

J'ai voté pour l'incompétence de la Cour.

L'article 26 du Mandat pour la Palestine est ainsi conçu :

« Le Mandataire accepte que tout différend, quel qu'il soit, qui viendrait à s'élever entre lui et un autre Membre de la Société des Nations, relatif à l'interprétation ou à l'application des dispositions du mandat et qui ne serait pas susceptible d'être réglé par des négociations, soit soumis à la Cour permanente de Justice internationale prévue par l'article 14 du Pacte de la Société des Nations. »

Le Gouvernement hellénique prétend que la réclamation Mavrommatis est un différend relatif à l'interprétation et à l'application de l'article 11 du Mandat, et, par conséquent, tombe sous la compétence de la Cour.

Mais, pour que l'intervention de la Cour soit légitime, il n'est pas suffisant qu'il s'agisse d'une question relative à l'interprétation et à l'application du Mandat ; il faut encore, ainsi que l'on déduit de l'article 26, que le litige se soit établi entre deux États et ne soit pas susceptible d'être résolu moyennant des négociations diplomatiques. L'impossibilité de la solution diplomatique peut être démontrée, soit par la nature même du conflit, soit par la non-réussite des négociations.

Ces deux conditions sont aussi substantielles. La première s'attache intimement à la nature de la Cour, à sa fonction spécifique, à sa mission internationale. Tribunal d'États, la Cour ne peut être appelée à protéger des droits *individuels*, mais seulement des droits *d'États*. L'autre condition traduit le respect qui est dû à la souveraineté des nations. Nations souveraines, elles ont le droit primordial de résoudre entre elles leurs dissensions, et l'intervention d'une autorité étrangère n'est compréhensible que lorsque cette solution n'est pas réalisable.

Or, aucune de ces deux conditions ne se trouve dans le cas soumis à la Cour.

Mavrommatis a obtenu du Gouvernement ottoman, de 1911

## DISSENTING OPINION BY M. PESSÔA.

[*Translation.*]

I have expressed my vote to the effect that the Court has no jurisdiction in this suit.

Article 26 of the Mandate for Palestine runs as follows :

“The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.”

The Greek Government maintains that the Mavrommatis claim is a dispute relating to the interpretation and the application of Article 11 of the Mandate, and therefore falls within the jurisdiction of the Court.

But, in order that it shall be legitimate for the Court to deal with a question, it is not sufficient that it be one relating to the actual interpretation and the application of the Mandate ; it is further necessary, as follows from Article 26, that the dispute shall have arisen between two States and that it cannot be settled by diplomatic negotiations. Such diplomatic settlement may be shown to be impossible either by the nature of the dispute itself or by the failure of the negotiations.

These two conditions are also substantial. The first is closely related to the nature of the Court, to its particular duties and to its international mission. The Parties which may appear before the Court being States, it cannot be called upon to protect the rights of *individuals*, but only those of *States*. The other condition gives expression to the respect due to the sovereignty of nations. As being sovereign they have the fundamental right to settle their disputes between themselves, and the interposition of an outside authority is only understandable when the former solution cannot be arrived at.

Neither of these two conditions is fulfilled by the suit submitted to the Court.

Mavrommatis obtained from the Ottoman Government, between

à 1914, certaines concessions et prétend que, en 1921, le Gouvernement britannique, en sa qualité de Mandataire dans la Palestine, les a violées. Mavrommatis a réclamé ; et, depuis lors, il a débattu *personnellement et directement* ses droits avec le Gouvernement anglais.

Ce n'est que le 22 décembre 1922 que le Gouvernement hellénique intervient. Mais il intervient . . . dans quel but ? Pour faire sienne la réclamation Mavrommatis et négocier sa solution ? Nullement ; il intervient à peine pour transmettre au Foreign Office une lettre de Mavrommatis dans laquelle, après avoir fait au Gouvernement grec un récit minutieux de ses réclamations, il se disait disposé à faire appel à la Société des Nations.

En voici la preuve :

*« I am therefore obliged to appeal to the Tribunal of the League of Nations provided for by Article 311 and 312 of the Treaty together with the first paragraph of Article 287, and to pray to take the necessary steps to bring my case before the Competent Authority so that, as soon as possible, consideration may be given to my request. »*

(Lettre de l'Agent hellénique au Greffier de la Cour, en date du 26 mai, page 6.)

