3.

PRELIMINARY OBJECTION TO THE JURISDICTION OF THE COURT FILED BY THE GOVERNMENT OF HIS BRITANNIC MAJESTY IN GREAT BRITAIN [1].

[AUGUST 9th, 1927.]

1. The Government of the Greek Republic have instituted the present proceedings by means of an Application dated May 28th, 1927, in which they allege that His Britannic Majesty's Government have not complied with the terms of Judgment No. 5 given by the Court on March 26th, 1925, and claim damages in consequence. The Government of His Britannic Majesty being of opinion that the Court has no jurisdiction to entertain these proceedings submits the present preliminary objection in accordance with Article 38 of the Revised Rules of Court.

GENERAL OBSERVATIONS.

2. The contentious jurisdiction of the Court is based upon the consent of the Parties. Such consent can be given either *ad hoc* after a particular dispute has arisen or generally in contemplation of possible future disputes. It is not suggested by the Greek Government that His Britannic Majesty's Government have entered into any special agreement for the submission of the present case, so that the question to be examined is whether or not there exists any treaty or convention involving the consent of His Britannic Majesty's Government to the exercise of jurisdiction by the Court. The only international instruments mentioned in the Application or Case of the Greek Government or which it has ever been suggested have any bearing upon the subject matter of these proceedings are the Statute of the Court, the Mandate for Palestine, and the Protocol of Lausanne, and it is proposed to show that neither of these three acts enables the Greek Government to refer the present case unilaterally to the Court.

3. Before dealing with this question, however, His Britannic Majesty's Government desire to make clear their position in reference to the allegations in the Greek Application and Case.

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[1] Documents quoted in this Objection:
Greek Application; see No. 1, II, pp. 102-108 of this volume.
„ *Case;* see No. 2, pp. 109-175.
Annexes to the Greek Case; see No. 2 *a*, pp. 176-450.

The present case does not appear to be one where it is necessary, for the purpose of the decision on the preliminary objection, to enter into any detailed investigation of the facts. Except for one point—namely, the relation of Mr. Rutenberg and his concessions to the claim of M. Mavrommatis—His Britannic Majesty's Government do not intend, at this stage, to embark upon a controversy in regard to the facts or their legal consequences. They will deal with the preliminary question, generally speaking, upon the basis of the case put forward by the Greek Government. But it must be clearly understood that His Britannic Majesty's Government make no admission as to any of the allegations or contentions contained in the Application or Case. They reserve the rights to refute all or any of these contentions and allegations, whether by argument or evidence, whenever it may become material or necessary to do so. The same applies, in particular, both to the reality and quantum of the damages claimed. But although His Britannic Majesty's Government do not regard it as justifiable to trouble the Court with matters which are not relevant to the preliminary question of law, inasmuch as their good faith is involved they desire to place formally on record their conviction that they have not in any way failed to comply with or carry out the Court's Judgment of March 26th, 1925, but on the contrary have fully and loyally given effect thereto by granting M. Mavrommatis new concessions the terms of which were settled by common agreement in contracts which His Britannic Majesty's Government have always been ready and willing to carry out.

THE STATUTE OF THE COURT.

4. The Greek Application is expressly based upon the alleged failure of His Britannic Majesty's Government to comply with the above-mentioned Judgment. At p. 13 of that document the Court is asked to give judgment that "by delaying, etc., the British Government has not complied with the terms of the Court's Judgment and consequently, in its capacity as Mandatory for Palestine, has violated its international obligations within the meaning of Article 11 of the Mandate". Assuming it were true that such failure had taken place, His Britannic Majesty's Government submit that there does not exist any provision giving the Court jurisdiction to entertain proceedings founded on this ground. The source of such jurisdiction can only be sought in the Statute of the Court. Article 60 enables the Court to construe a judgment in the event of a dispute as to its meaning or scope, but the present application is not, nor does it purport to be, a request for

interpretation of the Judgment of March 26th, 1925. Again, Article 61 empowers the Court to revise its judgments in certain circumstances, but there is no question of revision here. These are the only provisions in the Statute authorizing the Court to entertain proceedings arising out of its judgments. There is nothing in the Statute which empowers the Court to decide whether or not one of its judgments has been complied with. The Council of the League of Nations is entrusted under Article 13, paragraph 4, of the Covenant with certain powers for the purpose of giving effect to a judgment which has not been carried out, but the Court's jurisdiction and powers in respect of any particular case are exhausted when it has pronounced its decision. This being the position clearly laid down by the respective constitutions of the Court and of the League of Nations, the Government of His Britannic Majesty, by reason of the very value which they attach to the successful working of the Court, regard it as of the first importance that the true limits of its functions should be respected, and preserved from encroachments, direct or indirect.

