INDIVIDUAL OPINION OF JUDGE LEVI CARNEIRO

[*Translation*]

Though I have voted with the majority on nearly all the questions and have accepted the conclusions of the Judgment, I nevertheless venture to draw attention to some secondary differences of view, and to refer to certain considerations which have influenced my attitude in regard to questions which have been raised, but which have not been dealt with in the Judgment.

2. It has been decided not to join the Objection to the merits, in conformity with Article 62, paragraph 5, of the Rules of Court, as had been requested by one of the Parties.

I consider that such a joinder should only be made when it is absolutely necessary. However, it often happens that, although no joinder is made, the decision on the jurisdiction involves a summary, superficial, or *prima facie* consideration of certain questions pertaining to the merits. Such an examination is mainly confined to the legal issues, without dealing with the facts that are in dispute, and the decision on the jurisdiction may then be founded on considerations which touch upon these questions, without dealing exhaustively with them and without prejudging them.

3. In my opinion, in order to establish the Court's jurisdiction in the present case, it should have been decided that the Ambatielos claim is "based" on the Treaty of November 10th, 1886—that is to say, that it has given rise, in the words of the Protocol of the same date, to a controversy "respecting the interpretation or the execution" of the Treaty.

The United Kingdom Counter-Memorial has correctly indicated the line of argument by which the Hellenic Government justifies the Court's jurisdiction :

> ".... it contends that the treatment accorded to the claimant gave rise to a claim against the United Kingdom *under Article XV of the Treaty of 1886;* that, since the United Kingdom rejects this claim, it should be submitted to arbitration under the Protocol annexed to that Treaty and continued in force after the termination of the Treaty by the Declaration made on the date of signature of the Treaty of 1926; and finally that the refusal of the United Kingdom to go to arbitration raises a dispute as to the application of the Declaration which the Court has jurisdiction to decide under Article 29 of the Treaty of 1926" (paragraph 10, British Counter-Memorial) (my italics).

Certainly, the Hellenic Government's argument was correctly summarized in that passage. The Greek Memorial expressly contended that there had been a violation of Article XV, para-

graph 3, of the Treaty of 1886, consisting of a denial of justice, and of Article X of the said Treaty, consisting of inequality of treatment (Memorial, paragraphs 14 and 22).

The invocation of these provisions of the Treaty seems to be relevant. Without passing on the facts stated in the Memorial, or recognizing the correctness of these allegations, it would not be possible to say whether the invocation of the clauses of the Treaty of 1886 was justified. The Court cannot do so at the present stage of the proceedings. However, this invocation must, *prima facie*, be regarded as acceptable. That is both sufficient and necessary to enable the Court's jurisdiction to be asserted. If the claim manifestly went beyond the terms of the Treaty of 1886, the Court would have no jurisdiction. For example, if the claim related to facts prior to the Treaty of 1886, the Court's lack of jurisdiction would have to be at once admitted; the invocation of this Treaty would—even *prima facie*—appear to be ill-founded. In fact, what has to be decided is simply whether the claim is or is not *admitted* by the Treaty.

4. In the present case, recognition of the fact that the claim is based on the Treaty of 1886 follows from the declarations of the Parties.

In the Counter-Memorial (paragraph 11), after the summary of the Hellenic Government's reasoning, which I have quoted above, the Agent for the United Kingdom Government submitted that this reasoning ought to be rejected because:

> "*(a)* the Declaration does not form part of the Treaty of 1926 and Article 29 of the Treaty is therefore not applicable to it, and because
>
> *(b)* the Declaration was only intended to apply to claims brought before the date of its signature (16th July 1926)."

The British Government did not reject the reasoning on the ground that the claim was not based on the Treaty of 1886, although it disputed the denial of justice and the inequality of treatment. On the contrary, it admitted that the claim was, *prima facie*, based on the Treaty of 1886.

Its first submission was that the Court

> "has no jurisdiction to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government based on Article XV or any other article of the Treaty of 1886".

Subsequently, during the oral proceedings before the Court, the recognition of this fact became quite clear. Counsel for the United Kingdom, at the hearing on May 15th, stated the conditions which he regarded as necessary for the admission of the Court's jurisdiction: (1) that the Declaration was a provision of

the Treaty of 1926; (2) that the Greek claim was both "based on the Treaty of 1886" and covered by the Declaration (Oral Argument, page 16). He sought to show that the Declaration did not form part of the Treaty of 1926, and that it did not cover the claim; but he did not attempt to show that the claim was not based on the Treaty of 1886.

In conclusion, the Greek Counsel said:

> ".... even our opponents agreed that our legal bases included at least one which they recognized as pertinent: that was Article XV, paragraph 3, of the Treaty of 1886....".

I think that this fact should have been recognized. The Court's jurisdiction results from the fact that the dispute is within the framework of the Declaration of 1926: the claim is "based" on the Treaty of 1886.

