23

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

AMBATIELOS CASE

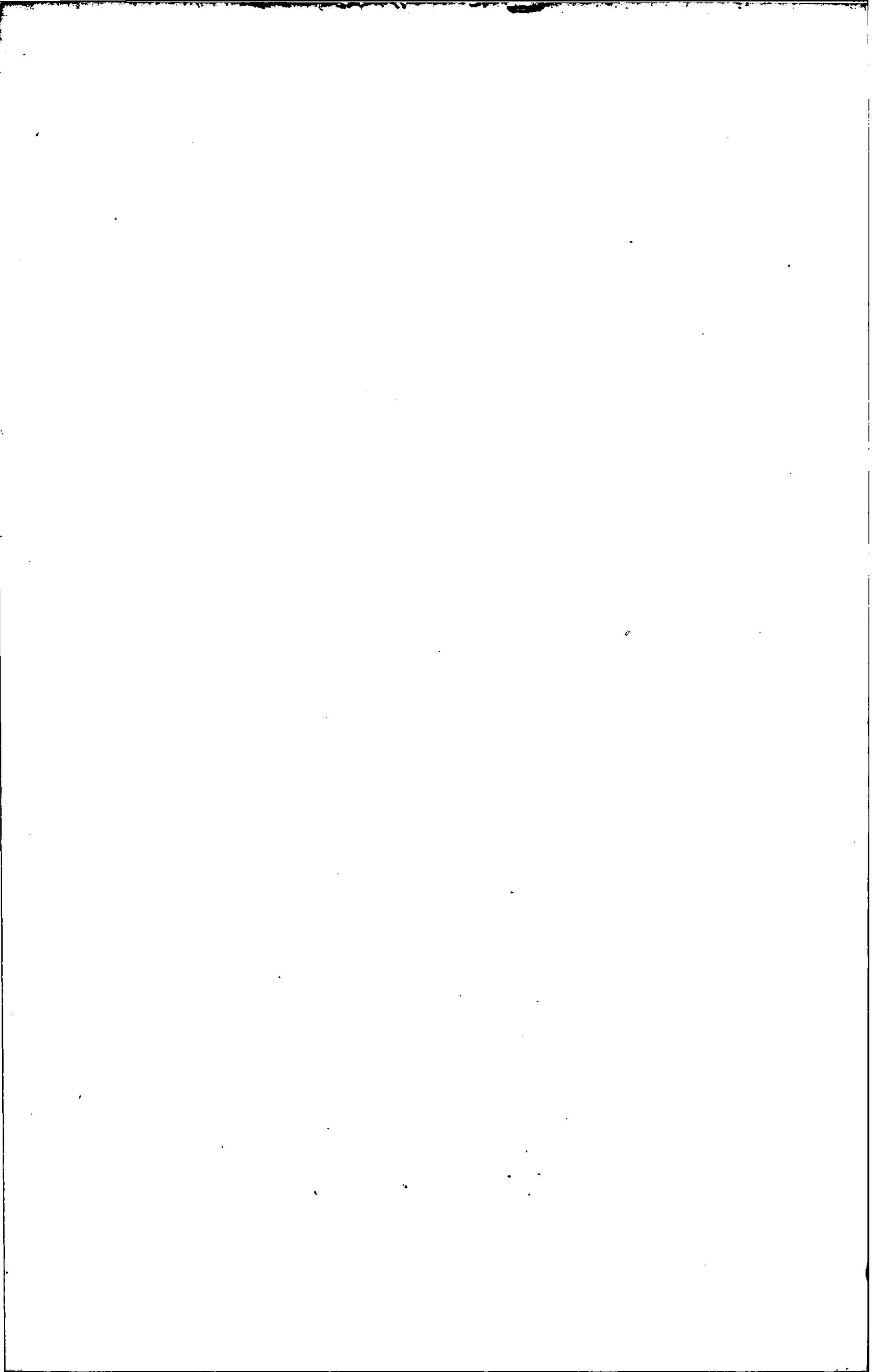
(GREECE *v.* UNITED KINGDOM)

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE AMBATIELOS

(GRÈCE c. ROYAUME-UNI)



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(GREECE *v.* UNITED KINGDOM)

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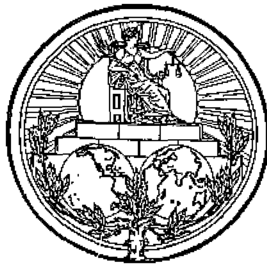
(GREECE *v.* UNITED KINGDOM)

JUDGMENTS OF JULY 1st, 1952, AND MAY 19th, 1953



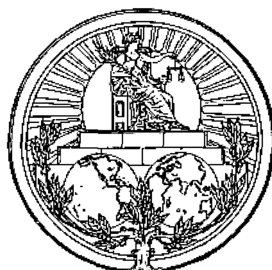
COUR INTERNATIONALE DE JUSTICE

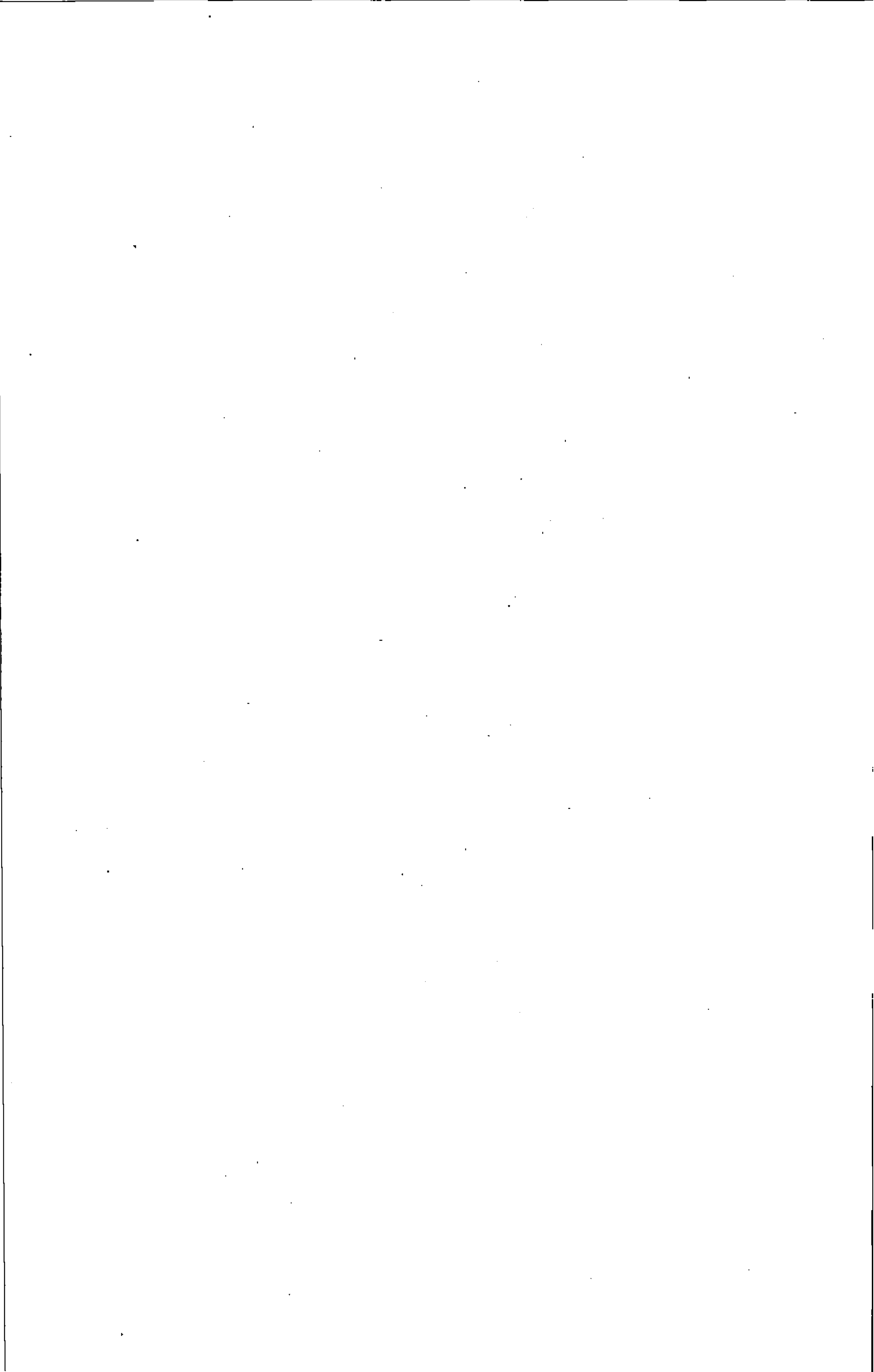
MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE AMBATIELOS

(GRÈCE c. ROYAUME-UNI)

ARRÊTS DES 1er JUILLET 1952 ET 19 MAI 1953





SECTION B

ORAL ARGUMENTS CONCERNING THE MERITS: OBLIGATION TO ARBITRATE

PUBLIC SITTINGS

held at the Peace Palace, The Hague, from March 23rd to 30th, and May 19th, 1953, the Vice-President, M. Guerrero, acting as President

SECTION B

PLAIDOIRIES CONCERNANT LE FOND: OBLIGATION D'ARBITRAGE

SÉANCES PUBLIQUES

tenues au Palais de la Paix, La Haye, du 23 au 30 mars et le 19 mai 1953, sous la présidence de M. Guerrero, Vice-Président, faisant fonction de Président

MINUTES OF THE SITTINGS HELD FROM MARCH 23rd TO 30th AND MAY 19th, 1953

YEAR 1953

FIRST PUBLIC SITTING (23 III 53, 4 *p.m.*)

Present: Vice-President GUERRERO, *Acting President; President* Sir Arnold McNAIR; *Judges* ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, KLAESTAD, BADAWI, READ, HSU MO, CARNEIRO, ARMAND-UGON; Professor Jean SPIROPOULOS, *Judge* ad hoc; *Registrar* HAMBRO.