5. The same basis as forms the foundation of the Application underlies the Greek Case. At the very beginning of that document the Greek Government refers to "the dispute which has arisen between the British Government and it, *respecting the carrying out of Judgment No.* 5," which dispute the Greek Government has submitted to the Court, and the Hellenic Government proceeds to say that it "proposes to prove that the British Government, in its capacity as Mandatory for Palestine, has disregarded the obligations devolving upon it under Article 11 of the Mandate *in that it has not complied with the terms of the said Judgment*". In paragraph 52 of the Case it is stated that "The statement of facts shows that the dispute submitted to the Court for judgment relates to the legality in international law and within the meaning of Article 11 of the Mandate, of the attitude adopted by the British Government *in regard to the execution of the Judgment of March 26th*, 1925." The Court has no jurisdiction, in the absence of a special agreement, to entertain any such dispute. It is true that in the conclusions of the Case (paragraph 87) the previous Judgment is not mentioned, but having regard to the terms of the conclusions of the Application, with which they must be read and the whole reasoning of the Case His Britannic Majesty's Government think it is indisputable that the present proceedings are primarily and fundamentally based upon the alleged non-execution of the Court's former Judgment, and are therefore misconceived and should be dismissed upon this ground alone.

But the Mandate for Palestine is relied upon incidentally. The Greek Government suggest that His Britannic Majesty's Government have disregarded the international obligations mentioned in Article 11 as interpreted by the Court, and this ground of jurisdiction will accordingly be examined below.

THE MANDATE.

6. Article 26 of the Mandate provides that "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." Article 11 of the Mandate contains the following provision: "The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein." It is obvious, as the Court expressly pointed out in Judgment No. 2, that the Mavrommatis concessions in themselves are outside the scope of this article (see A., No. 2, p. 19). In order that the Court's jurisdiction under the Mandate may come into play, it is necessary that there should have been some exercise by the Administration of Palestine of its power to provide for the public ownership or control contemplated in Article 11. A dispute as to whether such action violates or disregards the international obligations referred to in the article may be entertained by the Court under the terms of Article 26, but unless the power conferred upon the Administration by Article 11 has been exercised the question of interpretation or application of the Mandate does not arise. This reasoning lies at the root of the Courts' Judgments Nos. 2 and 5, and it does not, accordingly, seem necessary to insist further that in order to give the Court seizin of the present case under the Mandate the Greek Government must show that the Administration of Palestine has granted to some person other than M. Mavrommatis some concession or rights representing an exercise of the power referred to in Article 11.

7. It is to be remembered that in Judgment No. 5, in the course of the proceedings upon which the full facts regarding the Rutenberg concessions and their relation to M. Mavrommatis' Jerusalem concessions were for the first time examined,

the Court found that Mr. Rutenberg's Jaffa concession did not affect the rights derived by M. Mavrommatis from either of his concessions—that for the supply of water or that for the supply of electricity. (Series A., No. 5, p. 32.) In regard to Mr. Rutenberg's Jordan concession (i.e. the concession covered by the agreement of September 21st, 1921) the Court held that apart from the right given by Article 29 thereof to claim the annulment of previous concessions covering the whole or any part of his concession there was nothing therein which could be regarded as contrary to M. Mavrommatis' rights under his Electricity concession. (Series A., No. 5, p. 33.) As regards the Mavrommatis Water concession the Court upheld the British contention that there was no conflict between it and the Rutenberg Jordan concession. (Series A., No. 5, pp. 33-34.) In the present proceedings the Greek Government do not suggest that any new concessions, other than the Rutenberg concessions, conflicting with the Mavrommatis concessions have been granted. Nor do they distinctly allege that any action taken by the British authorities in regard to the Rutenberg concessions has led to any direct infringement of M. Mavrommatis' rights. What they say is this, in the Application, p. 9: "Relying on his Jaffa concession, which gives him the right to use for his works the waters of the El-Audja, Mr. Rutenberg raised an objection to permission being given, without his consent, to M. Mavrommatis, to utilize the same source for the supply of Jerusalem. The British Government could have overcome Mr. Rutenberg's opposition by delaying, until the difficulty had been settled, the final grant of his Jordan concession. But it gave its consent to that concession as early as March 5th" [1926]. The same point is made in paragraph 20 of the Case, and developed at greater length in paragraphs 68 and 69. The suggestion of the Greek Government appears to be, that inasmuch as Mr. Rutenberg claimed that Article 2 of his *Jaffa* concession enabled him to object to M. Mavrommatis being allowed to use the waters of El-Audja for his water concession the British Government somehow or other—it is not appreciated exactly how—did an injury to M. Mavrommatis by finally granting Mr. Rutenberg his *Jordan* concession.