Le Foreign Office répondit que l'affaire se trouvant confiée au ministère des Colonies, il serait bien plus facile et plus rapide de traiter directement avec lui :

*« . . . I understand that the Colonial Office are still in correspondence with this gentleman's Solicitors in this matter.*

*« In the circumstances it appears to me quite unnecessary for this Department to intervene, as matters can be settled much more expeditiously and satisfactorily by means of direct discussion between the Colonial Office and M. Mavrommatis' solicitors, who are parties principally concerned and who possess first-hand knowledge of the points at issue. » (Idem, page 8.)*

Et c'est tout.

Jusqu'ici, il n'y a donc pas eu de négociations entre les deux États.

Après cette date, il y eut encore deux interventions du Gouvernement grec.

La première, c'est la lettre du 27 janvier 1923. Mais, dans cette

1911 and 1914, certain concessions, and he maintains that, in 1921, the British Government as Mandatory in Palestine violated these. Mavrommatis protested, and from that moment onwards he discussed the question of his rights *personally and directly* with the British Government.

It was only on December 22nd, 1922, that the Greek Government intervened. But for what purpose did it intervene? To espouse the Mavrommatis claim and to negotiate for its settlement? By no means; it merely intervened for the purpose of forwarding to the Foreign Office a letter of Mavrommatis in which the latter, after giving the Greek Government a detailed statement of his claim, declared that he was inclined to appeal to the League of Nations.

Here is the proof of this:

*"I am therefore obliged to appeal to the Tribunal of the League of Nations provided for by Article 311 and 312 of the Treaty together with the first paragraph of Article 287, and to pray to take the necessary steps to bring my case before the Competent Authority, so that, as soon as possible, consideration may be given to my request".*

(Letter from the Greek Agent to the Registrar of the Court, dated May 26th.)

The Foreign Office replied that as the matter was in the hands of the Colonial Office, it would be much simpler and more speedy to deal direct with that Office:

"I understand that the Colonial Office are still in correspondence with this gentleman's solicitors in this matter.

*"In the circumstances it appears to me quite unnecessary for this Department to intervene, as matters can be settled much more expeditiously and satisfactorily by means of direct discussion between the Colonial Office and M. Mavrommatis' solicitors, who are parties principally concerned and who possess first-hand knowledge of the points at issue." (Ib., page 8.)*

And that is all.

Up to this point then there had been no negotiations between the two States.

After this date two further steps were taken by the Greek Government.

The first was the letter of January 27th, 1923. But in this letter

lettre, la Grèce n'expose pas encore sa prétention ; elle ne discute pas non plus les raisons opposées par l'Angleterre ; elle se borne à demander au Gouvernement britannique quel est son avis au sujet des réclamations Mavrommatis :

« After these explanations I hope you will be able to kindly see your way to inform me *what is the view of His Majesty's Government on the matter*, and venture to hope that a *settlement* will be possible in the near future. » (*Idem*, page 8.)

L'autre intervention est la lettre du 26 janvier 1924. On croit que, cette fois, le Gouvernement hellénique va déclarer qu'il prend sur lui la défense de son ressortissant et énumérer ses titres, prouver ses droits, discuter les raisons du ministère des Colonies . . . Rien de cela ; la Grèce persiste encore à demander l'avis du Gouvernement britannique et porte à sa connaissance que les avocats de Mavrommatis (les avocats de Mavrommatis et non pas le Gouvernement hellénique) suggèrent l'idée d'un tribunal d'arbitrage :

« In these circumstances, *I should be grateful to you if you could see your way to letting me know the views of His Majesty's Government on the matter, and whether, in their opinion, M. Mavrommatis' claim could not be satisfactorily met.*

« I have the honour to add *that M. Mavrommatis' solicitors suggested that he would be prepared to submit—should such a course be agreeable to His Majesty's Government—the examination of the matter to a Court of Arbitration.* » (*Idem*, page 10.)

Jusqu'ici, nous n'avons encore, par conséquent, aucun différend ni aucune négociation entre États.

