

## DISSENTING OPINION OF JUDGE ZORIČIĆ

[*Translation*]

The Court has found that it has jurisdiction 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, in so far as this claim is based on the Treaty of 1886. I regret that I am unable to concur in this decision for the following reasons :

## I

It is common ground between the Parties that Article 29 of the Treaty of 1926 is the only contractual clause between them which, in conjunction with Article 37 of the Court's Statute, confers compulsory jurisdiction on the Court. Article 29, paragraph 1, is worded 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."

Paragraph 2 of the same Article lays down that the court of arbitration shall be the Permanent Court of International Justice, and therefore, in the present circumstances, the International Court of Justice.

On the other hand, the Declaration of July 16th, 1926, lays down 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 Protocol of November 10th, 1886, provides for the settlement of controversies by commissions of arbitration, the members of which have to be selected by the two Governments, by common consent, etc.

It was not disputed by the Parties that the Ambatielos claim was put forward by the Hellenic Government on the basis of the Declaration. They disagree upon the question whether the Declaration can, or cannot, be regarded as a provision of the Treaty

of 1926, within the meaning of Article 29 of that Treaty, conferring jurisdiction on the Court.

The question whether a separate provision adopted by the parties on the occasion of the conclusion of a treaty should or should not be considered as an integral part of the treaty in question, depends—in the absence of any rule on that point—entirely on the circumstances of each individual case. These circumstances may include certain formal elements, but what is of chief importance is the content of the provision in question.

In the case now before the Court, it has been argued that the plenipotentiaries inserted the Treaty, the Customs Schedule, which is indisputably a part of the Treaty, and the Declaration, in a document of 44 pages, the Declaration appearing on page 44. Furthermore, great importance has been attached to the fact that the ratification of the Declaration was effected by the two States, at the same time as the ratification of the Treaty, and that, above all, the United Kingdom document of ratification does not mention the Declaration separately, but conjointly with the Treaty, and under the designation "Treaty".

In my opinion all these considerations are of secondary importance, and it can be argued in the opposite sense that the Declaration was drawn up and signed as a separate instrument from the Treaty, having a title of its own, and that neither the Treaty nor the Declaration mentions the latter as being part of the Treaty, although the Parties were careful, in Article 8 of the Treaty, to make express mention of the Customs Schedule which precedes the Declaration. In regard to ratifications, the Hellenic ratification mentions the Treaty and the Declaration separately, while the United Kingdom's instrument of ratification, worded in the terms of a formula, doubtless of long standing, certainly refers to the Treaty: "which is word for word as follows", but nevertheless includes the Declaration under its own title. It follows, in my opinion, that the two Governments undoubtedly considered the Treaty and the Declaration as forming part of a simultaneous agreement, and as having to be ratified together, but that in no way proves that the Declaration was "a provision" of the Treaty of 1926 within the meaning, and for the purposes, of Article 29 of that Treaty; still less does it follow that the Parties intended to submit disputes in regard to the application of that Declaration to the arbitration provided for in Article 29. Again, the Declaration was drawn up subsequently to, and independently of, the Treaty, a point on which I shall have more to say later on.

In these circumstances, the point of real importance is what are the terms of the text that has to be construed, and what were the intentions of the Parties and the purposes which the text was to serve, for: "... the Court's aim is always to ascertain whether an intention on the part of the parties exists to confer jurisdiction upon it" (P.C.I.J., Series A, No. 8, p. 32).