8. As the question of the Rutenberg concessions is conclusive for the purpose of jurisdiction under the Mandate, His Britannic Majesty's Government invite the Court to examine this matter somewhat closely. On February 25th, 1926, the two contracts were signed between M. Mavrommatis and the Crown Agents for the Colonies whereby his water and electricity concessions were respectively re-adapted in pursuance of the Lausanne Protocol and the Judgment of the Court (Greek

Case, Annexes Nos. 21 and 22). By clause 6 of the Water contract (Greek Case, Annex No. 21) it was provided that the water was to be obtained "from a source or sources to be approved by the High Commissioner". It will be within the recollection of the Court that in M. Mavrommatis' original water concession two alternative sources were contemplated, namely, Arroub and Ain-Fara and Ain-Favouar (see Series C., No. 5—I, p. 211). He chose the former as shown by the plans presented under that concession (*ibid.*, p. 208), and throughout the former proceedings Arroub was the only source ever mentioned in connection with the water concession. The first proposal with regard to El-Audja was, according to the Greek Case (see paragraph 5), made in the course of the negotiations in July, 1925, between M. Mavrommatis' engineers and Mr. Lees, the expert appointed by the Colonial Office, for the purpose of carrying out the readaptation of the concessions. His Britannic Majesty's Government deny the allegations (Case, paragraph 5) that M. Mavrommatis' expert consented to the figures required by the British expert on condition that it should be understood that the source to be utilized would be Ras-el-Ain or El-Audja, or that Mr. Lees accepted this condition in principle. His Britannic Majesty's Government are prepared, if need be, to disprove these allegations by the testimony of Mr. Lees. But it is to be observed that a strong presumption that no such agreement was arrived at is established by the terms of clause 6 of the contract of February 25th, 1926, mentioned above, a contract prepared with the collaboration of and expressly approved by the two experts (see Greek Case, Annex No. 12 *bis*). If the source had already been agreed upon one would expect to find some mention of El-Audja in the contract instead of the bare stipulation that the eventual source was to be one approved by the High Commissioner. The question of the utilization of El-Audja was first brought officially before the Administration of Palestine in the plans submitted to the High Commissioner by Lord Gisborough on May 5th, 1926 (Greek Case, Annex No. 39) and His Britannic Majesty's Government repudiate the suggestion (see Case, paragraphs 12, 19, 22) that any agreement was made by the Government experts or local authorities in Palestine on this subject. The Rutenberg Jaffa concession granted by the contract of September 12th, 1921 (set out in Series C., No. 5—I, p. 334), was of course in existence throughout this time, although it had not yet been given legislative validity, but inasmuch as it was a matter of common agreement, as the Court had found (Series A., No. 5, p. 32), that it did not affect M. Mavrommatis' rights under either of his concessions there could be no occasion for the British authorities to anticipate any difficulty by

reason thereof. It is impossible to suggest that the previous grant of that concession to Mr. Rutenberg, which the Court has already pronounced to be unobjectionable, can have constituted a breach of the international obligations referred to in Article 11 of the Mandate. And, indeed, it would not appear that the Greek Government go to this length. They complain, however (Case, paragraph 20), that on March 5th, 1926, the High Commissioner entered into a contract definitively granting the Jordan concession to Mr. Rutenberg's company. This contract is set out as Annex 147 to the Greek Case and the Court's attention is invited to its terms. In the first place it is quite clear that, like the original agreement of September 21st, 1921, it in no way affects the Mavrommatis water concession. With regard to his electricity concession it will be seen that certain alterations have been introduced into the Jordan concession for the purpose of conforming to the principles enunciated in the previous Judgment of the Court. Article 3 contains a proviso to the effect that "the Company shall not exercise any of the rights, powers or privileges granted by this concession in such manner as to derogate from, prejudice or affect the rights, powers, or privileges granted by————. (B) A concession granted by the Jerusalem Municipality in the year 1914 for electric supply and electric tramways.———— or (D) Any concessions which may be substituted for the above-mentioned concessions (B) and (C) for the purpose of carrying out the provisions of the Protocol appended to the Treaty of Lausanne which require that certain concessions granted in the Ottoman Empire shall be put into conformity with the new economic conditions, for so long and so far as such concessions respectively may be subsisting or capable of taking effect." As the Greek Government appear to feel some doubt (see Case, paragraph 69) as to whether this refers to the Mavrommatis concession, His Britannic Majesty's Government hereby declare that the words cited above were inserted for the specific purpose of protecting the Mavrommatis electric concession from any possibility of infringement arising out of the Jordan concession, and are, in their opinion, completely effective for such purpose. Article 20 of the Jordan contract, replacing the original Article 29 which formed the subject of so much discussion in the previous proceedings, provides that "at the request of the Company the High Commissioner shall *so far as he lawfully can and may* on behalf of and at the cost of the company expropriate————existing undertakings for the generation, supply, distribution or sale of electrical energy within the concession area". Read in conjunction with Article 3 it is, in the submission of His Britannic Majesty's Government, quite clear that all possible objections to which Article 29 of the original Jordan agreement may