5. It might perhaps have been possible to anticipate the final decision of this case by at once affirming—or denying—the obligation of the United Kingdom Government to submit to arbitration its dispute with the Hellenic Government in regard to M. Ambatielos's claim.

The fullness of the arguments appeared to allow of such a decision—and I myself was in favour of giving it. I now recognize that the present Judgment deals solely with the Objection to the jurisdiction. In presenting it, the British Government very clearly separated the question of jurisdiction from the question of the merits. In regard to the latter, it said that the claim of the Hellenic Government was barred by reason of the delay in its submission, and that the Court should, in accordance with the Hellenic Government's proposal, substitute itself for the Arbitration Commission, etc. On the preliminary question, what was alleged was the Court's lack of jurisdiction to order the British Government to submit to arbitration a claim by the Hellenic Government, etc.

The present decision of the Court, in its Judgment on the Preliminary Objection, is limited to an affirmation of its competence to give the ruling referred to.

Subsequently, in the next stage of the procedure, the Hellenic Government's request will be adjudicated upon. Then, and only then, will the Court be in a position to adjudge and declare, as requested by the Hellenic Government:

> "that the United Kingdom Government is under an obligation to refer its present dispute with the Hellenic Government to arbitration....".

It is true that the Hellenic Government itself, in its "Observations and Submissions" departed from this attitude and asked the Court

"to hold that the United Kingdom Government is bound to accept the submission to the International Court of Justice, sitting as an arbitral tribunal, of the dispute now existing between that Government and the Hellenic Government, and accordingly to fix time-limits for the filing by the Parties of the Reply and the Rejoinder dealing with the merits of the dispute".

A modification resulted from the acceptance by Counsel of the two Parties, during the oral proceedings, of the principle that the Court should exercise the functions of the Commission of Arbitration referred to in the Protocol of 1886. This proposal, which was proposed by Counsel for the Hellenic Government, was accepted by the United Kingdom Counsel, subject to the condition that the Court should first hold that it was competent. It has been very correctly decided in the Judgment that the Court has not thereby been invested with jurisdiction to decide on the merits.

In my view, it should be declared expressly that the Court could assume the function of the Arbitral Commission as a result of a Special Agreement between the two Governments. The declarations of the Agents, or even of Counsel, in the course of the proceedings, may suffice to establish the competence of the Court, by a prorogation of jurisdiction. However, in the present case, the Court holds that competence belongs to the Commission of Arbitration provided for in the Protocol of 1886. In my opinion, the Court could not agree to any derogation from the clause contained in this inter-governmental agreement on the basis of the mere declarations of Counsel ; nor could it admit that jurisdiction to adjudicate on the dispute has been transferred to it by virtue of such declarations.

In short, in the submission which I have quoted from its "Observations", the Greek Government envisages, in addition to this proposal regarding the Court's competence—which is unacceptable—the continuation of the proceedings by a Reply and a Rejoinder. This is required by Articles 41, paragraph 2, and 62, paragraph 5, of the Rules of Court, just as Articles 47 *et sqq.* call for further oral argument.

In this second phase, the question whether the claim is based on the Declaration of 1926 will be fully examined. One of the points that will then have to be decided is that raised by Counsel for the United Kingdom in his sixth argument, where he contended that the alleged denial of justice committed in violation of the general principles of international law did not constitute a violation of the Treaty of 1886, because this Treaty contained no provision to that effect. I agree that this question ought not to be decided at the present stage of the proceedings, but not on the ground that it has not yet been fully argued by the Parties. That omission by the Parties might be interpreted by the Court ; but I consider that it would not be a ground for failing to decide this question,

if it were opportune to do so. In fact, it is because this question pertains to the merits of the case that the Court cannot decide it at this time. That is all the more true because it is not necessary to consider this question in order to assert the Court's jurisdiction.

There will still be a third phase if the Parties agree, only after the end of the second phase, to confer the arbitral function upon the Court.

The Court's concern not to delay the proceedings cannot be allowed to prevent this prolongation of the case if the Parties do not find means of avoiding it.

6. The Court's future decision on the merits, being confined to a decision on the question whether the Ambatielos claim falls within the framework of the Declaration of 1926, there is no reason to fear that the judgment of the Commission of Arbitration would conflict with such a decision. The only point which the Court will have to decide will be the competence of that Commission. It is clear that even the Commission itself could not then declare that it lacks jurisdiction. If the Court should hold the Commission competent, it will be for it to decide the sole question of the validity of the Ambatielos claim. If the Commission, its competence having thus been established by the Court, refuses to decide this question, the Court will have to order a new commission to be constituted. Something has been said of the autonomy of the arbitral commissions ; in my view, their autonomy is limited by the instrument which institutes them—and in the present case that instrument is constituted by the Judgment of this Court.