Continuons.

L'Angleterre répondit le 1<sup>er</sup> avril que son intention était de reconnaître les droits de Mavrommatis en ce qui concerne le contrat de Jérusalem, mais non pas les concessions de Jaffa et du Jourdain. Et elle exposa ses raisons. On devait s'attendre à ce que, la curiosité du Gouvernement grec satisfaite, les intentions du Gouvernement britannique connues, la Grèce se décidât enfin à dire aussi ce qu'elle en pensait, à déduire ses fondements de droit ou d'équité et à réfuter ceux qui lui étaient opposés. Il est possible que, devant ces fondements, le Gouvernement anglais eût décidé, sinon d'abandonner les siens, tout au moins de les modifier. Que de

Greece does not yet put forward its claim ; nor yet does it discuss the reasons alleged against this claims on behalf of Great Britain ; it merely asks the British Government what is its opinion with regard to the Mavrommatis claims :

“After these explanations I hope you will be able to kindly see your way to inform me *what is the view of His Majesty’s Government on the matter*, and venture to hope that a *settlement* will be possible in the near future.” (Ib., page 8.)

The other step is constituted by the letter of January 26th, 1924. This time it might be expected that the Greek Government was going to state that it undertook the defence of its national, to set out his titles and to prove his rights ; to discuss the reasons put forward by the Colonial Office. Not so ; Greece still persists in asking the opinion of the British Government and informs it that Mavrommatis’ solicitors (Mavrommatis’ solicitors and not the Greek Government) suggest recourse to a Court of Arbitration :

“In these circumstances, *I should be grateful to you if you could see your way to letting me know the views of His Majesty’s Government on the matter and whether, in their opinion, M. Mavrommatis’ claim could not be satisfactorily met.*

“I have the honour to add *that M. Mavrommatis’ solicitors suggested that he would be prepared to submit—should such a course be agreeable to His Majesty’s Government—the examination of the matter to a Court of Arbitration.*” (Ib., page 10.)

Thus we have so far no dispute and no negotiations between States.

Let us go further.

Great Britain, on April 1st replied that its intention was to recognize M. Mavrommatis’ rights as far as concerned the Jerusalem contract, but not the Jaffa or the Jordan concessions ; and it stated its reasons. It might be expected that once the Greek Government’s curiosity was satisfied, the British Government’s intention having been made known, Greece would also at length decide to state what she thought of the matter, to set forth her arguments in law and in equity and to refute those of her opponent. It is possible that in the face of these arguments the British Government would have decided either to abandon its own Case or at any rate to modify it.

fois, pour des motifs de courtoisie ou pour des considérations d'une autre espèce, une nation fait à une autre des concessions qu'elle ne ferait pas à un ressortissant de cette dernière !

Eh bien ! une fois encore, la Grèce n'a rien dit sur sa manière de considérer les concessions Mavrommatis ; elle n'a formulé non plus aucune prétention à ce sujet ; elle a tout simplement écrit une lettre au Gouvernement anglais pour lui annoncer qu'elle allait le traduire devant la Cour internationale de Justice !

Voilà les faits. Sera-t-il possible d'affirmer devant leur évidence qu'il y a eu *un différend* entre la Grèce et l'Angleterre sur les concessions Mavrommatis et que, pour le résoudre, il y a eu *des négociations* entre les deux Gouvernements ?

La négociation, c'est le débat, la discussion entre des représentants d'intérêts contraires, discussion en laquelle chacun présente ses raisons et conteste celles de l'autre. Or, qu'on me montre un document, un seul, où la Grèce ait exposé ses prétentions, en en alléguant les raisons justificatives. Il n'existe point. Qu'on me dise, au moins, quelles sont ces prétentions, quelles sont ces raisons ? Personne ne le sait.

Il est certain que le Droit international n'établit pas de formules protocolaires pour les négociations ; mais, pour en reconnaître l'existence, il exige naturellement qu'elles aient eu lieu sous une forme quelconque. Or, dans le cas actuel, nous ne nous trouvons pas devant des négociations qui aient eu une forme quelconque ; nous sommes devant la complète absence de négociations.