have given rise have been removed in the new Jordan concession.

On December 2nd, 1926, the approval by the High Commissioner of the plans for the Mavrommatis water concession was conveyed to M. Mavrommatis by the Colonial Office (Greek Case, Annex No. 113). As these plans provided for the utilization of the El-Audja source it is obvious that the existence of the Rutenberg Jaffa concession did not prevent the High Commissioner from giving his consent to the use of that source under Article 6 of the contract of February 25th, 1926 (Greek Case, Annex No. 21). On March 7th, 1927, a draft Ordinance of the Palestine Government was promulgated for the purpose of giving legislative validity to the Rutenberg concessions and certain powers to the High Commissioner in connection therewith (Greek Case, Annex No. 147). The Greek Government refer to this fact (Case, paragraph 46) but do not formulate any precise complaint in regard to it. His Britannic Majesty's Government submit that inasmuch as neither of the Rutenberg concessions infringe or prevent the execution of the Mavrommatis concessions, there can be no ground for objecting to their being put definitely into force; still less for suggesting, which alone would give the Court jurisdiction under the Mandate, that this course involved any disregard or breach of the international obligations mentioned in Article 11.

9. In the course of the Application and Case various charges are made to the effect that the alleged delay in the approval of the Mavrommatis plans and the alleged hostility shown to him were due to the opposition of Mr. Rutenberg (see Application, p. 9; Case, paragraphs 20, 23, 69, 70, 87 [2]). Whilst not in any way admitting the correctness of the facts alleged, His Britannic Majesty's Government desire to point out that the acts and conduct of Mr. Rutenberg are, in themselves, immaterial for the purpose of founding the jurisdiction of the Court under Article 11 of the Mandate. In the absence of the exercise by the Administration of Palestine of the power there mentioned—as by granting to Mr. Rutenberg concessions conflicting with M. Mavrommatis' rights—attempts by Mr. Rutenberg to delay the approval of the Mavrommatis plans, or arouse the hostility of the Colonial Office, could not affect the question of jurisdiction in any way whatever. It has been shown above that there was, in fact, no conflict between the Mavrommatis water concession and the Rutenberg Jaffa concession, or between the Mavrommatis electricity concession and the Rutenberg Jordan concession; nor could there possibly be any conflict between the Mavrommatis water concession and the Rutenberg Jordan concession or the Mavrommatis electricity concession and the Rutenberg Jaffa

concession. The fact—if it were the fact, which is not admitted—that Mr. Rutenberg tried to influence the Colonial Office or the High Commissioner to delay the approval of M. Mavrommatis' plans is obviously a matter quite outside the terms of Article 11 of the Mandate. But even if it were assumed that the alleged delay in approving those plans was the result of Mr. Rutenberg's influence, and, further, that such delay was a breach of the contracts of February 25th, 1926,—both of which assumptions are contrary to the facts—it would still, in the submission of His Britannic Majesty's Government, be impossible to hold that such delay was due to the exercise of the power of public control mentioned in Article 11. The only exercise of public control that could be alleged upon the principles laid down by the Court in Judgment No. 2 would be the grant of concessions conflicting with those of M. Mavrommatis, and this is not suggested.