While not exceeding the limits of a decision as to its competence, the Court should not reduce its decision to a doctrinal, abstract or theoretical assertion ; it must necessarily relate its decision to the specific case. The Court's jurisdiction is derived from treaties, and from the features of the particular case before it. And so the Court will definitively determine the extent of its jurisdiction and that of any other organ which has to act in the same case.

7. The most important of the questions submitted is, as has been recognized in the Judgment, whether the Declaration annexed to the Treaty of July 16th, 1926, is a part of that Treaty. The Court's reasons in this connection are amply sufficient.

There is, however, I suppose, some doctrinal interest in emphasizing the juridical nature of this Declaration.

It is—it must be so described—according to a current expression, an "interpretative declaration". Declarations of this sort are often made by one of the parties concerned to define the attitude adopted towards a given treaty, a method of executing

it (Fenwick, *International Law*, p. 438 ; Oppenheim, *International Law*, 6th edit., Vol. I, p. 787).

In the *British Year Book of International Law* (1948, pp. 201-202), Mr. A. B. Lyons, referring to a declaration by the French Government on the most-favoured-nation clause, observed that the competent court had "held that the interpretative declaration must be read with and deemed to form part of the text of the treaty and was binding on the courts".

The Declaration of 1926, which has been referred to, was signed by the same representatives of the two Governments who were signatories of the Treaty of the same date. It has the significance of an authentic interpretation, embodied in the Treaty itself. The Treaty consists of three parts—Articles, Customs Schedule and Declaration.

Marcel Sibert has said that a declaration removes various uncertainties from the principles which are considered as the expression of the international law in force. Thus, the Declaration embodied in the Treaty of 1926 removes some uncertainties in regard to the application of that Treaty and of the earlier treaty which it replaced.

It is true that the Declaration relates to the Treaty of 1886, in that it saves claims—which have been or may yet be presented—based on the provisions of that Treaty, and ensures the continuity of their remedies in certain cases. Now, this safeguard only became necessary because a new treaty made its appearance in 1926. Thus, the Declaration restricted the application of the Treaty of 1926 by providing that it should not apply to the cases it mentioned. In virtue of that fact, it could be inserted in the new treaty, and it forms an integral part thereof ; it was so regarded by the two Governments in their instruments of ratification.

From an intellectual, ideological and juridical point of view, the Declaration forms part of the Treaty of 1926.

8. There is another consideration which supports that conclusion : if it were not adopted, there would be no pre-established procedure for the settlement of a dispute between the two Governments on the interpretation and application of the Declaration.

But such a situation must be avoided, more especially in the case of two friendly nations—like Greece and the United Kingdom—which are united by their love of democracy and of peace : they would not fail to provide for a friendly settlement of disputes which might arise in connection with their two successive commercial treaties. I could never believe that the United Kingdom and Greece, having concluded two treaties, forty years apart, in the operation of which there was no interruption, motivated by the same solicitude for the safeguarding and assisting of their respective nationals in the territory of the other State, and having expressly provided, in two instruments, for the friendly settlement

of their disputes (Protocol annexed to the Treaty of 1886, Article 29 of the Treaty of 1926), should find themselves unable to agree on the application of one of these Treaties, without there being any solution for such disagreement, either by arbitration or by recourse to some organ of international justice.

9. I consider such a situation all the more strange and unacceptable because the progress of international law, in its efforts to prevent war and promote international co-operation, is above all directed to the pacific settlement of disputes.

The interpretation and application of treaties constitute the special domain of arbitration for the very reason that they give rise to purely juridical questions. This was declared by the Second Hague Conference in 1907 and in Article 13 of the Covenant of the League of Nations and now, once more, in Article 36 of the Court's Statute.

If it is held that the Declaration of the 16th July, 1926, forms part of the Treaty signed on that day, the difference regarding the interpretation or application of that Declaration must be settled by the International Court of Justice, in accordance with Article 29 of the said Treaty in conjunction with Article 37 of the Statute of the Court.

10. In regard to the retroactive application of procedural provisions, and provisions relating to jurisdiction—which the Court has rejected—I venture to add that, in the sphere of international law, such an application can only be allowed when it is expressly provided for. Even when the organ which was formerly competent has been abolished, its powers cannot be regarded as automatically transferred to the new organ which replaces it. Thus, in order that this Court might inherit the powers of the Permanent Court of International Justice, it was necessary that this should be expressly laid down in Article 37 of the Statute. But, in the Treaty of 1926, there is no provision abolishing the Arbitral Commissions provided for in the Treaty of 1886. On the contrary, there is nothing to prevent these Commissions from being constituted, should that be necessary. From another point of view, the Declaration annexed to the Treaty of 1926 expressly maintains the means of settlement by arbitration, in accordance with the Protocol annexed to the Treaty of 1886, of disputes based on that Treaty ; Article 29 of the Treaty of 1926 limits the powers of the International Court to the settlement of disputes as to the interpretation or application of any of the provisions of the new treaty. The retroactive application of Article 29 would not be justified and has been expressly excluded.

(Signed) LEVI CARNEIRO.