Also present:

For the United Kingdom of Great Britain and Northern Ireland:

Mr. V. J. EVANS, Assistant Legal Adviser of the Foreign Office, *as Agent;*

assisted by, as Counsel:

Mr. G. G. FITZMAURICE, C.M.G., Second Legal Adviser to the Foreign Office;

Mr. J. E. S. FAWCETT, D.S.C., Member of the English Bar;

Mr. D. H. N. JOHNSON, Assistant Legal Adviser, Foreign Office.

For the Royal Hellenic Government:

M. E. VERGHIS, Chargé d'affaires *ad interim* of Greece, *as Deputy-Agent;*

assisted by, as Counsel:

Professor Henri ROLIN, of the University of Brussels, former President of the Belgian Senate.

Mr. C. John COLOMBOS, Q.C., LL.D.

In opening the sitting, the VICE-PRESIDENT, Acting President in this case, stated that the Court was assembled to examine, in its second phase, the dispute which had arisen between Greece and the United Kingdom of Great Britain and Northern Ireland concerning the claim submitted by the Hellenic Government for reparation for damage alleged to have been suffered in the United Kingdom by M. Ambatielos, one of its nationals. Proceedings in this case were instituted by an Application by the Hellenic Government, filed in the Registry on April 9th, 1951.

On February 9th, 1952, the Government of the United Kingdom, in its Counter-Memorial, submitted, in particular, that the Court lacked jurisdiction in the case.

PROCÈS-VERBAUX DES SÉANCES TENUES DU 23 AU 30 MARS ET LE 19 MAI 1953

ANNÉE 1953

PREMIÈRE SÉANCE PUBLIQUE (23 III 53, 16 *h.*)

Présents : M. GUERRERO, *Vice-Président, faisant fonction de Président ;* Sir ARNOLD MCNAIR, *Président ;* MM. ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, KLAESTAD, BADAWI, READ, HSU MO, CARNEIRO, ARMAND-UGON, *juges ;* M. Jean SPIROPOULOS, *juge* ad hoc ; M. HAMBRO, *Greffier.*

Présents également :

Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :

M. V. J. EVANS, conseiller juridique adjoint du Foreign Office,
en qualité d'agent ;

assisté de, comme conseils :

M. G. G. FITZMAURICE, C. M. G., deuxième jurisconsulte du Foreign Office ;

M. J. E. S. FAWCETT, D. S. C., membre du Barreau anglais ;

M. D. H. N. JOHNSON, jurisconsulte adjoint du Foreign Office.

Pour le Gouvernement royal de Grèce :

M. E. VERGHIS, chargé d'affaires *a. i.* de Grèce,
en qualité d'agent adjoint ;

assisté de, comme conseils :

M. le professeur Henri ROLIN, de l'Université de Bruxelles, ancien Président du Sénat belge ;

M. C. John COLOMBOS, Q. C., LL. D.

Le VICE-PRÉSIDENT faisant fonction de Président ouvre l'audience et déclare que la Cour se réunit pour examiner, dans sa seconde phase, le différend qui a surgi entre la Grèce et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord à l'occasion de la demande présentée par le Gouvernement hellénique en vue d'obtenir réparation pour certains dommages qu'aurait subis un de ses ressortissants, M. Ambatielos, au Royaume-Uni. Cette affaire a été introduite par une requête du Gouvernement hellénique, déposée au Greffe le 9 avril 1951.

Le 9 février 1952, le Gouvernement du Royaume-Uni a, dans son contre-mémoire, excipé notamment de l'incompétence de la Cour pour connaître de l'affaire.

On July 1st, 1952, the Court delivered judgment on the objection to its jurisdiction. It found that it lacked jurisdiction to decide on the merits of the Ambatielos claim, but that it had jurisdiction to decide whether the United Kingdom were under an obligation to submit to arbitration—in accordance with the declaration which accompanied the Treaty concluded between Greece and the United Kingdom in 1926—the difference as to the validity of the Ambatielos claim, in so far as this claim was based on the Treaty of 1886.

In pursuance of that judgment, the Court, by an Order of July 18th, 1952, had fixed the time-limits for the filing of the Royal Hellenic Government's Reply and of the United Kingdom's Rejoinder.

Three Members of the Court were not present on the Bench. MM. Zoričić and Golunsky had informed the President of the Court that their state of health prevented them from taking part in the present case. Furthermore, Sir Benegal Rau, who was indisposed, was unable to take part in the proceedings that afternoon.

The Acting President further pointed out that the Greek Government, not having a judge of its own nationality on this Bench, had availed itself of the right conferred on it by Article 31 of the Statute, and had chosen as judge *ad hoc* Professor Spiropoulos, who had already sat on the Bench in the first phase of the case, on which occasion he had made the declaration prescribed by Article 20 of the Statute.

The Parties were represented:

The Royal Hellenic Government by:

Mr. E. VERGHIS, Chargé d'affaires *ad interim* of Greece at The Hague, *as Deputy-Agent;*

assisted by:

Professor Henri ROLIN, of the University of Brussels, former President of the Belgian Senate,

The Right Honourable Sir Frank SOSKICE, Q.C., M.P., former Attorney-General of the United Kingdom,

Mr. C. John COLOMBOS, Q.C., LL.D.,

as Counsel.

The Government of the United Kingdom of Great Britain and Northern Ireland by:

Mr. V. J. EVANS, Assistant Legal Adviser, Foreign Office,

as Agent;

assisted by

Mr. G. G. FITZMAURICE, C.M.G., Second Legal Adviser to the Foreign Office,

Mr. J. E. S. FAWCETT, D.S.C., Member of the English Bar,

Mr. D. H. N. JOHNSON, Assistant Legal Adviser, Foreign Office,

as Counsel.

The Acting President noted that the Agents and Counsel of the Parties were present in Court, and he called on the Agent of the Kingdom of Greece.

Le 1er juillet 1952 la Cour a rendu son arrêt sur l'exception d'incompétence. Elle a jugé qu'elle n'est pas compétente pour statuer sur le fond de la réclamation Ambatielos, qu'elle est compétente pour décider si le Royaume-Uni est tenu de soumettre à l'arbitrage — conformément à la déclaration qui accompagnait le traité conclu entre la Grèce et le Royaume-Uni en 1926 — le différend relatif à la validité de la réclamation Ambatielos en tant que cette réclamation est fondée sur le traité de 1886.

A la suite de cet arrêt, par ordonnance du 18 juillet 1952, la Cour a fixé les délais pour le dépôt de la réplique du Gouvernement royal de Grèce et de la duplique du Gouvernement du Royaume-Uni.

Trois membres de la Cour n'ont pas pris séance. MM. Zoričić et Golunsky ont fait savoir au Président de la Cour que leur état de santé ne leur permettait pas de prendre part à la présente affaire. D'autre part, sir Benegal Rau, indisposé, n'est pas en mesure d'assister à cette audience.

Le Vice-Président faisant fonction de Président rappelle en outre que le Gouvernement hellénique, ne comptant pas au sein de la Cour un juge de sa nationalité, s'est prévalu du droit que lui confère l'article 31 du Statut et a désigné comme juge *ad hoc* M. le professeur Spiropoulos, lequel a déjà siégé dans la première phase de la présente affaire, au cours de laquelle il a fait la déclaration prévue par l'article 20 du Statut.

