

INDIVIDUAL OPINION OF PRESIDENT McNAIR

I concur in the conclusion reached in the Judgment of the Court and wish to add some words of my own, as the reasons leading me to this conclusion are not entirely the same as those contained in that Judgment.

I shall begin by making some remarks of a preliminary character. Under the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice no State was under any obligation to accept the jurisdiction of that Court. However, Article 36, paragraph 2, of the Statute afforded to States an opportunity of doing so by means of a voluntary act. That paragraph (which is reproduced in the Statute of the present Court in terms which are identical in all material respects) was in the nature of a standing invitation made on behalf of the Court to Members of the League of Nations to accept as compulsory, on the basis of reciprocity, the whole or any part of the jurisdiction of the Court as therein defined. It should be noted that the machinery provided by that paragraph is that of "contracting-in", not of "contracting-out". A State, being free either to make a Declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity. Another State seeking to found the jurisdiction of the Court upon it must shew that the Declarations of both States concur in comprising the dispute in question within their scope. Article 36, paragraph 5, of the Statute of the present Court, which came into force in 1945, provides that Declarations made under Article 36 of the Statute of the Permanent Court and which were then still in force should be deemed to be acceptances of the compulsory jurisdiction of the present Court, and it is common ground between the Parties that the Iranian Declaration ratified on 19 September, 1932, was in force when the United Kingdom filed its Application in this Court on 26 May, 1951. It is also common ground that the present dispute falls within the scope of the United Kingdom's Declaration.

An international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*. That aspect does not exhaust the matter. The Court itself, acting *proprio motu*, must be satisfied that any State which is brought before it by virtue of such a Declaration has consented to the jurisdiction. This aspect of the matter was mentioned in the Judgment of the Permanent Court in 1927 in the *Chorzów Factory Case* (Jurisdiction), Series A,

No. 9, p. 32 (not a case arising on a Declaration) in the following passage :

“It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court’s jurisdiction is always a limited one, existing only in so far as States have accepted it ; consequently, the Court will, in the event of an objection—or when it has automatically [*d’office*] to consider the question—only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. 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.”

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The principal question before the Court is the meaning of the following words occurring in the Iranian Declaration of acceptance of the jurisdiction of the Court, dated 2 October, 1930, and ratified on 19 September, 1932 :

“sur tous les différends qui s’élèveraient après la ratification de la présente déclaration, au sujet de situations ou de faits ayant directement ou indirectement trait à l’application des traités ou conventions acceptés par la Perse et postérieurs à la ratification de cette déclaration, exception faite pour....”.

Does the reference to treaties or conventions denote treaties or conventions accepted by Iran *regardless of the date of their acceptance*, as the United Kingdom contends, or only treaties or conventions accepted by Iran *after the date of the ratification of the Declaration*, as Iran contends ? That is, do the words “postérieurs à la ratification de cette déclaration” refer to “situations ou faits”, as the United Kingdom contends, or to “traités ou conventions”, as Iran contends ? The importance of this matter lies in the fact that the United Kingdom relies, at any rate as a basis of the jurisdiction of the Court, upon certain treaties accepted by Iran before 19 September, 1932.

I need not repeat the discussion of the matter contained in the Judgment of the Court because I accept the conclusion at which the Court has arrived. Both interpretations are grammatically possible, as Counsel for the United Kingdom admitted. Moreover, both are possible as a matter of substance ; both make sense, though the effects of the two interpretations are quite different. In short, there is a real ambiguity in the text, and, for that reason,

it is both justifiable and necessary to go outside the text and see whether any light is shed by the surrounding circumstances.

In 1928 the Assembly of the League of Nations launched a campaign for securing more acceptances of the compulsory jurisdiction of the Permanent Court. This campaign bore fruit, for in the years 1928 to 1932 inclusive some 26 States deposited Declarations accepting the compulsory jurisdiction of the Court in some form or another. Among the Governments which responded to the appeal was the Iranian Government. Its contribution was a very modest one, though it enabled its delegate at Geneva to announce to the Assembly on 16 September, 1930, that he had received a telegram from Teheran to the effect that his country had "acceded to the Optional Clause of the Statute of the Permanent Court of International Justice".

