DISSENTING OPINION OF JUDGE HSU MO

The principal issue in the present case is not simply whether or not the Declaration of 1926 is a part of the Treaty of 1926. It is the question whether the Declaration constitutes a provision or provisions within the meaning of Article 29 of the Treaty so that that Article must apply to these provisions just as it must apply to all the provisions contained in the text of the Treaty itself.

The facts with which the Court is concerned at this stage are that the Hellenic Government has taken up the claim of Ambatielos against the United Kingdom Government; that the Hellenic Government, invoking the Declaration of 1926, contends that the claim should be referred to arbitration in accordance with the provisions of the Protocol of November 19th, 1886; and that the United Kingdom Government has declined to go to arbitration on the claim. There is thus a dispute between the two Governments relative to the interpretation and application of the Declaration. The Court is called upon to determine whether or not, acting by virtue of Article 37 of the Statute, it has jurisdiction to examine and settle this dispute.

In order to determine this question, it is necessary to examine whether the Declaration should be regarded as being included in the expression "any of the provisions of the present Treaty" contained in Article 29, paragraph 1, of the Treaty of 1926. The fact that the Declaration appears at the end of the Treaty, was signed on the same day as the Treaty, and may be considered to have been ratified, together with the text of the Treaty, by the United Kingdom Government as well as the Hellenic Government, merely tends to show that the Parties attached equal importance in law and gave the same degree of solemnity to the two documents, but does not necessarily prove that the Declaration is an integral part of the Treaty, much less that Article 29 of the Treaty applies to the Declaration in the same way that it applies to the provisions of the Treaty. The question at issue must be resolved by considering the substance of the Declaration and its relation to the Treaty itself.

Prior to the conclusion of the Treaty of 1926, the Hellenic and the United Kingdom Governments had reached a *modus vivendi*, according to which the régime under the Treaty of 1886 and the Protocol annexed thereto would terminate upon the coming into force of the Treaty then under negotiation. The Declaration of 1926 produces no more effect than keeping alive the provisions of the Treaty of 1886 for the purpose of dealing with claims based thereon, as well as the arbitral procedure of settling any possible

disputes concerning the validity of such claims. The Declaration did not in any way prevent the Treaty of 1926 from coming into full force upon the exchange of ratifications. It does not alter the situation which results from the operation of that Treaty. It does not add anything to nor detract from any of the provisions of the Treaty. It cannot be considered as forming any reservation to Article 32 or any other article of the Treaty which, as far as its own terms are concerned, can be properly interpreted and applied without reference to the Declaration at all. When any claims envisaged in the Declaration have to be dealt with, it is not any of the provisions of the Treaty of 1926 which will be relied upon by one or the other Party, but it is the Declaration and the relevant provisions of the 1886 Treaty which will come into play. Any relationship which the Declaration bears to the Treaty is purely negative in character. The Declaration says, in effect : "Notwithstanding the conclusion of the new Treaty, the provisions of the old Treaty may still be relied upon for certain purposes." But for the Declaration, no claims based on the provisions of the 1886 Treaty could be entertained. This is not because they would have been wiped out by the 1926 Treaty, but because the 1886 Treaty with the Protocol, according to the *modus vivendi*, would have completely lost its force. The Declaration is thus not an interpretative clause of the Treaty of 1926 ; it rather constitutes a separate agreement whereby the Treaty of 1886, for certain purposes, has been given a new lease of life. In short, the Declaration has its own field of operation ; it stands on an equal footing with the Treaty of 1926 ; it cannot be absorbed by Article 29 of that Treaty for the "interpretation or application of any of the provisions of the present Treaty".

The independent nature of the Declaration is confirmed by an examination of the distinctive methods of arbitration provided for respectively in the Declaration and in Article 29 of the Treaty. In one case, it is arbitration by *ad hoc* commissions ; in the other, it is, in principle, arbitration by a permanently established international Court. From the very terms of the Declaration and Article 29, it may be justifiably inferred that the intention of the Parties was to make the two distinctive methods of arbitration exist side by side so that one might be brought into operation without resort to the other. The Parties wanted to have all disputes relative to the claims based on the old Treaty settled by the original procedure of arbitration. They wanted to have all disputes relative to any provisions of the new Treaty settled by the new procedure of arbitration. They envisaged two distinctive sets of disputes and two distinctive methods of arbitration. There is no connecting link between the new and the old method of arbitration.

It is difficult to believe that the Parties should have divided the process of settling disputes concerning claims based on the Treaty

of 1886 into two successive phases. In the first phase any dispute concerning the obligation to submit to a Commission of Arbitration any claim based on the provisions of the 1886 Treaty, should be referred, unless otherwise agreed upon, to the Permanent Court of International Justice for settlement. Thus, the question of the existence or non-existence of a claim, of its being presented or not presented on behalf of private persons, or of its being based or not based on the provisions of the Treaty of 1886—in each case, a question concerning the interpretation or application of the Declaration—would logically belong to the first phase and would therefore fall within the jurisdiction of the Permanent Court of International Justice. After the dispute as to the arbitrable character of the claim had been settled in favour of the government making the claim, there would begin the second phase of settlement, which would consist in referring the dispute as to the validity of the claim itself to a different organ, a commission of arbitration to be set up in accordance with the Protocol of 1886. There is absolutely no evidence to show that the contracting Parties desired to have what is in reality one and the same dispute settled by these two different methods and through these two different stages. Such dual procedure is so uncommon in international practice that it could not possibly be inferred from a reasonable interpretation of Article 29 of the Treaty of 1926 in conjunction with the Declaration.

The procedure of arbitration prescribed in the Protocol annexed to the Treaty of 1886 is, after all, an ordinary system of settling international disputes. It was apparently in reliance upon mutual good faith that the Hellenic and the United Kingdom Governments kept alive that system in the Declaration of 1926, just as so many other States, reposing the same confidence in one another, have before and since accepted the same or similar system of arbitration in so many treaties or conventions. If, in 1926, the two contracting Parties had entertained any doubt as to the efficacy of arbitration by *ad hoc* commissions and had desired to ensure compulsory arbitration by a permanently established international Court in the case of disputes concerning claims based on the Treaty of 1886, they could have stipulated in the Treaty or in the Declaration, with the greatest ease and simplicity, that the method of arbitration provided for in Article 29 shall also apply to such disputes. The fact that they did not choose to do so shows clearly that it simply never occurred to them that the arbitration clause contained in the Declaration should be itself subject to a different method of arbitration.

Even assuming that the Declaration does form a part of the Treaty of 1926, the clause of arbitration in the Declaration must be

regarded as a specific provision, since it deals with a specific kind of dispute, whereas the arbitration clause in Article 29 must be regarded as a general provision, since it covers disputes relating to all the provisions of the Treaty. It is a well-recognized principle of interpretation that a specific provision prevails over a general provision. Therefore, even if the Declaration had actually been written into the Treaty as an additional article, it must, nevertheless, in the absence of any indication of intention to the contrary, form an exception to the applicability of Article 29.

It is thus clear that this Court, as the substitute for the Permanent Court of International Justice, cannot exercise jurisdiction conferred upon it by Article 29 of the Treaty of 1926, in a dispute relative to the interpretation or application of the Declaration of 1926.

(Signed) HSU MO.