Les Parties sont représentées :

Le Gouvernement hellénique par :

M. E. VERGHIS, chargé d'affaires *a. i.* de Grèce à La Haye,

comme agent adjoint;

et, comme conseils, par :

M. le professeur Henri ROLIN, de l'Université de Bruxelles, ancien Président du Sénat belge,

le Très Honorable Sir Frank SOSKICE, Q. C., M. P., ancien *Attorney-General* du Royaume-Uni, et

M. C. John COLOMBOS, Q. C., LL. D.

Le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord est représenté par :

M. V. J. EVANS, jurisconsulte adjoint du Foreign Office,

comme agent,

et, comme conseils, par :

MM. G. G. FITZMAURICE, C. M. G., deuxième jurisconsulte du Foreign Office,

J. E. S. FAWCETT, D. S. C., membre du Barreau anglais, et

D. H. N. JOHNSON, jurisconsulte adjoint du Foreign Office.

Le Vice-Président faisant fonction de Président constate la présence devant la Cour de MM. les agents ainsi que de leurs conseils, et donne la parole à M. l'agent du Royaume de Grèce.

M. VERGHIS asked that Professor Rolin be allowed to open the case on behalf of the Greek Government.

The ACTING PRESIDENT called on Professor Rolin.

Professor ROLIN began the speech reproduced in the annex [1].

(The Court rose at 5.50 p.m.)

[Signatures.]

SECOND PUBLIC SITTING (24 III 53, 10.30 *a.m.*)

Present : [See sitting of March 23rd.]

The ACTING PRESIDENT called on Professor Rolin.

Professor ROLIN concluded the speech reproduced in the annex [2].

The ACTING PRESIDENT announced that the next sitting of the Court would take place on March 25th at 11 a.m.

(The Court rose at 12.15 p.m.)

[Signatures.]

THIRD PUBLIC SITTING (25 III 53, 11.15 *a.m.*)

Present : [See sitting of March 23rd.]

In opening the sitting, the ACTING PRESIDENT stated that the Court had heard with grief the news of the death of H.M. Queen Mary. It joined sincerely in the mourning of the Royal Family and of all the people of the Commonwealth. Throughout her long life, a life of dignity and greatness, filled with so many joys and sorrows, the Sovereign who had just passed away had won the respect and admiration of the whole world.

The Court desired to express its condolences to the British representatives before the Court and asked them to transmit these condolences to their Government. It also wished to express its feelings of affectionate sympathy to the President of the Court, Sir Arnold McNair.

The AGENT OF THE UNITED KINGDOM GOVERNMENT, on behalf of his Government, wished to thank the Court for its kind expression of sympathy. Her Majesty was held in the highest esteem and affection by the British people, and her loss would be greatley mourned by them and by her friends throughout the world. He would pass the Court's message of sympathy to his Government.

The DEPUTY-AGENT OF THE ROYAL HELLENIC GOVERNMENT stated, on behalf of his Government, that he wished to associate in the feelings of sympathy which had been expressed by the President.

The ACTING PRESIDENT requested the Assistant Agent of the Hellenic Government to produce the texts of the provisions of the Treaties

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[1] See pp. 351-362.
[2] ,, ,, 362-376.

M. VERGHIS demande que le professeur Rolin soit autorisé à prendre la parole en premier au nom du Gouvernement hellénique.

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au professeur Rolin.

Le professeur ROLIN commence la plaidoirie reproduite en annexe [1].

(L'audience est levée à 17 h. 50.)

[Signatures.]

DEUXIÈME SÉANCE PUBLIQUE (24 III 53, 10 *h.* 30.)

Présents : [Voir séance du 23 mars.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au professeur Rolin.

Le professeur ROLIN termine l'exposé reproduit en annexe [2].

Le VICE-PRÉSIDENT annonce que la prochaine séance de la Cour aura lieu le mardi 25 mars à 11 heures.

(L'audience est levée à 12 h. 15.)

[Signatures.]

TROISIÈME SÉANCE PUBLIQUE (25 III 53, 11 *h.* 15.)

Présents : [Voir séance du 23 mars.]

En ouvrant l'audience, le VICE-PRÉSIDENT faisant fonction de Président déclare que la Cour a appris avec douleur la nouvelle de la mort de S. M. la Reine Mary. Elle prend une part profonde au deuil de la famille royale et de tous les peuples du Commonwealth. Dans sa longue vie, toute de dignité et de grandeur, et au cours de laquelle s'étaient succédé tant de joies et de douleurs, la souveraine qui vient de s'éteindre avait su acquérir le respect et l'admiration du monde entier.

La Cour, exprimant ses condoléances aux représentants britanniques qui se trouvent aujourd'hui devant elle, les prie de bien vouloir les transmettre à leur Gouvernement. Elle exprime également son affectueuse sympathie à son Président, sir Arnold McNair.

L'AGENT DU GOUVERNEMENT DU ROYAUME-UNI tient, au nom de son Gouvernement, à remercier la Cour de ce témoignage de sympathie. Sa Majesté jouissait de la plus haute estime et de l'affection du peuple britannique ; sa perte sera vivement ressentie par celui-ci comme par les amis qu'elle avait à travers le monde. Il ne manquera pas de transmettre à son Gouvernement le message de condoléances de la Cour.

L'AGENT ADJOINT DU GOUVERNEMENT HELLÉNIQUE déclare s'associer, au nom de son Gouvernement, aux sentiments de sympathie exprimés par le Président.

Le VICE-PRÉSIDENT faisant fonction de Président prie l'agent adjoint du Gouvernement hellénique de faire connaître les textes des disposi-

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[1] Voir pp. 351-362.
[2] » » 362-376.

between the United Kingdom on the one hand and Spain, Denmark and Sweden on the other, on which the Hellenic Government had relied in its argument in respect of most-favoured-nation treatment, as well as the provisions of any treaties of more recent date which it might regard as relevant to this issue.

The Acting President called upon Counsel for the United Kingdom Government.

Mr. G. G. FITZMAURICE began the speech reproduced in the annex [1].

(The Court adjourned from 12.45 to 4 p.m.)

Mr. FITZMAURICE continued the speech reproduced in the annex [2].

The ACTING PRESIDENT stated that the next sitting of the Court would be held on March 26th at 4 p.m.

(The Court rose at 6.05 p.m.)

[Signatures.]

FOURTH PUBLIC SITTING (26 III 53, 4.15 *p.m.*)

Present : [See sitting of March 23rd. Also present Sir Frank SOSKICE, *Counsel of the Hellenic Government.*]

The ACTING PRESIDENT called on Counsel for the United Kingdom Government.

Mr. G. G. FITZMAURICE continued the speech reproduced in the annex [3].

(The Court rose at 6.40 p.m.)

[Signatures.]

FIFTH PUBLIC SITTING (27 III 53, 10.30 *a.m.*)

Present : [See sitting of March 26th.]

The ACTING PRESIDENT called upon Counsel for the United Kingdom Government.

Mr. J. E. S. FAWCETT began and concluded the speech reproduced in the annex [4].

The ACTING PRESIDENT called upon the Agent of the United Kingdom Government.

Mr. V. J. EVANS stated that he had been asked by his Government to convey to the Court and to the Deputy-Agent of the Hellenic Government appreciation of their expressions of sympathy on the death of Her Majesty Queen Mary.

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[1] See pp. 377-386.
[2] ,, ,, 386-399.
[3] ,, ,, 399-417.
[4] ,, ,, 418-433.

tions des traités conclus par le Royaume-Uni avec l'Espagne, le Danemark et la Suède, sur lesquelles le Gouvernement hellénique s'est appuyé dans son argumentation relative au traitement de la nation la plus favorisée ; il l'invite à y joindre les dispositions de tout traité plus récent qui pourraient également être considérées comme pertinentes en la matière.

Puis le Vice-Président faisant fonction de Président donne la parole au conseil du Gouvernement du Royaume-Uni.

M. G. G. FITZMAURICE commence la plaidoirie reproduite en annexe [1].

(L'audience, suspendue à 12 h. 45, est reprise à 16 heures.)

M. FITZMAURICE continue la plaidoirie reproduite en annexe [2].

Le VICE-PRÉSIDENT faisant fonction de Président annonce que la prochaine audience de la Cour aura lieu le 26 mars à 16 heures.

(L'audience est levée à 18 h. 05.)

[Signatures.]

QUATRIÈME SÉANCE PUBLIQUE (26 III 53, 16 *h.* 15.)

Présents : [Voir séance du 23 mars. Également présent sir Frank SOSKICE, *conseil du Gouvernement hellénique.*]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au conseil du Gouvernement du Royaume-Uni.

M. G. G. FITZMAURICE continue l'exposé reproduit en annexe [3].

(L'audience est levée à 18 h. 40)

[Signatures.]

CINQUIÈME SÉANCE PUBLIQUE (27 III 53, 10 *h.* 30.)