Iran's limitation of its acceptance to situations and facts relating directly or indirectly to treaties or conventions was unique, and one is naturally led to inquire whether there was any reason for this unusually restrictive attitude, and whether there is anything that indicates which of the two possible interpretations of the formula is the correct one.

The explanation given by the Iranian Government in paragraph 19 of its Preliminary Observations dated 22 February, 1952, in which this Objection to the jurisdiction was raised, is as follows :

"The Iranian Government had, indeed, overwhelming reasons of international policy to limit its acceptance in the way it did : on October 2nd, 1928 [? 1930], it had denounced all existing treaties, binding it to other States, which were based on a capitulatory system ; this resulted in a great number of negotiations for the replacement of former conventions by new agreements based on the equality of the contracting parties.

The Iranian Government drafted the clause under which it adhered to the Statute of the Court in such a way as to exclude the Court's jurisdiction in respect of international conventions signed before that date, because it had denounced those conventions and because it wanted to put an end generally and finally to the capitulatory system. That is the reason why it was naturally inclined to accept the Court's jurisdiction *only in respect of treaties subsequent in date to its adherence*, that is to say, to confine ourselves to the essentially political aspect, subsequent to the change which came about in 1928 in Iran's negotiations with other States."

This statement—made in 1952—requires investigation, and we must ascertain whether there was during the relevant period 1928 to 1932 anything peculiar in the treaty position or the treaty-making activities of Iran. The gradual break-up of the régime of Capitulations throughout the world during the decade

following the first World War is described in Professor A. J. Toynbee's *Survey of International Affairs* for 1928, pages 349 and 350, and in Wheeler-Bennett's *Documents on International Affairs*, 1928, pages 200-212. Iran moved in 1927, and on May 10 of that year "formally notified all States holding capitulatory privileges in Persia [believed to number at least 13] that those privileges would be abolished on the 10th May, 1928". As a sequel to this denunciation it became necessary for Iran to overhaul her treaty system, to revise her treaties and to replace the former capitulatory system by a series of treaties of commerce and establishment befitting the new status of legal equality which she had asserted and acquired.

In consequence, as an examination of the *League of Nations Treaty Series* shews, the years 1928 to 1932 were marked by intense activity on the part of Iran in the negotiation of new treaties of friendship or commerce or establishment. In the case of some States formerly holding capitulatory privileges Iran had to be content with provisional solutions embodied in Exchanges of Notes, some of which had not been replaced by formal treaties at the end of 1932 or much later. In short, Iran's treaty system was in a state of suspense and transition, and it was difficult for her to know precisely how she stood in relation to certain States, and what vestiges of the old régime still remained.

I think it is also necessary to bear in mind the large part that had been played by most-favoured-nation clauses in creating the network of the capitulatory system in Iran and elsewhere.

A perusal of Hertslet, *Treaties, etc., between Great Britain and Persia, and between Persia and other Foreign Powers* (1891), shews how widespread these clauses were in the treaties of Iran. It is true that these clauses are in no way confined to the system of Capitulations and have been used for hundreds of years by States in their treaty relations without any reference to Capitulations. Nevertheless, from the point of view of a State which had been subject to a system of Capitulations for at least a century and had only recently denounced them and emerged into a new status, it would be surprising if the most-favoured-nation principle was not regarded as an obnoxious concomitant of that system. Such a State, while still engaged in negotiating a new treaty régime restricting the most-favoured-nation principle to normal commercial intercourse, would naturally be shy of accepting any compulsory jurisdiction in terms wide enough to expose itself to the invocation of any part of its old treaty system that might still survive.

These historical considerations make it easier for me to understand why the Iranian Government should desire to start with a clean slate in regard to the compulsory jurisdiction of the Court and to limit its obligations in that regard to treaties and conventions accepted by it after 19 September, 1932.

