-matter of the ratification, unless they would be so incorporated by virtue of the intention of the Parties, express or implied. My answer to this question is in the negative. The question whether documents accompanying a treaty—by whatever name they may be called, Declarations, Protocols, Additional Articles, Exchanges of Letters, etc.—are incorporated in the treaty or not, depends upon the intention of the contracting Parties. The intention to incorporate such a document in a treaty is frequently evidenced expressly by a written stipulation to the effect that it shall form an integral part of the treaty; or, alternatively, it may be implied from the juridical nature of the document and its relation to the treaty.

Of an express stipulation there are countless illustrations, old and recent ; for instance, in the Jay Treaty of 1794 between the United States of America and Great Britain (Miller, *Treaties of the United States of America*, Vol. 2, p. 272), where President Washington did "hereby declare that the said Treaty, and the said Additional Article form together one Instrument and are a Treaty between the United States of America and His Britannic Majesty"; or the Greco-Italian Commercial Convention of 24th November, 1926 (League of Nations Treaty Series, Vol. 63, No. 1480), where one of the two accompanying Declarations is expressed to be an integral part of the Treaty, while the other (which, incidentally, bears some resemblance to the Declaration of 1926 now under consideration) contains no such term ; or, again, Article 92 of the Charter of the United Nations, which states that the "annexed Statute" of this Court "forms an integral part of the present Charter". (Notice, incidentally, "the present Charter", not "the Charter of the United Nations signed at San Francisco the 26th day of June, 1945".) I shall deal later with the question whether the incorporation of the Declaration in the Treaty of 1926 can be implied.

(c) It is also suggested that it must be inferred from the expression "which treaty is, word for word, as follows", occurring in the United Kingdom's Instrument of Ratification, that all the documents (Treaty, Schedule and Declaration) which follow these words must be regarded as forming one treaty. If the history of this phrase is examined, I do not consider that it can sustain this argument. Either in this form or in some such phrase as "duquel la teneur de mot à mot s'ensuit", in Latin, French, English or German, this traditional formula has been in use in treaties and other public documents for at least 600 years. (See, for instance, Dumont, *Corps universel diplomatique du Droit des Gens et Recueil des Traités*, Vol. 2, pp. 22-26, where the formula occurs in two Acts of Cession and Renunciation between the King of France and the King of England dated 1360, "de quelles Lettres la teneur de mot à mot s'ensuit", or "de mot en mot", and many similar illustrations throughout the volumes of Dumont ; see also a Russian Instrument of Ratification of 1739 in Mervyn Jones, *Full Powers and Ratification*, p. 167, "desquels la teneur suit, transcrite de mot à mot"; and President Washington's ratification of the Jay Treaty of 1794, "which Treaty is word for word as follows ; to wit", in U.S. Senate Document No. 26 of 1919, "Ratification of Treaties, Methods and Procedure, etc.". p. 49.) The formal parts of treaties, and the documents connected with the making of treaties, such as Full Powers, Instruments of Ratification, Procès-verbaux of Exchange of Ratifications, etc.,

contain many expressions of an archaic and purely routine character, and I do not find it possible to infer from the expression "which treaty is, word for word, as follows" the intention of the Contracting Parties to incorporate all the documents which follow into the treaty; that is, I do not think that Article 36 (1) of the Statute of this Court envisages as one of the bases of its jurisdiction so slender a consensual foundation as is afforded by the use of one of these venerable and routine formulas. The corresponding expression in the Greek Instrument of Ratification is "the texts of which follow"

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Too much importance must not be attached to consistency in language, but it must be noted that Articles 8, 14, 19, 21, 25, 29, 30 and 32 of the Treaty of 1926, when referring to that Treaty, use the expression "the present Treaty" or "this Treaty", whereas the accompanying Declaration refers to it as "the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date", just as later on it refers to the Anglo-Greek Commercial Treaty of 1886. This language suggests to my mind that the signatories of the Declaration did not regard it as a part of the Treaty of 1926. If they had done so, they would have found it shorter, more natural and more consistent with the language of that Treaty itself to use the expression "the present Treaty" or "this Treaty"; moreover, it is unlikely that they would have lapsed into the first person and used the expression "our two Governments", which is more appropriate to an exchange of assurances by Ministers on behalf of their respective Governments than to a treaty.

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I shall now turn from questions of form and language to examine the juridical nature of the Declaration and its relation to the Treaty.