In order to understand the aim of the Declaration and the intention of the Parties, it is necessary to recall the situation which gave rise to this Declaration. Greece and the United Kingdom had, in 1886, concluded a treaty of commerce and navigation, to which was attached a protocol providing that any controversies which might arise respecting the interpretation or the execution of the Treaty should be submitted to the decision of commissions of arbitration. The Treaty of 1886 was denounced by Greece in 1919, and was afterwards renewed, for successive periods, the last time by an exchange of notes, until August 31st, 1926, it being, however, understood that it would cease to be in force on the date of the coming into force of the new Treaty, which was in course of preparation. Before the signature of the new Treaty the United Kingdom Government had realized that, owing to the termination of the Treaty of 1886, certain claims of its nationals, based upon that Treaty, could no longer be referred to the arbitration provided in the Protocol of 1886, and in order to safeguard these rights—that is, rights founded on the Treaty of 1886—the United Kingdom Government approached the Hellenic Government (see letter of June 22nd, 1926, from the Foreign Office to the Greek Minister, annexed to the Greek Observations) seeking for assurances on this point before the signature of the new Treaty, which had, it is clear, been already drafted. The two Governments then agreed on the Declaration, which was signed on the same day as the Treaty of July 16th, 1926. It is the interpretation and application of this Declaration which have given rise to the present dispute.

In these circumstances, I do not consider that any support for the theory that the Declaration was an interpretation of the Treaty of 1926, or a reservation to that Treaty, is to be found, either in the terms of the Treaty, or in the purposes which the Declaration was to serve, or in the terms of the Declaration. A reservation is a provision agreed upon between the parties to a treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning; it is therefore, by its very nature, closely linked to the content of the Treaty. But in the present case, the Treaty makes no mention of the Declaration; and the Declaration, for its part, does not explain anything; it neither adds anything to, nor subtracts anything from, the provisions of the Treaty of 1926; all that it says is that "the Treaty of to-day's date does not prejudice claims .... based on the .... Treaty of 1886". Leaving on one side the indisputable fact that the Treaty of 1926 could not, in the absence of any special provision to that effect, in any way prejudice rights acquired under the régime of an earlier treaty, and that, in consequence, the words "the Treaty .... of to-day's date" could not have reference to the content of the Treaty of 1926, the only true interpretation of these terms seems to be that it was intended simply to fix the date of the expiry of the Treaty of 1886; this event was in no way a consequence of any

clause in the Treaty of 1926, or of that Treaty as a whole, but was a consequence of the denunciation by Greece of the Treaty of 1886 which—as has been mentioned—was to be brought to an end, by means of a special agreement contained in an exchange of notes, on the date of the coming into force of the new Treaty.

If that is the case, and I feel no doubt upon the subject, it seems impossible to hold that the Declaration can be regarded as an interpretative clause or as a reservation to the Treaty of 1926, which does not contain any clause repealing the Treaty of 1886. Article 32 of the Treaty of 1926 does not even mention the Treaty of 1886; it merely provides that the Treaty of 1926 will come into force immediately after the ratification, that is, at an uncertain date. As it had been agreed upon, in the exchange of notes mentioned above, that this uncertain date should be the date of expiry of the Treaty of 1886, the only relation between the coming into force of the treaty of 1926 and the termination of the Treaty of 1886 was a coincidence of dates resulting from a special agreement. Far from being a reservation to the Treaty of 1926, the Declaration is, in my opinion, a reservation to the expiry of the Treaty of 1886, or, in other words, it is a partial prolongation of the Treaty of 1886 in so far as it maintains in existence claims based on the Treaty of 1886 and the means of arbitration provided for their settlement. The Declaration is, therefore, a special agreement governing a situation which is entirely extraneous to the Treaty of 1926, and it is not a provision of that Treaty within the meaning and for the purposes of Article 29 of the Treaty.

That this is so is shown, in the first place, by the fact that, when drawing up the Treaty of 1926 and its Article 29, the Parties could not have had in mind any other provisions than those contained in the Treaty itself ("provisions of the present Treaty") and by the fact that the Declaration, prepared subsequently to the drafting of the Treaty and relating to a subject foreign to that Treaty, could not even have been contemplated at the time when the Treaty was drawn up. It follows that the Parties could not have had in mind the application of Article 29 to the subsequent Declaration.