Présents : [Voir séance du 26 mars.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au conseil du Gouvernement du Royaume-Uni.

M. J. E. S. FAWCETT commence et termine l'exposé reproduit en annexe [4].

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole à l'agent du Gouvernement du Royaume-Uni.

M. V. J. EVANS déclare que son Gouvernement l'a prié de transmettre à la Cour et à l'agent adjoint du Gouvernement hellénique l'expression de sa gratitude pour leurs témoignages de sympathie à l'occasion du décès de Sa Majesté la Reine Mary.

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[1] Voir pp. 377-386.
[2] » » 386-399.
[3] » » 399-417.
[4] » » 418-433.

The ACTING PRESIDENT stated that the Court would next sit on Saturday, March 28th, at 10.30 a.m., and would devote the morning and afternoon sitting to the hearing of the oral reply on behalf of the Royal Hellenic Government.

He requested the representatives of the Parties, in their oral reply and rejoinder, to present their final conclusions or to confirm the conclusions already presented in the pleadings.

(The Court rose at 1 p.m.)

[Signatures.]

SIXTH PUBLIC SITTING (28 III 53, 10.30 *a.m.*)

Present : [See sitting of March 26th.]

The ACTING PRESIDENT called on Counsel for the Royal Hellenic Government.

Sir Frank SOSKICE began the speech reproduced in the annex [1].

(The Court adjourned from 12.50 to 4 p.m.)

Sir Frank SOSKICE concluded the speech reproduced in the annex [2].

The ACTING PRESIDENT asked Counsel for the Hellenic Government whether he confirmed the conclusions presented in the Greek reply.

Sir Frank SOSKICE replied in the affirmative.

(The Court rose at 6.55 p.m.)

[Signatures.]

SEVENTH PUBLIC SITTING (30 III 53, 10 *a.m.*)

Present : [See sitting of March 26th, with the exception of Mr. JOHNSON, Professor ROLIN and Sir Frank SOSKICE, absent.]

The ACTING PRESIDENT called on Counsel for the United Kingdom Government.

Mr. G. G. FITZMAURICE made the speech reproduced in the annex [3].

(The Court adjourned from 12.40 to 4 p.m.)

Mr. J. E. S. FAWCETT made the speech reproduced in the annex [4].

The AGENT OF THE UNITED KINGDOM GOVERNMENT made the speech reproduced in the annex [5], at the end of which he stated the final Conclusions of the United Kingdom Government.

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[1] See pp. 434-448.
[2] ,, ,, 448-468.
[3] ,, ,, 469-485.
[4] ,, ,, 486-494.
[5] ,, ,, 495-502.

Le VICE-PRÉSIDENT faisant fonction de Président déclare que la Cour siégera le samedi 28 mars à 10 heures 30 et consacrera les audiences du matin et de l'après-midi à entendre la réplique orale présentée au nom du Gouvernement hellénique.

Il prie les représentants des Parties d'énoncer dans leur réplique et duplique orales leurs conclusions finales, ou de confirmer les conclusions qui figurent dans les écritures.

(L'audience est levée à 13 heures.)

[Signatures.]

SIXIÈME SÉANCE PUBLIQUE (28 III 53, 10 *h.* 30.)

Présents : [Voir séance du 26 mars.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au conseil du Gouvernement hellénique.

Sir Frank SOSKICE commence l'exposé reproduit en annexe [1].

(L'audience, suspendue à 12 h. 50, est reprise à 16 heures.)

Sir Frank SOSKICE termine l'exposé reproduit en annexe [2].

Le VICE-PRÉSIDENT faisant fonction de Président demande au conseil du Gouvernement hellénique s'il confirme les conclusions soumises dans la réplique hellénique.

Sir Frank SOSKICE répond dans l'affirmative.

(L'audience est levée à 18 h. 55.)

[Signatures.]

SEPTIÈME SÉANCE PUBLIQUE (30 III 53, 10 *h.*)

Présents : [Voir séance du 26 mars, à l'exception de MM. JOHNSON, ROLIN et sir Frank SOSKICE, absents.]

Le VICE-PRÉSIDENT faisant fonction de Président donne la parole au conseil du Gouvernement du Royaume-Uni.

M. G. G. FITZMAURICE prononce la plaidoirie reproduite en annexe [3].

(L'audience, suspendue à 12 h. 40, est reprise à 16 heures.)

M. J. E. S. FAWCETT prononce l'exposé reproduit en annexe [4].

L'AGENT DU GOUVERNEMENT DU ROYAUME-UNI prononce la plaidoirie reproduite en annexe, à la fin de laquelle il énonce les conclusions finales du Gouvernement du Royaume-Uni [5].

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[1] Voir pp. 434-448.
[2] » » 448-468.
[3] » » 469-485.
[4] » » 486-494.
[5] » » 495-502

The ACTING PRESIDENT asked the Agents of the Parties to remain at the disposal of the Court and declared the oral proceedings closed.

(The Court rose at 6.20 p.m.)

[Signatures.]

EIGHTH PUBLIC SITTING (19 V 53, 4 *p.m.*)

Present: *Vice-President* GUERRERO, *Acting President*; *President* Sir Arnold McNAIR; *Judges* ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, KLAESTAD, BADAWI, READ, HSU MO, CARNEIRO, Sir BENEGAL RAU, ARMAND-UGON; Professor Jean SPIROPOULOS, *Judge* ad hoc; *Registrar* HAMBRO.

Also present:

For the United Kingdom of Great Britain and Northern Ireland:

Mr. V. J. EVANS, Assistant Legal Adviser to the Foreign Office,
as Agent.

For the Royal Hellenic Government:

His Excellency N. G. LÉLY, Envoy Extraordinary and Minister Plenipotentiary of Greece,

as Agent;

M. E. VERGHIS, Secretary,

as Deputy-Agent.

The VICE-PRESIDENT, Acting President in the case, opened the sitting and stated that the Court had met for the reading of its Judgment in the Ambatielos case (Merits: Obligation to arbitrate) between the Kingdom of Greece and the United Kingdom of Great Britain and Northern Ireland. Proceedings in this case were instituted on April 9th, 1951, by an Application of the Hellenic Government.

In accordance with Article 58 of the Statute, due notice had been given to the Agents of the Parties that the Judgment would be read in open Court at the present public sitting. He noted that the Agents were present in Court; an official copy of the Judgment would be handed to them during the present sitting.

The Court had decided, in accordance with Article 39 of the Statute, that the English text of the Judgment should be the authoritative text. He would, however, read the French text.

The Vice-President, Acting President, read the Judgment [1].

He asked the Registrar to read the operative clause of the Judgment in English.

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[1] See Court's publications: *Reports of Judgments, Advisory Opinions and Orders 1953*, pp. 10-24.

Le VICE-PRÉSIDENT faisant fonction de Président prie les agents des Parties de rester à la disposition de la Cour et prononce la clôture des débats oraux.

(L'audience est levée à 18 h. 20.)

[Signatures.]

HUITIÈME SÉANCE PUBLIQUE (19 V 53, 16 *h.*)

Présents : M. GUERRERO, *Vice-Président, faisant fonction de Président ;* Sir Arnold MCNAIR, *Président ;* MM. ALVAREZ, BASDEVANT, HACKWORTH, WINIARSKI, KLAESTAD, BADAWI, READ, HSU MO, CARNEIRO, Sir BENEGAL RAU, M. ARMAND-UGON, *juges ;* M. Jean SPIROPOULOS, *juge* ad hoc ; M. HAMBRO, *Greffier.*

Également présents :

Pour le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord :

M. V. J. EVANS, conseiller juridique adjoint du Foreign Office,
en qualité d'agent.

Pour le Gouvernement royal de Grèce :

S. Exc. M. N. G. LÉLY, envoyé extraordinaire et ministre plénipotentiaire de Grèce,
en qualité d'agent ;
M. E. VERGHIS, secrétaire,
en qualité d'agent adjoint.

En ouvrant la séance, M. GUERRERO, Vice-Président faisant fonction de Président, déclare que la Cour s'est réunie pour le prononcé de l'arrêt qu'elle va rendre dans l'affaire Ambatielos (Fond : Obligation d'arbitrage) entre le Royaume de Grèce et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord. Cette instance avait été introduite le 9 avril 1951 par requête du Gouvernement hellénique. Il rappelle que, conformément à l'article 58 du Statut, les agents des deux Parties ont été dûment prévenus qu'il serait donné lecture de l'arrêt au cours de la présente audience publique. Il constate que ces agents sont présents et indique qu'une expédition officielle de l'arrêt leur sera remise au cours de l'audience.