The British comment upon the Iranian Government's explanation of the limitations contained in its Declaration, quoted above, is to be found in paragraph 20 of the Observations of the United Kingdom of 24 March, 1952. (a) It is said there that the British interpretation of that Declaration would suffice to exclude from compulsory jurisdiction disputes arising out of treaties relating to Capitulations, because even on that interpretation the Declaration is limited to disputes arising after 19 September, 1932, and relating to situations or facts subsequent to that date. But Iran's new treaty system was not yet complete on 19 September, 1932, when the Declaration was ratified—much less so on 2 October, 1930, when it was deposited in Geneva; some of the new treaties had not been ratified; some had not even been negotiated; and in a number of cases all that existed was an Exchange of Notes agreeing upon a "Provisional Settlement". In my opinion, it is intelligible, for the reasons given above, that the Iranian Government, when it decided on 2 October, 1930, to sign a Declaration, should have confined it to treaties accepted after the ratification of that Declaration.

(b) Again, it is said by the United Kingdom that during the period 1929-1934 the Iranian Government entered into a large number of treaties with various States in which it accepted some form of international arbitration for disputes arising from the application or interpretation of treaties, past, present or future. I do not find this answer convincing. It is one thing to agree upon arbitration with a specific State; it is another thing to accept the jurisdiction of the Permanent Court in regard to treaties generally, with the knowledge that that acceptance involves the risk of being compelled to litigate with any Member of the League of Nations which had made a Declaration containing the necessary element of reciprocity. Moreover, if the eleven treaties enumerated in paragraph 21 of the same Observations and cited in support of this argument are examined, it will be found that most of them are treaties made with States formerly holding capitulatory rights in Iran and later willing to substitute new treaties which would recognize Iran's new status of equality; while three of them are with Estonia, Finland and Lithuania—new arrivals on the international scene—which had, so far as I can ascertain, never held capitulatory rights in Iran. Thus the States mentioned in this paragraph are precisely the kind of States with which Iran might be disposed to agree upon some general form of arbitration for disputes upon treaties. In my opinion these eleven treaties are not inconsistent with the view that what the Iranian

Government was afraid of when signing its Declaration on 2 October, 1930, was the possibility of being summoned before the Permanent Court under that Declaration by virtue of some treaty, or part of some treaty, dating from, or connected with, the régime of Capitulations.

Accordingly I have formed the opinion that the Iranian Government's interpretation of its Declaration is preferable to that of the United Kingdom and that the Declaration refers only to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Iran *after* 19 September, 1932 (and then only subject to the reservations contained in the Declaration, which are not now in question).

In coming to this conclusion I have not relied on the Iranian Law of 15 January, 1931, communicated to this Court as late as 10 June, 1952, and I should have preferred that it should be excluded from the consideration of the Court. Its admissibility in evidence is open to question, and its evidentiary value is slight.

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I now come to the second question, namely, whether there are any treaties ratified by Iran *after* 19 September, 1932, upon which the United Kingdom can rely in order to establish the jurisdiction of the Court. The United Kingdom's first claim to be able to do this (see paragraph 22 of the Observations of 24 March, 1952) rests on what is there described as "the international engagement between Persia and the United Kingdom to observe the terms of the Concession Convention of 1933".

With regard to that Concession Convention, which was made between the Iranian Government and the Anglo-Persian Oil Company, Limited, I accept the finding of the Court and the reasoning which supports it. I do not regard it as falling within the expression "traités ou conventions acceptés par la Perse". Neither the circumstances in which it was negotiated, nor the settlement of the contemporaneous dispute between the United Kingdom and Iran which was pending before the Council of the League of Nations, resulted in the creation of a tacit or an implied agreement between the United Kingdom and Iran that can be brought within the formula "traités ou conventions acceptés par la Perse". Upon the significance of the expression "acceptés par la Perse", I draw attention to the observations of the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions Case*, Judgment No. 2 (Jurisdiction), Series A, No. 2, at page 24, on the meaning of the expression "international obligations accepted by the Mandatory", and to the observations of Lord Finlay and Judge Moore to the same effect at pages 47 and 68. The words

“acceptés par la Perse” would not be apt to describe a tacit or an implied agreement, if any such agreement had arisen. Some meaning must be given to the word “acceptés”.