10. Before passing from the question of jurisdiction under the Mandate, it must be pointed out that His Britannic Majesty's Government have dealt with it upon the hypothesis that M. Mavrommatis possessed at the material period concessions covered by the Lausanne Protocol and therefore the subject of "international obligations accepted by the Mandatory" within Article 11 of the Mandate. They have so dealt with the question because it was desired to examine it on the basis presented by the Greek Government. But the true position was, it is submitted, that as from February 25th, 1926, when the new contracts were made between M. Mavrommatis and the Crown Agents for the Colonies (Greek Case, Annexes Nos. 21 and 22) the concessionary contracts between the City of Jerusalem (being an Ottoman local authority) and M. Mavrommatis had been absolutely cancelled and annulled under clause 3 of the new contracts and that there were, accordingly, no concessions in existence to which the Lausanne Protocol could apply. This point will be dealt with more fully below (see paragraph 14) but His Britannic Majesty's Government submit here that if this be, as they contend, the true position the Court cannot in any event, and apart altogether from the contentions made above, possess any jurisdiction under the Mandate, inasmuch as there would not exist in regard to the Mavrommatis concessions any international obligations within the meaning of Article 11, these international obligations being, as the Court held in Judgment No. 5 (Series A., No. 5, p. 27), constituted solely by the Protocol of Lausanne.

PROTOCOL OF LAUSANNE.

11. The third international instrument referred to in the Greek Application and Case is Protocol XII signed at Lausanne on July 24th, 1923. It must be observed that the Greek Government do not found their claim to bring the present case before the Court upon this instrument. They refer to it only as one of the elements in the Court's previous Judgment with which they allege the British Government have not complied (see Application, pp. 5 and 13). Paragraph 52 of the Case, which states the questions involved in the merits, does not expressly mention the Protocol, neither do the conclusions formulated in paragraph 87. It would appear, therefore, that the Greek Government recognize that the jurisdiction of the Court cannot be based upon the Protocol. In paragraph 53 of the Case an exposition is given of the obligations which it is claimed His Britannic Majesty's Government have failed to fulfil. The Greek Government point out that the Court in its previous Judgment held that the Protocol alone constituted the international obligations referred to in Article 11 of the Mandate, and that the Mavrommatis concessions fell under the application of Article 4 of the Protocol, and they contend that His Britannic Majesty's Government have neglected to give full effect to Article 4 in dealing with the Mavrommatis concessions and, therefore, have failed to carry out the Judgment. As it is thus clear (as has already been indicated at the beginning of this Objection) that the present proceedings are in substance and in fact based upon the non-execution of the previous Judgment and that the Protocol is only brought in as part of the subject-matter of that Judgment, it may, strictly speaking, be unnecessary to deal with it at the present stage. But it seems advisable, for the sake of clarity, to examine, as shortly as may be, the bearing of the Protocol upon the preliminary question.

12. In the first place, it is to be remembered that the Lausanne Protocol itself does not confer any jurisdiction upon the Court. As was observed in Judgment No. 2, "the Court is not competent to interpret and apply, upon a unilateral application, that Protocol as such, for it contains no clause submitting to the Court disputes on this subject". (Series A., No. 2, p. 28.) It is only if the Mavrommatis concessions have been affected by the acts contemplated by Article 11 of the Mandate, in so far as such are contrary to the obligations contracted under the Protocol, that the Court has compulsory jurisdiction (see Series A., No. 5, p. 27). In Judgment No. 5 the Court in effect dismissed the claim that the Rutenberg

concessions had affected the Mavrommatis concessions (i.e. the claim giving rise to jurisdiction under the Mandate), subject only to this, that it held that by reason of the retrospective subrogation of Great Britain to Turkey, by Article 9 of the Protocol, the existence for a certain period of time of the right of expropriation given to Mr. Rutenberg by clause 29 of his Jordan concession constituted an infringement of the international obligations referred to in Article 11 of the Mandate. This did not, however, result in any damage to M. Mavrommatis—it was merely a technical infringement, *injuria sine damno* (see Judgment No. 5, head II, pp. 32-45). The claim under the Protocol of Lausanne was decided by virtue of the special consent of His Britannic Majesty's Government (see Series A., No. 5, pp. 27-28, 45). Such consent was given in the British Counter-Case and was limited to the question whether the Mavrommatis concessions fell under Articles 4 and 5 or under Article 6 of the Protocol (see paragraph 11 set out in Series C., No. 7—II, pp. 213-214) as the Court expressly recognized (Series A., No. 2, pp. 27-28).

13. In these circumstances it is quite clear that the Court has no jurisdiction to decide, in the present proceedings, whether His Britannic Majesty's Government have carried out the obligations, if any, laid down by the Protocol with regard to the Mavrommatis concessions, unless indeed it can be shown that they have since the date of Judgment No. 5 disregarded those obligations by the exercise of the power to provide for public ownership or control within the meaning of Article 11 of the Mandate. His Britannic Majesty's Government have indicated in paragraphs 7 and 8 hereof the reasons why, in their submission, this condition cannot be held to have been fulfilled. Nor is the absence of jurisdiction to decide the above question affected in any way by the fact that the Court has given a previous Judgment on the subject (see paragraphs 4 and 5 above). In order that the Court may entertain any given case it must be shown that the specific dispute which is alleged to have arisen between the Parties is within its jurisdiction. If the present dispute is in respect of the international obligations laid down by the Protocol of Lausanne it is outside the jurisdiction of the Court, and if it is in respect of the execution of Judgment No. 5 it is equally so.