Il signale que la Cour a décidé, conformément à l'article 39 du Statut, que le texte anglais de l'arrêt ferait foi, ajoutant, toutefois, que c'est du texte français que lecture va être donnée.

Le Vice-Président, faisant fonction de Président, donne lecture de l'arrêt [1].

Le Vice-Président faisant fonction de Président prie ensuite le Greffier de donner lecture du dispositif de l'arrêt dans le texte anglais.

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[1] Voir publications de la Cour : *Recueil des Arrêts, Avis consultatifs et Ordonnances 1953*, pp. 10-24.

The REGISTRAR read the relevant clause in English.

The VICE-PRESIDENT, Acting President, stated that Sir Arnold McNair, President, Judges Basdevant, Klaestad and Read, availing themselves of the right conferred on them by Article 57 of the Statute, appended to the Judgment the joint statement of their dissenting opinion [1].

The authors of this joint dissenting opinion had informed the Acting President that they did not wish it to be read in Court.

The Vice-President, Acting President, closed the sitting.

(The Court rose at 4.35 p.m.)

[Signatures.]

[1] *Ibid.*, pp. 25-35.

Le GREFFIER lit le dispositif en anglais.

Le VICE-PRÉSIDENT faisant fonction de Président indique que sir Arnold McNair, Président, MM. Basdevant, Klaestad et Read, se prévalant du droit que leur confère l'article 57 du Statut, ont joint à l'arrêt l'exposé commun de leur opinion dissidente [1].

Les auteurs de cette opinion dissidente collective ont informé le Président en fonction qu'ils ne désirent pas que lecture en soit donnée ici.

Le Vice-Président faisant fonction de Président lève la séance.

(L'audience est levée à 16 h. 35.)

[Signatures.]

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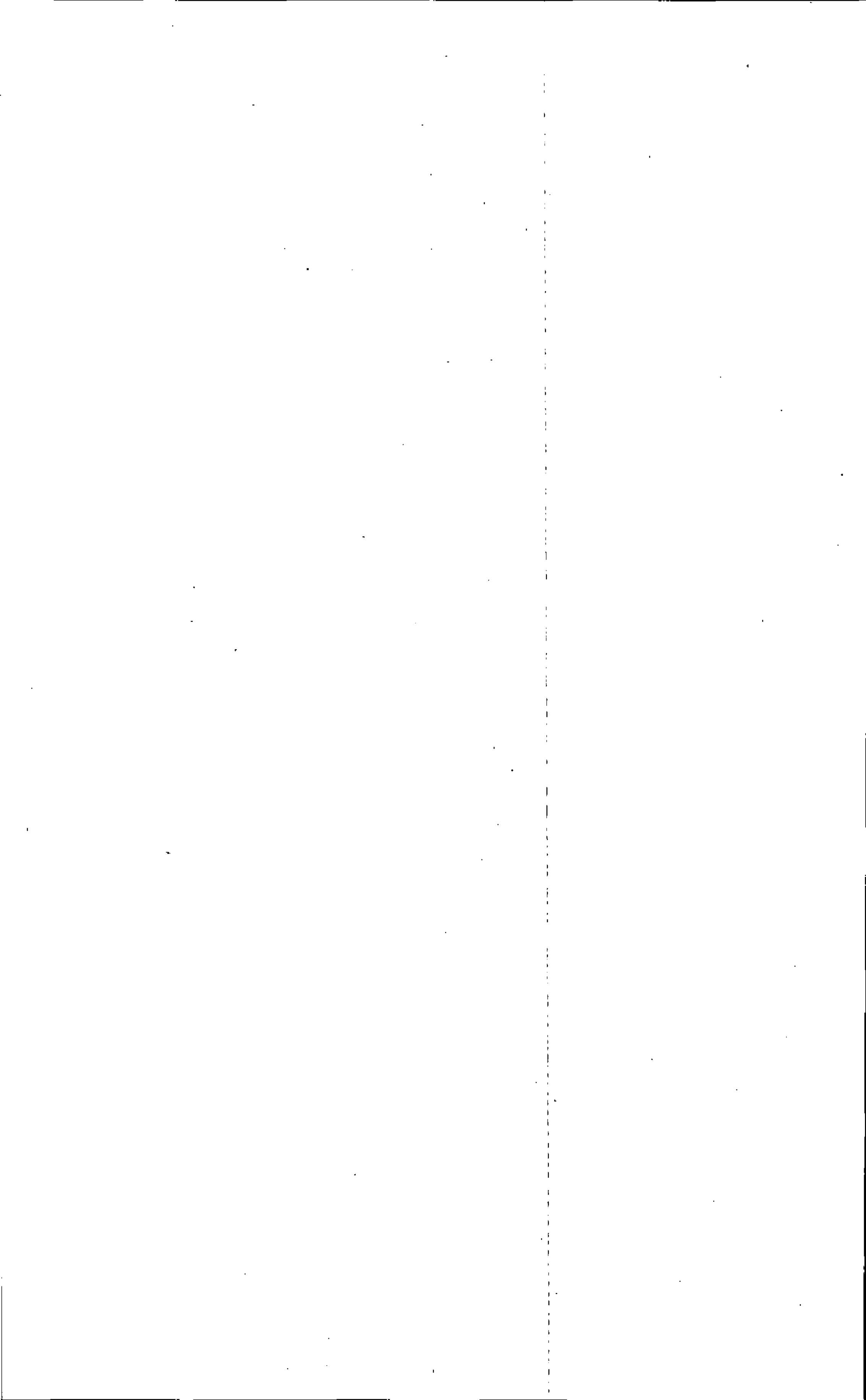
[1] *Ibid.*, pp. 25-35.



ANNEX TO THE MINUTES
ANNEXE AUX PROCÈS-VERBAUX

1. PLAIDOIRIE DE M. LE PROFESSEUR HENRI ROLIN

(CONSEIL DU GOUVERNEMENT HELLÉNIQUE)

AUX SÉANCES PUBLIQUES DES 23 ET 24 MARS 1953

[Séance publique du 23 mars 1953, après-midi]

Je veux d'abord dire quelques mots pour exprimer les regrets de M. Lély, qui est retenu à l'étranger par la maladie et qui se trouve ainsi empêché de continuer à suivre l'affaire qu'il avait initiée. Je dois également exprimer des regrets que je prie M. l'agent du Gouvernement britannique de bien vouloir transmettre à sir Eric Beckett ; il avait été adversaire dans la première instance de cette affaire et avait défendu les intérêts du Gouvernement britannique avec l'autorité et la compétence que la Cour a pu fréquemment apprécier. Son état de santé a été sérieusement ébranlé, mais je suis sûr que je n'exprime pas seulement mes sentiments mais ceux de la Cour en souhaitant très vivement qu'il soit en mesure prochainement de reprendre intégralement ses fonctions. Je me réjouis, du reste, de le voir remplacé à cette barre par mon collègue et ami, M. Fitzmaurice.

Je n'ai pas besoin de dire qu'en ce qui concerne les membres de la Cour que la maladie retient également éloignés, et spécialement M. Zoričić, qui avait participé à la délibération du premier arrêt, je forme également des vœux pour leur complet rétablissement.

Et, enfin, je dois excuser sir Frank Soskice, qui devait être ici aujourd'hui, qui a été retenu à la dernière minute, et ne nous rejoindra que dans quelques jours. Il m'a demandé de le remplacer un peu au pied levé pour présenter cette première plaidoirie. C'est ce qui m'a amené à demander à la Cour de bien vouloir retarder jusqu'à cet après-midi le moment pour moi de prendre la parole.

Messieurs, la Cour a présente à la mémoire l'origine de ce procès sur lequel je ne vais pas m'étendre : la mésaventure d'un ressortissant hellénique, M. Ambatielos, qui, ayant acheté au Gouvernement britannique neuf navires en construction et versé un acompte de 2.000.000 de livres sterling n'a reçu les premiers navires qu'avec un retard important qui, vu la baisse du prix du fret, l'empêcha de réaliser son programme et au bout de peu de temps, n'ayant pu payer le solde du prix, le laissa sans les navires et sans l'argent.

Une procédure judiciaire introduite par lui a échoué dans des conditions que le Gouvernement hellénique juge peu régulières, et le recours introduit par M. Ambatielos en vue d'obtenir la réparation du préjudice subi n'ayant pas abouti, le Gouvernement hellénique, après une très longue négociation diplomatique, a cru devoir, au mois d'avril 1951, introduire une requête à la Cour internationale de Justice.

Les faits, Messieurs, se situent en 1919/1923. A cette époque, il existe entre la Grèce et le Royaume-Uni un traité de commerce et de navigation qui est du 10 avril 1886 et qui avait été accompagné d'un protocole du même jour, prévoyant une procédure arbitrale pour la solution des différends relatifs à l'interprétation et à l'application dudit traité.