Secondly, the Declaration, which related solely to claims based on the Treaty of 1886, provided that "such claims" should be dealt with by means of the arbitration prescribed in the Protocol of 1886, that is to say, by a special method of arbitration differing from that of Article 29. The Parties could quite well have inserted in the Declaration a reference to Article 29 of the Treaty of 1926, as was done in the entirely analogous Declaration annexed to the Greco-Italian Treaty of November 24th of the same year. They did not do so, and it must therefore be concluded that they deliberately maintained two methods of arbitration, that is to say, arbitration by the Court under Article 29 for disputes arising under the Treaty of 1926, and the arbitration provided for in the Protocol of 1886 for disputes arising in connection with claims based on the Treaty of 1886.

That this was so and that the Hellenic Government itself considered that the arbitration system of 1886 was the only one applicable to the disputes mentioned in the Declaration, is clearly shown by the attitude which it observed throughout so many years subsequent to the ratification and which it expressed in particular in its note of August 6th, 1940, addressed to the United Kingdom Government, wherein it stated :

“From the enclosed memorandum it clearly appears, in the opinion of the Royal Hellenic Government, that the arbitral committee provided for by the final protocol of the Greco-British Commercial Treaty of 1886 *is the only competent authority in the matter*, and it is their sincere hope that His Britannic Majesty’s Government will see their way to inform them of the appointment of their arbitrator or arbitrators for a final settlement of this question.”  
(My italics.)

## II

To the foregoing considerations there should, in my opinion, be added another which is even more important, namely, that the Parties could not have intended to introduce in what has been called one and the same treaty, a dual jurisdiction, that of Article 29 and that of the Declaration, for it is manifest that this must give rise to all kinds of complications.

If the Declaration were to be regarded as a provision of the Treaty of 1926, within the meaning of Article 29, it would follow, according to the terms of the latter Article, that “*any dispute that may arise between the Parties as to the proper interpretation or application*” of the Declaration must be submitted to this Court as the Court of arbitration referred to in Article 29.

It would be impossible to draw a line of demarcation between the jurisdiction of the Court and that of the commissions of arbitration provided for in the Declaration, so that the Court would have jurisdiction only to decide whether the Parties were bound to have recourse to the arbitration system of 1886, while the commissions of arbitration would be competent to decide disputes concerning the validity of claims based on the Treaty of 1886. No foundation for such a division of jurisdiction can be found either in Article 29 or in the Declaration, for they both confer jurisdiction without any qualification. Either the Court has jurisdiction to interpret and apply the Declaration, or it has not. If it has jurisdiction, it cannot confine itself to exercising only a part of its jurisdiction and to stop at that point. On the contrary, the Court must decide, at the very least, whether the conditions of the Declaration have been satisfied—a point which pertains to the merits—that is to say, in particular, whether the claim was formulated and submitted in conformity with the Declaration, whether the Hellenic Government’s claim is not barred

as the result of the delay in its submission (a question which has, in fact, already been decided in the Judgment), whether the claim is based on the Treaty of 1886, and so on. Only if the Court were convinced that the conditions of the Declaration had really been fulfilled would it be possible for it to refer the case to the arbitral commission of arbitration provided for, as a special arbitration, for the sole purpose of determining the validity of the claim.

But, according to the Declaration, it is not solely on the validity of the claims that the commissions of arbitration are to decide. On the contrary, any examination of the conditions of the applicability of the Declaration falls within the exclusive jurisdiction of the commissions of arbitration provided for in the Protocol of 1886. It is these commissions, and these alone, that are to decide "on the validity of *such* claims"; they must, therefore, before undertaking an examination of the validity, satisfy themselves that these claims are really "such" as are referred to in the Declaration. It follows that any action by the Court in relation to the Declaration and based on Article 29 of the Treaty of 1926 would inevitably lead to overlapping and to a confusion between the Court's jurisdiction and that of the commissions of arbitration referred to in the Declaration, an extraordinary confusion which, I am convinced, the Parties certainly never intended to create.

I have, therefore, reached the conclusion that, even if the Treaty and the Declaration are regarded as being part of one and the same agreement between Greece and the United Kingdom, the Declaration cannot be regarded as a provision of the Treaty of 1926, within the meaning and for the purposes of Article 29 of that Treaty, and that, in consequence, the Court is without jurisdiction in the present case.

(Signed) ZORIČIĆ.