14. But His Britannic Majesty's Government desire to point out that apart altogether from the foregoing considerations, there is, in their submission, no room at all for the application to the present Mavrommatis concessions of the provisions of the Protocol. As already mentioned, new contracts were made between M. Mavrommatis and the representatives of the High Commissioner for Palestine on February

25th, 1926. (Greek Case, Annexes Nos. 21 and 22.) These contracts embodied the readaptations agreed upon by the Parties as giving effect to Article 4 of the Protocol, in regard to the Water and Electricity Concessions respectively, and each of them provided by clause 3 that "the Concessionnaire (i.e. M. Mavrommatis) hereby absolutely and irrevocably surrenders and renounces all rights and benefits in and under the Agreement dated the 14th-27th day of January, 1914, hereinbefore recited (i.e. the original Water and Electricity Concessions respectively) to the intent that the same may be absolutely cancelled and annulled". His Britannic Majesty's Government submit that the effect of this clause was to put an end, once and for all, to the concessionary contracts between M. Mavrommatis and the City of Jerusalem. Now those, and those alone, are the contracts to which the Lausanne Protocol relates. That instrument has no bearing upon concessionary contracts made between the Palestine Administration or the British Government and a Greek national in the year 1926. The Greek Government seek to avoid the consequences of this situation by contending (1) that Article 4 of the Protocol is not fulfilled by an agreement as to the terms of readaptation, but only by such terms being carried out and rendered effective (Case, paragraph 53) and (2) that the grant of the new concessions, and the abandonment of the old, in the 1926 contracts did not possess a definitive character. They argue that if the conditions laid down in clause 4 of those contracts were not fulfilled, by one Party or the other, the old contracts would "subsist", and they support this view by reference to the meaning, in English law, of the term "consideration" which appears in that clause (Case, paragraph 55). His Britannic Majesty's Government will not deal with argument (1) because it relates to the merits. If the Court had jurisdiction *aliunde* to entertain the present case that point might arise, but the question now under discussion is whether, after the conclusion of the new contracts, the original concessions maintained by the Protocol retained any force, be it only suspensive force. Upon this question His Britannic Majesty's Government dissent entirely from the conclusions embodied in the Greek argument (2). They submit that, according to English law (by which, as the Greek Government recognize, the contracts of 1926 are governed) the renunciation contained in clause 3 is, as it purports to be, absolute and irrevocable, and that the subject-matter thereof—namely, the contracts of 1914—cannot in any circumstances whatever revive. His Britannic Majesty's Government entirely accept the definition of "consideration" in paragraph 55 of the Greek Case, which is taken from a leading authority: Currie *v.* Misa, L.R. 10 Ex. 153 at p. 162, but they point out that

according to clause 4 of the 1926 contracts the consideration for the renunciation by M. Mavrommatis of his old contracts was the grant, by that clause, of the new concessions. "In consideration of the said renunciation the High Commissioner *hereby grants* the Concession as hereinafter described." M. Mavrommatis received valuable consideration for his renunciation by the fact of the new concessions being granted. It is true that clause 4 proceeds: "provided always and upon the express conditions following that is to say that the Concessionnaire shall within a period of twelve months" do various things. But these were conditions requiring the fulfilment of certain obligations by the Concessionnaire relating to the concession "hereby granted". In the event of his failure to carry out those obligations the High Commissioner had "the right to determine the concession". According to English law the only remedy of the Concessionnaire for the wrongful exercise of such right (which of course is not alleged here) would be damages for breach of the 1926 contract. There could be no question, under English law, of annulment of that contract, resulting in the revival of the original contract. The only ground upon which the 1926 contracts could be annulled, according to English law, would be misrepresentation or fraud at or before the date of its signature. In the absence of fraud or misrepresentation, the rights of the Parties, being embodied and defined in a valid contract, depend upon that contract exclusively. The Greek Government contend (Case, paragraph 54) that there must be implied (*sous-entendu*) in the 1926 contracts a right of determination on the part of the Concessionnaire corresponding to the High Commissioner's right under clause 4. There is, however, no warrant whatever in law or in fact for any such implication. As the Greek Government themselves point out (Case, paragraph 54) the only obligation of the High Commissioner under clause 4 is to notify his approval or disapproval of the plan, or his objections thereto, within a certain period, and in case of non-approval followed by submission of revised plans, to notify his approval or disapproval thereof within one month; in the event of non-approval of the revised plans the Concessionnaire can require the submission of the plans to an independent expert whose decision is final and binding. In the meantime the High Commissioner is expressly precluded from granting any conflicting concession or licence. It is therefore plain that no failure on the part of the High Commissioner can prevent the due performance of the contract—there is no room for any act or omission of his going to the root of the contract in any way at all; the Concessionnaire can secure a decision upon the plans within the time laid down apart from any act of the High Commissioner. Moreover, it is to be observed