The United Kingdom's second claim to be able to base the jurisdiction of the Court upon a treaty ratified by Iran *after* 19 September, 1932, rests upon three treaties made by Iran with Denmark (1934), Switzerland (1934) and Turkey (1937) “upon the provisions of which” (according to paragraph 22 of the above-mentioned Observations) “the United Kingdom is entitled to rely by virtue of most-favoured-nation clauses in the treaties of 1857 and 1903 between the United Kingdom and Persia”. These treaties are said “to bring the present case within the terms of the declaration”. It will suffice, for the purpose of considering this argument, to confine ourselves to the Treaty of 1934 between Iran and Denmark (which came into force on 21 March, 1935) and Article 9 of the Anglo-Persian Treaty of 1857, which was expressly preserved on a temporary basis by means of an Exchange of Notes between Iran and the United Kingdom dated 10 May, 1928 (*British Parliamentary Paper*, Cmd. 3606).

Unquestionably, if the jurisdiction of the Court in this case had already been established and if the Court was now dealing with the merits, the United Kingdom would be entitled to invoke against Iran the most-favoured-nation clause (Article 9) of the Anglo-Persian Treaty of 1857, for the purpose of claiming the benefit of the provisions of the Irano-Danish Treaty of 1934 as to the treatment of foreign nationals and their property. But that is not the question now before the Court. The question is whether the United Kingdom can effectively base the jurisdiction of the Court on the Irano-Danish Treaty of 1934 as a treaty “postérieur à la ratification de cette déclaration”—which is quite another matter.

Having regard to the view which I have expressed that the Iranian Declaration applies only to treaties ratified by Iran *after* 19 September, 1932, I consider that this contention of the United Kingdom encounters two obstacles :

(a) the first is that the United Kingdom can rely on no treaty between herself and Iran ratified after that date. In reply to that objection, it may be argued that the Iranian formula does not in express terms say that the treaties aimed at by it must be treaties made between Iran and the other Party to the proceedings in this Court. Nevertheless, I am strongly inclined to think that when a State makes a Declaration agreeing, on a basis of reciprocity, to refer disputes arising out of treaties to this Court, that Declaration means disputes arising out of treaties made between the two Parties to the proceedings. However, whether that view is right or wrong, there is the further, and in my opinion fatal, obstacle :

(b) that the United Kingdom, before it can base its claim on the Irano-Danish Treaty, must establish a connection with it,

and this the United Kingdom attempts to do by invoking Article 9 of the Anglo-Persian Treaty of 1857—a treaty which antedates the Iranian Declaration.

Thus it would be necessary, in order to accept this contention of the United Kingdom, for the Court to hold that the United Kingdom can

(a) not only invoke a treaty of 1934 between Iran and a third State, but also

(b) telescope together that treaty and a treaty between Iran and herself of 1857 by praying in aid a most-favoured-nation clause contained in the last-mentioned treaty.

Can either treaty alone, or both of them together, be called “un traité ou convention accepté par la Perse” *after* 19 September, 1932, within the meaning of the Declaration? I think not. Such an interpretation seems to me to be artificial and much strained, and I cannot accept it. I do not consider that a State making a Declaration under paragraph 2 of Article 36 can be said to contemplate such a roundabout application of it.

Nor do I consider that the words “directement ou indirectement” help the United Kingdom because these words qualify the relation between the situations or facts and the application of the treaty, and are not apt to cover the indirect operation of a most-favoured-nation clause in connecting a treaty of 1857 with a treaty of 1934 for the purpose of satisfying the formula contained in the Iranian Declaration.

For these reasons I am unable to accept the United Kingdom’s claim to base the jurisdiction of the Court upon the treaties with Denmark, Switzerland and Turkey accepted by Iran *after* 19 September, 1932.

Accordingly the Court has no jurisdiction in this case.

(Signed). ARNOLD D. MCNAIR.