On doit remarquer encore que, *ex vi* de l'article 26 du Mandat, pour que la question appartienne au domaine de la Cour, il ne suffit pas qu'il y ait eu des négociations entre les deux Gouvernements ; il est encore indispensable ou que le conflit, par sa propre nature, ne soit pas susceptible d'une solution diplomatique, ou, dans le cas contraire, que les négociations n'aient pas réussi. L'exigence de ces négociations est, ainsi que je l'ai déjà fait noter, un hommage rendu à la souveraineté des nations. Le principe, c'est que tous les différends doivent être résolus entre les nations intéressées elles-mêmes. L'autorité de la Cour ne peut intervenir que lorsque cette solution est reconnue comme impossible.

Or, le litige n'est évidemment pas de ceux qui ne puissent être décidés par la voie diplomatique, et, en admettant que des négociations aient eu lieu, où trouve-t-on la preuve que cette impossibilité se soit manifestée ?

How many times has it happened that for reasons of courtesy or other considerations one nation has made to another concessions which it would not make to a national of such other State !

Well, once again Greece said nothing as to her view of the Mavrommatis concessions ; nor did she formulate any claim on the subject ; she simply wrote a letter to the British Government announcing that she intended to sue that Government before the International Court of Justice !

Such are the facts. Having regard to them, can it be asserted that there was a *dispute* between Greece and Great Britain in regard to the Mavrommatis concessions, and that, for the purpose of settling it, negotiations took place between the two Governments ?

Negotiation consists of debate or discussion between the representatives of rival interests, discussion during which each puts forward his arguments and contests those of his opponent. Now, I ask to be shown a single document in which Greece stated its claim and put forward its arguments in support. There is not one. I ask to be told at least what these claims and what these reasons are. Nobody knows.

There is no doubt that International Law lays down no protocol or formulae for *negotiations* ; but in order that the existence of negotiations may be recognized, it naturally requires that they shall have taken place in some form or other. In the present case we have not before us any negotiations that have taken place in any form whatever. There is a complete absence of negotiations.

It must further be remarked that under Article 26 of the Mandate, the mere fact that negotiations have taken place between the two Governments does not suffice to bring a question within the jurisdiction of the Court ; it is further indispensable that either the conflict from its very nature cannot be settled by negotiation or else that negotiations shall have failed. The fact of requiring such negotiations is, as I have already stated, a tribute to the sovereignty of nations ; the principle is that all disputes shall be settled between the nations concerned themselves. The Court can only interpose its authority when such solution is recognized as impossible.

Now the dispute is clearly not one which cannot be settled through diplomatic channels ; and even if it be admitted that negotiations have taken place, where is to be found the proof that such a settlement has been found impossible ?



On dit que l'Angleterre, dans sa réponse au Gouvernement grec, a tout de suite déclaré que sa manière de considérer l'affaire était irréductible.

Qu'on m'excuse . . . mais cela n'est pas exact. L'Angleterre a dit qu'elle reconnaissait les droits de Mavrommatis en ce qui concerne Jérusalem ; qu'elle n'était pas à même (*prepared*, dit le texte anglais) de reconnaître la concession de Jaffa, et qu'elle niait celle du Jourdain. La seule réclamation qu'elle a contestée d'une manière positive, fut donc celle du Jourdain ; et même dans ce cas, elle se basait sur l'inexistence d'un document ; elle changerait peut-être d'avis, si ce document lui était présenté :

« *The Jerusalem concessions, as M. Mavrommatis' solicitors have been informed, are the only ones which His Majesty's Government are prepared to recognize, subject to the production of the original signed copies of the documents and to their being found in order, since they alone arose out of an agreement entered into with the Ottoman Government before October 29th, 1914 . . .*

« *The Jaffa concessions were signed at a date subsequent to October 29th, 1914, and, as M. Mavrommatis has already been informed, His Majesty's Government are not prepared to recognize that he possesses any right in respect of them . . .*

« *In regard to the third group, the Jordan concessions, no concessionary contract was actually completed or signed and M. Mavrommatis has already been informed that His Majesty's Government do not recognize he has any rights in this area whatsoever.* » (*Idem*, pp. 12-13.)

Où trouve-t-on, alors, l'opposition irréductible de l'Angleterre ?