that the "express conditions" upon which the High Commissioner grants the concession to M. Mavrommatis under clause 4 do not and cannot include, as the Greek Government suggest (Case, paragraphs 54 and 55), fulfilment of the High Commissioner's obligations. Such an interpretation is not only inconsistent with the terms of the clause, but contrary to common sense, as it is impossible for the High Commissioner to grant a thing on condition that *he* will do something. Non-fulfilment by M. Mavrommatis of his obligations, which are conditions of the grant and fundamental for the purpose of the contract, naturally gives rise to a right of determination of the concession, but there is no reason for any right of determination in the case of non-fulfilment of the High Commissioner's obligations, which are not conditions of the grant and are not fundamental for the purpose of the contract.

As a matter of English law it is clear that the only remedy of M. Mavrommatis for breach of the High Commissioner's obligations under clause 4 would be for damages for breach of the contract. For these reasons, it is submitted that as from February 25th, 1926, the concessionary contracts of M. Mavrommatis within the meaning of the Lausanne Protocol have ceased to exist.

ALTERNATIVE GROUND OF OBJECTION.

15. In addition to all the above contentions His Britannic Majesty's Government object to the jurisdiction of the Court upon the following alternative ground. They submit that even if the present dispute were otherwise covered by an international instrument involving their consent to its reference to the Court, the Greek Government's application should be rejected by reason of the non-fulfilment of a necessary condition precedent, namely, the submission by M. Mavrommatis of his claim to the Courts of England or Palestine which are competent to adjudicate thereon under the municipal law of both countries. It is a well-established principle of international law that no State is entitled to take up the claim of its subject or citizen against a civilized foreign Government until after he has exhausted his judicial remedies in the Courts of the foreign country, provided that those Courts are open to him for the purpose. *See* Vattel, Book II, Ch. VII, Section 84; Ch. XVIII, Section 350; F. de Martens, *Traité de Droit international,* Vol. I, p. 445; Pradier-Fodéré, Tome I, Ch. X, pp. 476-477; Phillimore, Part V, Ch. II, Section III; Hall, 6th Ed., p. 273; Bluntschli, Section 380; Calvo, Section 864; Anzilotti in R.G.D.I.P., Tome XIII, p. 8; Moore's *Digest,* Vol. 6, p. 259; Borchard, *Diplomatic*

Protection of Citizens Abroad, pp. 281, 282, 284. As the last-mentioned author observes (p. 330): "In last analysis denial of justice is the fundamental basis of an international claim." This "elementary principle of international law" has been expressly recognized by the Court itself in Judgment No. 2 (see Series A., No. 2, at p. 12) and its applicability to international judicial proceedings, as well as to diplomatic action, is there assumed—such applicability indeed follows *a fortiori*. His Britannic Majesty's Government regard the maintenance of this principle as of general importance, as part of the respect due to each other by the members of the family of nations and as a safeguard against vexatious international litigation.

16. There can be no doubt as to the municipal Courts being open to M. Mavrommatis or as to their power to grant him relief. Assuming for the sake of argument that his claim, as presented by the Greek Government, is well founded, complete satisfaction can be given to it by the award of damages for breach by the High Commissioner of the contracts of February 25th, 1926 (Greek Case, Annexes Nos. 21 and 22), and the Courts of Palestine are competent to entertain an action by him for the recovery of such damages (see Crown Actions Ordinance No. 30 of 1926 annexed hereto). By clause 62 of the water contract and clause 46 of the electricity contract the contracts "shall be interpreted and construed according to the laws of England and shall be given effect to accordingly". The Palestine Courts would therefore apply English law.

CONCLUSION.

17. For all these reasons, the Government of His Britannic Majesty submit that the Court has no jurisdiction to entertain the present proceedings, and ask the Court to dismiss the claim of the Greek Government upon this ground.