A vrai dire, ce traité se trouvait déjà dénoncé depuis 1919, mais, tout en étant dénoncé, il était maintenu provisoirement en vigueur de l'accord des parties et faisait l'objet d'une négociation pour sa revision, qui aboutit au mois de juillet 1926. Le traité de 1886 fut remplacé à ce moment par un traité nouveau qui reproduisit presque intégralement un certain nombre de ses dispositions, qui en ajouta d'autres, et le même jour une déclaration — cette fois on qualifia le document de « déclaration » — accompagna le traité. Cette déclaration n'avait pas le même objet que le précédent protocole ; la clause juridictionnelle était en 1926 incluse dans le traité ; elle décidait que tous les différends relatifs à son interprétation seraient soumis à l'arbitrage comme précédemment dans le traité de 1886, mais que l'organe arbitral serait la Cour internationale de Justice, tandis que la déclaration — pour l'instant il est inutile de vous rappeler les termes que je vous lirai tantôt — tandis que la déclaration s'appliquait aux différends relatifs au traité de 1886 et décidait qu'ils demeureraient soumis à la procédure arbitrale décrite dans ce traité de 1886.

La Grèce appuya la demande qu'elle introduisit en 1951 devant la Cour à la fois sur les dispositions de fond du traité de 1886 et sur celles du traité de 1926, considérant que, du moment que les dispositions invoquées n'avaient pas été modifiées, il importait peu que le différend soit antérieur au traité de 1926 puisque la même règle avait été maintenue comme devant s'appliquer aux relations entre les parties. Les agents, porte-parole du Gouvernement hellénique, défendirent donc notamment devant la Cour — au mois de mai dernier — la thèse que pour l'application de la clause compromissoire il n'y avait pas lieu d'avoir égard à la date des faits ou à la date de la réclamation qui avait été introduite, et qu'on pouvait considérer comme relatifs à un traité de 1926 les différends qui étaient antérieurs, absolument comme en droit interne l'on considère comme pouvant être soumis à une procédure ou à des tribunaux nouveaux créés par une loi nouvelle des différends antérieurs à cette loi, du moment que les règles de fond que cette procédure ou cette juridiction nouvelle doit contrôler existaient antérieurement et avaient effectivement été enfreintes. Cette rétroactivité de la loi de compétence nous paraissait être une théorie que l'on pouvait tenter de voir consacrer en droit international. Je reconnais que sur ce point la Cour ne nous a pas suivis et qu'elle a précisé dans son arrêt qu'elle avait à se prononcer sur la compétence éventuelle de la juridiction arbitrale exclusivement pour les différends en tant que fondés sur le traité de 1886.

Je crois, Messieurs de la Cour, que la première tâche qui m'incombe est d'essayer de définir aussi clairement que possible l'objet ainsi assigné à la présente instance. A mon avis, dans l'arrêt que vous avez rendu le 1er juillet 1952, la Cour a estimé nécessaire, — et je crois à bon droit bien que la chose ne nous soit pas apparue ni à l'une ni à l'autre des parties très clairement au cours de nos débats du mois de mai, — qu'il y avait à distinguer dans cette affaire, en réalité, trois instances ou tout au moins trois questions dont vous deviez vous saisir successivement. L'une qui était la question de votre compétence à vous Cour internationale de Justice pour apprécier le différend entre le Gouvernement britannique et le Gouvernement hellénique, différend qui ne se confondait pas avec la réclamation Ambatielos, différend qui portait sur ce que j'appellerai par un mot un peu hardi l'arbitrabilité de cette réclamation, c'est-à-dire l'obligation éventuelle du Royaume-Uni de recourir à l'arbitrage. Première question : la Cour était-elle

compétente pour en décider ? Deuxième question : le Gouvernement grec était-il fondé à prétendre que ce différend était arbitral ? Puis, tout à fait dernière question : la réclamation Ambatielos était-elle fondée ?

Comme je vous le disais lorsque nous avions plaidé, nous avions un peu sommairement demandé à la Cour, au cas où elle se déclarerait compétente, d'inviter les parties à conclure au fond, et quand nous parlions de fond, nous pensions que le fond serait le fond de la réclamation Ambatielos et que votre déclaration de compétence statuerait en réalité et viderait à la fois la question de votre compétence et celle de la compétence de la juridiction arbitrale, ce qui évidemment sont deux questions différentes.

La Cour a donc limité l'objet de la présente instance dans le dispositif de son arrêt dans les termes suivants : elle s'est déclarée compétente « pour décider si le Royaume-Uni est tenu de soumettre à l'arbitrage, conformément à la déclaration de 1926, le différend relatif à la validité de la réclamation Ambatielos en tant que cette réclamation est fondée sur le traité de 1886 ». Je crois, Messieurs, que, à cette question qui est donc de notre commun accord la seule question sur laquelle vous deviez vous prononcer aujourd'hui, vous donnerez une réponse affirmative, et les raisons qui m'incitent à vous exprimer cette confiance feront l'objet de la deuxième partie de ma plaidoirie. Mais avant cela, je voudrais rechercher avec vous ce que comporte très exactement cette décision et sur quels points va pouvoir porter votre contrôle, lorsque vous aurez à apprécier l'obligation du Gouvernement du Royaume-Uni de soumettre à l'arbitrage.

Comme le dit le mémoire de duplique britannique, cela conduit en grande partie à rechercher la signification correcte à donner au mot « fondée », lorsque vous dites en tant que cette réclamation est « fondée » sur le traité de 1886. Suivant la thèse britannique, laquelle est développée dans la première partie du mémoire de duplique, le Gouvernement hellénique qui, assurément, a l'obligation de faire la démonstration de l'obligation du Gouvernement britannique de soumettre le différend à l'arbitrage, doit, pour pouvoir aboutir et obtenir de la Cour une réponse affirmative, faire la démonstration que la réclamation Ambatielos trouve effectivement dans les dispositions du traité de 1886 sur laquelle elle s'appuie un fondement réel, légitime, qu'elle est non seulement *fondée*, mais tout au moins en droit *bien fondée* sur le traité de 1886. C'est ce que notamment le Gouvernement britannique prétend tirer des mots « en tant que cette réclamation est fondée sur le traité de 1886 ».

Dans l'opinion individuelle qui accompagne votre arrêt, M. le juge Spiropoulos a de son côté exprimé l'opinion qu'en employant ces mots : « en tant que cette réclamation est fondée sur le traité de 1886 », la Cour semblait — à tort du reste selon lui — imposer à la partie demanderesse, comme le soutient le Gouvernement britannique aujourd'hui, le devoir d'établir le fondement effectif que la réclamation Ambatielos trouvait dans le traité. Je crois, Messieurs, que cette interprétation est inexacte et qu'en réalité les mots « est fondée » sur le traité de 1886 lorsqu'on lit le reste de l'arrêt n'ont manifestement pas la portée qu'on prétend leur attribuer aujourd'hui.

En réalité, comme je vous l'indiquais tantôt, le Gouvernement hellénique, tout au long de la procédure écrite, dans la première phase, avait

estimé pouvoir s'appuyer non seulement sur la déclaration de 1926 et le traité de 1886, mais sur le traité de 1926 lui-même, sur sa clause compromissoire et sur ses clauses substantielles. Il avait cru que, du moment que des règles substantielles avaient été reprises en 1926 au traité de 1886, la Cour allait être compétente directement pour statuer leur éventuelle violation et donc sur le fond de la réclamation Ambatielos. Or, la Cour, dans la première partie de son dispositif écarte cette prétention. Elle déclare qu'elle n'est pas compétente directement pour statuer sur le fond de la réclamation Ambatielos, laquelle relève éventuellement de la procédure arbitrale prévue en 1886, et ce nécessairement dans les limites de la partie de la réclamation fondée sur le traité de 1886. Elle rejette donc comme sans pertinence cette espèce de tableau de comparaison que nous avions cru pouvoir dresser dans notre procédure écrite entre les articles I, X, XII, XV, paragraphe 3, du traité de 1886 et des dispositions correspondantes du traité de 1926. La Cour nous répond : je ne veux pas connaître des dispositions plus ou moins semblables du traité de 1926, je suis simplement compétente pour décider si la procédure arbitrale du protocole de 1886 va devoir s'appliquer, étant entendu que la réclamation dans l'affirmative se limitera aux violations des dispositions substantielles de ce traité de 1886.