The genesis of the Declaration must be noted. It is not necessary for the Court, nor open to it at this stage, to construe the Declaration for the purpose of forming an opinion on the question whether or not the Ambatielos claim falls within it. It is, however, both permissible and necessary to examine the question why, and how, the Declaration came into being. It must be remembered that, until a date in 1926 about to be mentioned, the commercial relations between Greece and the United Kingdom were governed by the Anglo-Greek Commercial Treaty of 1886. This Treaty was denounced by the Hellenic Government in 1919, no doubt with

the intention that it should be replaced by a treaty more appropriate to modern conditions. The operation of the denunciation was suspended from time to time, and it did not actually take effect until the 28th July, 1926. Attached to the "Observations and Submissions of the Hellenic Government on the Objection to the Jurisdiction" is the following letter from Mr. Miles Lampson (as he then was) of the United Kingdom Foreign Office :

"Foreign Office.

22nd June, 1926.

The Greek Minister.

Sir,

Before proceeding to the signature of the commercial treaty between Greece and this country, I would ask for an assurance that the conclusion of the treaty will not be regarded by your Government as prejudicing the claims of British subjects for compensation or relief on the ground that the recent Greek loan is contrary to Article 13 of the Anglo-Greek Commercial Treaty of 1886, and for a further assurance that in the event of any difference of opinion between our two Governments with reference to the validity of these claims, the matter 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.

M. LAMPSON,

For the Secretary of State."

Upon receipt of this letter, the Hellenic Government, in order to generalize the reference to claims arising under the Treaty of 1886 and to make the proposed assurance reciprocal, submitted a draft Declaration, the terms of which are to be found in paragraph 13 of the Counter-Memorial of the United Kingdom dated 4th February, 1952. The United Kingdom Government, in reply, proposed the form of Declaration which was in fact adopted. The Declaration is evidently an elliptical document and seems to be due to the desire of both Parties that the expiry of the Treaty of 1886, then imminent, should not adversely affect claims "based" upon it, and the procedure of arbitration provided therein for them. I do not see how the provisions of the Treaty of 1926 could prejudice claims "based" on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them. Neither the expiry of the Treaty of 1886, nor the entry into force of the Treaty of 1926, could affect the survival and validity of claims "based" on a breach of the Treaty of 1886 which had already occurred. In other words, I consider that the first sentence of the Declaration was, however prudent, strictly speaking unnecessary and was

inserted *ex abundanti cautela*. On the other hand, the second sentence of the Declaration, that is, the sentence dealing with the arbitral procedure, was necessary to preserve that procedure, because it would otherwise lapse upon the expiry of the Treaty of 1886. What made the first sentence of the Declaration prudent, and the second sentence of the Declaration necessary, was not the Treaty of 1926 but the imminent expiry of the Treaty of 1886, which took effect on 28th July, 1926, by reason of its denunciation by the Hellenic Government. The Declaration does not touch or concern anything contained in the Treaty of 1926 but regulates something external and collateral to it.

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There are two other factors which support the conclusion that the Declaration is not part of the Treaty of 1926: first, the difference between the Treaty and the Declaration as to the respective periods of their duration, and, secondly, the difference in their respective provisions for the settlement of disputes. The effect of Article 32 of the Treaty of 1926 is that the Treaty was intended to last for at least three years from the date of its coming into force and thereafter would remain in force until the expiration of one year's notice given by either Party to the other. Thus it was capable of expiring at the end of three years from the date of its coming into force. On the other hand, no date is fixed for the expiry of the duration of the Declaration, and it would have been highly inconvenient and contrary to the intentions of the Parties that the arbitral procedure expressly maintained by the Declaration should fall to the ground at the same moment as the Treaty of 1926. This was an additional reason for making the Declaration a separate document and not making it a provision of the Treaty.

Moreover, it is necessary to note that the Declaration contains its own machinery for the settlement of disputes between the two Governments as to the validity of claims arising under the Treaty of 1886, namely, the arbitral procedure provided by the Protocol of November 10th, 1886, annexed to that Treaty. The fact that the Parties maintained this special machinery for dealing with these claims makes it difficult to believe that the general machinery of Article 29 of the Treaty of 1926 was intended to apply to any dispute concerning such a claim.

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The conclusion that I reach is that the Declaration is precisely what it is said to be in the League of Nations Treaty Series, Vol.

LXI, p. 16, namely, an "accompanying Declaration", and that it is not among the "provisions of the present Treaty" within the meaning of Article 29. It is a collateral and contemporaneous agreement between the Parties, entered into because one of them, at any rate, was not prepared to sign the new Treaty, and to contemplate the expiry of the old Treaty of 1886 on the 28th July, 1926, without having previously made sure that claims based on the old Treaty would survive these events and, what is more important, that the arbitral procedure provided in the old Treaty for dealing with these claims should also survive with them. But even if the provisions of the Declaration are among the provisions of the Treaty of 1926, in my opinion the existence of the special machinery for dealing with disputes contained in the Declaration excludes the application of the general provisions of Article 29 of that Treaty.

For these reasons, the Court has, in my opinion, no jurisdiction at all in this case.

(Signed) ARNOLD D. MCNAIR.