Devant les faits que je viens d'exposer, il me semble évident que l'affaire Mavrommatis n'est nullement un litige entre deux États.

La Grèce a le droit de prendre à sa charge les réclamations de ses ressortissants et cela est, à mon avis, suffisant pour donner à la réclamation Mavrommatis un caractère international ; mais la vérité, c'est que la Grèce, *jusqu'au moment où elle s'est présentée devant la Cour*, n'avait dit ni ce qu'elle pensait ni ce qu'elle désirait en ce qui concerne les concessions Mavrommatis ; elle n'avait ni expliqué la nature de ces concessions, ni dit la valeur et l'étendue qu'elle leur accordait ; elle n'avait dit non plus les raisons juridiques qui les protègent ni montré la non-raison de l'opposition anglaise.

It is said that Great Britain, in her reply to the Greek Government, at once declared that her views on the matter were capable of no modification.

I beg to be excused if I state that this is not correct. Great Britain said that she recognized Mavrommatis' rights as far as concerned Jerusalem; that she was not prepared to recognize the Jaffa concession and that she denied the existence of the Jordan concession. The only claim which she definitely rejected was therefore the Jordan one; and even in this case she relied on the absence of a document; she would perhaps change her opinion if this document was presented to her:

*"The Jerusalem concessions, as M. Mavrommatis' solicitors have been informed, are the only ones which His Majesty's Government are prepared to recognize, subject to the production of the original signed copies of the document and to their being found in order, since they alone arose out of an agreement entered into with the Ottoman Government before October 29th, 1914 . . . ."*

*"The Jaffa concessions were signed at a date subsequent to October 29th, 1914, and, as M. Mavrommatis has already been informed, His Majesty's Government are not prepared to recognize that he possesses any right in respect of them . . . ."*

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(*Ib.*, pp. 12—13.)

Where is the insurmountable opposition of Great Britain to be found?

In view of the facts which I have stated, it seems clear to me that the Mavrommatis affair is in no way a dispute between two States.

Greece is entitled to bring claims on behalf of its nationals, and that is in my opinion sufficient to give to the Mavrommatis claim an international character; but the truth is that Greece, *up to the time when it applied to the Court*, had not said what it thought or what it wanted as regards the Mavrommatis concessions; it had neither explained the nature of these concessions nor stated what were, in its opinion, their importance or their extent; it had further put forward no arguments in law to uphold them nor had it shown the weakness of the British opposition.

Il résulte, en second lieu, des faits exposés, qu'il n'y a eu aucune négociation entre les deux gouvernements sur ces réclamations : le Gouvernement grec a demandé au Gouvernement britannique quel était son point de vue sur les contrats Mavrommatis ; le Gouvernement britannique lui a dit de quelle façon il considérait chacun des contrats ; le Gouvernement hellénique ne lui a pas répliqué.

On conclut, finalement, des faits exposés qu'on n'a d'aucune façon prouvé *l'impossibilité* de résoudre le conflit par voie diplomatique.

Or, en vertu de l'article 26 du Mandat, la Cour n'est compétente que lorsque ces conditions se présentent simultanément : si le différend a lieu entre deux Etats et s'il n'est pas susceptible d'être réglé par des négociations.

Mais ces conditions ne se trouvent pas dans la question soumise à la Cour par le Gouvernement hellénique.

Donc, la Cour n'est pas compétente pour la juger.

(Signé) EPITACIO PESSÔA.

It follows, in the second place, from the facts stated that no negotiation took place between the two Governments in regard to these claims ; the Greek Government asked the British Government what were its views with regard to the Mavrommatis contracts ; the British Government stated how it envisaged each of the contracts ; the Greek Government made no reply.

The conclusion to be finally drawn from the facts stated is that the *impossibility* of settling the dispute through diplomatic channels has in no way been proved.

Under Article 26 of the Mandate, however, the Court has jurisdiction only when these conditions have simultaneously been fulfilled : if the dispute arises between States and if it cannot be settled by negotiation.

But these conditions are not fulfilled in the suit submitted to the Court by the Greek Government.

The Court has therefore no jurisdiction to hear and determine it.

(Signed) EPITACIO PESSÔA.

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