Je crois, Messieurs, que cette interprétation n'est en rien contredite par un extrait des attendus de l'arrêt que cite le mémoire britannique (p. 44 de l'arrêt) :

> « En conséquence, la Cour est compétente pour connaître de tout différend relatif à l'interprétation ou à l'application de la déclaration, et, dans un cas approprié, pour dire qu'il devrait y avoir soumission à une commission arbitrale. Cependant, tout différend quant à la validité des réclamations en cause devra, ainsi qu'il est prévu dans la déclaration elle-même, être soumis à la commission.
>
> Il peut sembler à première vue qu'il existe ici une possibilité de conflit entre une décision de la Cour déclarant qu'il y a obligation de soumettre un différend à une commission arbitrale et une décision éventuelle de la commission. En réalité, il n'y a pas de possibilité de ce genre.
>
> La Cour aura à juger s'il y a un différend entre les Parties au sens de la déclaration de 1926.
>
> Si elle arrive à la conclusion qu'un tel différend existe, la commission arbitrale aura à se prononcer sur le fond du différend. »

Or, le fond du différend dont il est question ici comme devant être soumis à la commission arbitrale, c'est assurément la validité de la réclamation Ambatielos, laquelle suppose à toute évidence la vérification par la commission des moyens non seulement de fait mais des moyens de droit invoqués dans la réclamation Ambatielos.

Nous voici donc arrivés dans mon examen à une première conclusion qui peut, je pense, être résumée comme suit : c'est que pour décider si la réclamation Ambatielos doit être soumise à la procédure arbitrale, il n'y a pas lieu pour la Cour de vérifier d'emblée l'exactitude de l'interprétation donnée aux dispositions du traité de 1886 par le Gouvernement hellénique. Si elle le faisait, elle se mettrait en contradiction avec la première partie de son dispositif qui a dit qu'elle ne veut pas connaître du fond, car l'interprétation des dispositions, c'est du fond ; et elle se mettrait également en contradiction avec cette partie de

ses attendus suivant laquelle c'est la commission arbitrale qui aura à se prononcer sur le fond du différend.

S'ensuit-il, Messieurs, que la Cour est tenue dans la première présente instance, dans la présente instance, cette deuxième instance, de se contenter de la simple vérification du fait que des dispositions du traité de 1886 sont *invoquées* par le Gouvernement hellénique ? Nous ne songeons pas à le soutenir. Supposez, Messieurs, que le Gouvernement hellénique n'ait pas eu à sa disposition un traité de commerce et de navigation, ni une déclaration réciproque des deux gouvernements acceptant la compétence obligatoire de la Cour, que dans l'arsenal des traités le liant au Royaume-Uni il n'ait trouvé qu'un traité collectif relatif à la propriété industrielle ou à la protection de la baleine, et que pour appuyer une réclamation portant sur le traitement infligé à un de ses ressortissants, il ait invoqué la clause compromissoire figurant dans pareil traité, bien que, de façon éclatante, manifeste, il n'ait aucun rapport quelconque avec l'objet de la réclamation. Pareille exigence, inspirée uniquement par le souci de trouver un prétoire afin de pouvoir s'y répandre avec amertume sur l'injustice prétendument infligée à un ressortissant, pourrait-elle aboutir ?

Je pense, Messieurs, que personne, ni à la Cour ni sur le banc du Gouvernement hellénique, ne songerait à soutenir qu'en pareil cas, simplement parce que le Gouvernement hellénique a trouvé une disposition compromissoire — et bien qu'il ait, contre toute évidence et contre tout bon sens, établi, prétendu établir, un lien manifestement inexistant entre ses griefs et le traité qu'il invoque —, personne ne songerait à dire qu'en ce cas néanmoins, simplement sur le vu de la clause compromissoire de ce traité et sans contrôler en aucune façon, même à première lecture, le lien de relation existant entre le traité invoqué et l'objet du différend, la Cour devrait ordonner que l'on ait recours à la procédure arbitrale.

J'ajoute, Messieurs, que si même nous avions été tentés de soutenir une thèse semblable, la chose nous eût été impossible en l'espèce, car si la Cour avait estimé devoir s'en tenir à la présentation formelle de la demande, eh bien, en l'espèce, la Cour ne nous aurait certainement pas demandé de nous réunir pour discuter de cette obligation d'arbitrage ; il lui aurait suffi de constater que dans la requête du Gouvernement hellénique il était fait mention d'un traité de 1886 prévoyant la procédure arbitrale, pour sans aucun examen des faits ordonner que la procédure arbitrale soit déclenchée, sauf à la commission arbitrale à apprécier ultérieurement l'effet sur sa compétence et sur ses pouvoirs.

Messieurs, il y a pourtant une question qui se pose, et si nous acceptons que nécessairement il y a, pour la Cour, actuellement obligation de vérifier la pertinence des titres juridiques invoqués — et le mot pertinence j'ai eu plaisir à le retrouver également, mais je crois par inadvertance, sous la plume de l'agent du Gouvernement britannique (au par. 24 de sa duplique) —, si nous reconnaissons que l'on peut et que l'on doit vérifier la relation véritable existant entre les faits dénoncés et les moyens juridiques, la relation existant entre les moyens de fait et les moyens de droit et non pas l'exactitude des moyens de droit, à la réflexion, nous nous sommes rendu compte qu'il y avait, même dans cette appréciation de la relation, il y avait des degrés. Ces degrés, il nous paraît indispensable à la Cour de les distinguer aujourd'hui. Ce rapport entre les dispositions du traité invoquées et

les faits dénoncés, on peut l'aborder de trois façons, soit en vue du minimum de vérification de la connexité nécessaire pour apprécier l'obligation d'arbitrage, soit au point de vue de la compétence de la commission arbitrale, soit au point de vue de l'adjudication ou du rejet de la réclamation.

Me voici donc amené à proposer à la Cour une nouvelle distinction, et je m'en excuse. Elle peut paraître subtile ; je la crois tout à fait exacte, encore que nous l'ayons aperçue tardivement, mais c'est en relisant les nombreuses opinions individuelles accompagnant l'arrêt que nous nous sommes rendu compte qu'un certain nombre de juges de la Cour avaient été attentifs à cet aspect de la question, soit du reste qu'ils en aient déduit des conclusions favorables à la competénce de la Cour, soit qu'ils en aient déduit des conséquences défavorables, ce qui est une tout autre question. La Cour a paru se préoccuper dans l'exercice de la compétence dérivant de la déclaration de 1926 de ne pas empiéter sur la compétence de la commission arbitrale. Or, la commission arbitrale, normalement, trouve dans sa compétence notamment la compétence pour juger elle-même de sa compétence. C'est là, je n'ai pas besoin de vous dire, c'est un point entièrement acquis en droit des gens : il l'était antérieurement aux conventions de La Haye. Il a été reproduit dans les deux conventions de La Haye de 1899 et de 1907. L'article 48 de la première, l'article 73 de la deuxième prévoient que le tribunal est autorisé à déterminer sa compétence en interprétant le compromis, ainsi que les autres traités qui peuvent être invoqués dans la matière en appliquant les règles de droit international.

Comme je vous le disais, Messieurs, cette question a été soulignée par plusieurs d'entre vous, dans les avis qui accompagnent l'arrêt du 1er juillet. M. Klaestad, dans son opinion dissidente (p. 83), indique que selon un principe reconnu, un tribunal international a le pouvoir de décider sur sa propre compétence et qu'il appartiendrait à la commission arbitrale elle-même de décider si elle est compétente pour connaître d'un différend qui lui est soumis, seule une disposition expresse et claire pouvant empêcher la commission d'exercer cette compétence. M. le juge Hsu Mo (p. 86) exprimait de son côté sa difficulté à admettre que les parties aient divisé en deux phases successives le règlement du différend portant sur des réclamations fondées sur le traité de 1886. M. le juge Zoričić (pp. 78-79) exposait le dilemme dans les termes suivants :

> « Ou bien la Cour est compétente pour interpréter et appliquer la déclaration, ou elle ne l'est pas. Si elle l'est, elle ne peut se borner à exercer seulement une partie de sa compétence et en rester là. La Cour devrait, au contraire, statuer tout au moins sur la question de savoir si les conditions de la déclaration ont été remplies — ce qui est une question de fond —, c'est-à-dire notamment, si la réclamation a été formulée et présentée conformément à la déclaration, si le Gouvernement hellénique n'est pas forclos à raison de son retard à présenter la réclamation (question d'ailleurs que l'arrêt a déjà décidée) » — dit-il — ; « s'il s'agit d'une réclamation fondée sur le traité de 1886, et ainsi de suite. Ce n'est que si la Cour était convaincue que les conditions de la déclaration sont vraiment remplies qu'elle pourrait, éventuellement, déférer l'affaire à la commission d'arbitrage prévue, comme arbitrage spécial, afin de statuer sur la seule validité de la réclamation.