(*Signed*) A. J. HARDING,
Agent of the Government of His Britannic Majesty in Great Britain.

Dated this 9th day of August, 1927.

Annex to No. 3.

Government of Palestine.

CROWN ACTIONS ORDINANCE.

No. 30 of 1926.

An Ordinance to make provision relating to Actions by and against the Government.

BE IT ENACTED by the High Commissioner for Palestine, with the advice of the Advisory Council thereof:

1. This Ordinance may be cited as the Crown Actions Ordinance, 1926. Short title.

2. Claims by the Government of Palestine or by any Government Department against a private person shall be brought by the Attorney-General or his representative or by any Officer authorized by law to prosecute such claims on behalf of the Government. Claims by Government against private persons.

3. (1) Save as hereinafter provided, no claim of any kind whatsoever, whether by way of original claim, counter-claim or otherwise, against the Government or any Government Department shall be entertained in any Court unless it be a claim for obtaining relief, other than relief in the nature of specific performance or injunction, against the Government or a Government Department in respect: Claims by private persons against the Government.

(*a*) of the restitution of any movable property or compensation to the value thereof, or

(*b*) of the payment of money or damages in respect of any contract lawfully entered into on behalf of the Government or a Government Department, or

(*c*) of the possession or restitution of any immovable property or compensation to the value thereof.

(2) No claim which may lawfully be made against the Government shall be entertained in any Court unless the claimant shall have obtained the written consent of the High Commissioner authorizing him to bring an action.

(3) Every such claim shall be preferred before a District Court or a Land Court if the claim is one which relates to a matter in which the Land Court has exclusive jurisdiction, in an action instituted by the claimant as plaintiff against the Attorney-General as defendant, or such other officer as the High Commissioner may from time to time designate for that purpose.

4. (1) The action shall be commenced by the filing of a petition at the District Court or Land Court, as the case How action commenced.

may be, and the delivery of a copy thereof at the office of the Attorney-General or other officer designated as aforesaid. No Court fee shall be payable on the filing or delivery of such petition.

(2) The Chief Clerk of the Court shall forthwith transmit the petition to the Chief Secretary, and the same shall be laid before the High Commissioner. In case the High Commissioner shall grant his consent as aforesaid, the petition shall be returned to the Court with the fiat of the High Commissioner endorsed thereon, and the claim shall then be prosecuted upon payment of the prescribed fees.

Service of documents.

5. All documents which, in an action of the same nature between private persons, would be required to be served upon the defendant, shall be delivered at the office of the Attorney-General or other officer designated as aforesaid.

Judgment and proceedings thereon.

6. Whenever in any suit brought under this Ordinance judgment shall be given against the Government, no execution or attachment or process in the nature thereof shall ensue thereon, but a copy of the judgment shall be transmitted to the High Commissioner who, if the judgment shall be for the payment of money, shall by warrant under his hand direct the amount awarded by such judgment to be paid, and in the case of any other judgment shall take such measures as shall be necessary to cause the same to be carried into effect; or, in case he shall think fit, he may direct that an appeal shall be entered and prosecuted against any judgment.

Appeal.

7. An appeal shall lie from the judgment of the District Court and the Land Court to the Supreme Court on the same conditions as an appeal from a judgment brought by or against a private person. Provided that the Government may claim in any appeal that the Court shall contain a majority of British Judges.

Application of rules of Civil Procedure.

8. Save as herein before provided, all the provisions contained in the Code of Civil Procedure or in any enactment amending the same, and the practice and the course of procedure in the Civil Courts shall extend and apply to all actions and proceedings brought by or against the Government of Palestine, and in all such actions costs may be awarded in such manner as in actions between private parties;

Provided that no person representing the Government or any Department of Government in any action shall be called upon to pay Court fees or other fees or to give security for costs or security that he will abide by the decision of the Court, or other security.

And provided also, that the Government of Palestine shall be entitled to recover advocates' fees whether it is represented in Court by an Officer of the Government or a private advocate.

Proceedings before High Court not affected.

9. Nothing in this Ordinance shall affect any application made to the High Court in accordance with the provisions of Section 6 of the Courts Ordinance, 1924.

Actions already instituted not affected.

10. Nothing in this Ordinance shall affect any civil proceedings instituted prior to the date on which this Ordinance comes into force by or against the Government of Palestine or any Department thereof, or any officer of the Government of Palestine acting in his official capacity. No such proceedings in which final judgment has been given prior to such date shall be reopened on account of anything in this Ordinance.

(*Signed*) PLUMER, F. M.,
High Commissioner.

1st September, 1926.