> Or, selon la déclaration, ce n'est pas seulement sur la validité des réclamations que les commissions d'arbitrage doivent statuer. Bien au contraire, tout examen des conditions de l'applicabilité de la déclaration appartient à la compétence exclusive des commissions d'arbitrage prévues dans le protocole de 1886. Ce sont ces commissions et elles seules qui doivent statuer: « quant à la validité de *telles* réclamations », elles doivent donc, elles, avant d'entreprendre l'examen de la validité, s'assurer que les réclamations sont vraiment « telles » que la déclaration le prévoit.... »

Je crois, Messieurs, qu'en réalité le problème qui était ainsi dénoncé est un problème réel mais qu'il était plus aisément soluble que les opinions que je viens de lire ne paraissaient le redouter, et je crois que, sans avoir repris intégralement le problème, M. le juge Spiropoulos indiquait clairement dans son avis où en était la clef, lorsqu'il montrait, à la page 56, que « lorsqu'un État s'est lié par une clause d'arbitrage obligatoire — et le protocole de 1886 en est un exemple —, il n'existe pour cet État, en principe, aucun moyen de décliner une offre de recourir à l'arbitrage. Ce n'est que dans le cas tout à fait exceptionnel où l'invitation de recourir à l'arbitrage constituerait un abus manifeste de l'État requérant que le recours à l'arbitrage ne serait pas obligatoire. Pareil abus existerait, par exemple, si, sans l'existence d'un différend réel, l'une des parties demandait la constitution du tribunal arbitral. En effet, en pareil cas, on est obligé de reconnaître à la partie adverse le droit de refuser la désignation de son arbitre. Pareille hypothèse, si alléguée, pourrait naturellement faire l'objet d'un examen de la part de la Cour lorsque celle-ci se prononcera sur le bien-fondé de la demande du Gouvernement hellénique en question. »

Ainsi, M. Spiropoulos nous propose — et aujourd'hui je crois que cela nous vient tout à fait à point — une distinction, que je crois lumineuse, entre l'obligation de recourir à l'arbitrage et la compétence du tribunal arbitral. Un État qui a souscrit une convention d'arbitrage ne peut pas se refuser d'aller devant le tribunal arbitral uniquement parce qu'il en conteste la compétence, car, en principe, c'est le tribunal arbitral qui va lui-même juger de cette compétence. C'est seulement dans le cas où il y a abus manifeste, dans le cas où de façon éclatante, flagrante, il n'y a pas de question qui puisse honnêtement être envisagée par le tribunal arbitral, c'est dans ce cas seulement que l'État peut dire: non! je n'irai pas à l'arbitrage, parce qu'en réalité, en l'espèce, il n'y a même pas de contestation de compétence sérieuse, il est manifeste, il est flagrant que c'est par un véritable abus que l'on prétend m'imposer cette procédure. Et dans ce cas aussi, l'autorité invitée à se prononcer sur l'obligation de donner effet à la clause compromissoire rejettera la demande.

La distinction que je vous propose et que je crois trouver suggérée dans les avis dont je vous ai donné lecture n'est pas seulement exacte, je la crois également pratique, car elle indique à la Cour de façon fort claire cette démarcation que nous cherchions entre sa compétence actuelle et celle de la juridiction arbitrale éventuelle. Il ne peut pas y avoir de conflit, en pareil cas, entre la compétence de la Cour, exercée en vertu de l'arrêt du 1er juillet, et la compétence qui éventuellement reviendrait à la juridiction arbitrale, y compris la compétence de sa compétence, car la compétence de la Cour, celle qu'elle exerce aujourd'hui, est un contrôle

différent de celui que la juridiction arbitrale exercerait sur sa compétence, c'est un contrôle préalable au fonctionnement de la justice arbitrale ; il porte exclusivement sur l'obligation des parties de donner à la clause compromissoire un commencement d'effet, et réserve entièrement leur délégation de compétence et les exceptions qu'ils feraient éventuellement valoir devant la juridiction arbitrale. Or, ils sont tenus de souscrire à ce commencement d'effet du moment que la demande présentée à la requête d'une des parties, comme le dit du reste la déclaration de 1926, se trouve présentée dans des conditions sérieuses qui n'en permettent pas immédiatement le rejet.

Je voudrais signaler encore à la Cour que ce genre d'examen, auquel je l'invite quant à la pertinence des réclamations helléniques, n'est pas du tout aussi exceptionnel qu'il pourrait sembler à première vue et qu'il rappelle directement une situation fréquente en droit interne. A propos de l'arbitrage, j'ai sous les yeux, Messieurs, un traité que je crois classique, bien qu'il soit belge, de mon confrère et collègue Alfred Bernard sur «l'arbitrage volontaire en droit privé», dans lequel, étudiant la doctrine et la jurisprudence tant française que belge, l'auteur explique (n° 294) « que les arbitres ne peuvent statuer sur des questions que pour autant que l'existence et la validité du compromis ne soient pas contestées et que la régularité de leur nomination ne soit pas discutée. S'il y avait discussion à cet égard, les arbitres seraient sans pouvoir pour statuer. En effet, les arbitres ne tiennent leur pouvoir que d'une désignation régulière, leur existence dépend de la convention des parties ; en cas d'absence ou de nullité de cette convention, il n'y a pas de juridiction arbitrale. Si l'existence ou la validité du compromis est contestée, c'est la validité de la juridiction des arbitres qui est mise en question, et on ne peut admettre qu'ils se créent un titre à eux-mêmes, en statuant sur la question de savoir s'ils existent ou non en qualité d'arbitres. Diverses décisions relèvent le cas notamment où l'on conteste l'existence ou la validité de la convention contestée contenant la clause compromissoire, la nullité de cette convention en raison du fait qu'elle est entachée de dol ou de fraude, la caducité de cette convention », etc.

Je sais bien, Messieurs, que, en droit des gens, la situation n'est pas identique et que la doctrine et la jurisprudence ne distinguent pas dans le pouvoir des arbitres de statuer comme juges de leur compétence, s'il s'agit seulement de l'interprétation du compromis ou également de la validité du compromis. Mais en réalité, Messieurs, la jurisprudence internationale présente sur ce point cette singularité, c'est que, comme les arbitres tiennent très généralement en réalité leur existence du compromis, l'existence des pouvoirs des arbitres, l'existence de l'obligation arbitrale ne sont pas mises en question. Il n'y a que la limite des pouvoirs, il n'y a que l'interprétation du compromis qui va être contestée, et je n'ai pas souvenance que des cours aient été consultées quant à l'obligation de constituer le tribunal arbitral.

Et pourtant, même en droit international, il existe aujourd'hui une situation qui est assez semblable à celle à laquelle je viens de faire allusion. Il existe un certain nombre de conventions dans lesquelles on a admis la juridiction arbitrale comme juridiction compétente, mais où, pour composer la juridiction arbitrale, l'on a prévu qu'il serait fait appel à certaines autorités, notamment au Président de la Cour internationale de Justice. Ou, je vous pose la question, Messieurs, lorsque le Président de la Cour internationale de Justice est saisi d'une demande de constituer,

de désigner un arbitre, est-ce que le Président va toujours aveuglément, nécessairement, automatiquement procéder à cette désignation ? Ou est-ce que le Président ne va pas d'abord vérifier, surtout s'il y a contestation des parties, si la demande de désignation lui est adressée par une seule d'entre elles, et qu'elle est contestée par l'autre, est-ce qu'il ne va pas, avant tout, vérifier si *a priori* la convention sur laquelle on s'appuie est exacte, existante, s'il y a un lien quelconque entre la demande que l'on veut porter et le texte juridique en vertu duquel on lui demande de désigner un arbitre ?

Messieurs, nous avons tout récemment eu l'occasion de vérifier que, dans un cas tout au moins, le Président de la Cour internationale de Justice, en exerçant cette juridiction quasi administrative mais qui était tout de même une juridiction, a dû refuser de faire droit à une demande de désignation, et apprécier que, en réalité, le consentement donné par la Cour permanente de Justice internationale à l'exercice de cette fonction par son Président ne pouvait pas, dans l'état actuel du droit, être considéré comme liant le Président de la Cour internationale de Justice.

Je crois, d'autre part, que dans les cas fréquents où le Président de la Cour internationale de Justice fait droit à la demande qui lui est présentée, il n'entend aucunement, surtout s'il agit à la demande d'une seule des parties au différend, que sa décision soit considérée comme préjugeant de façon définitive de la compétence de la juridiction arbitrale et que la juridiction arbitrale soit tenue de se déclarer compétente, uniquement parce que *a priori* il a été admis qu'il y avait obligation de recourir à la compétence arbitrale. C'est donc que, déjà, dans le fonctionnement normal de la justice internationale telle qu'elle évolue en ce moment, il y a place pour un certain contrôle pré-arbitral qui, normalement, est exercé par l'autorité, que ce soit le chef d'État ou le Président du Conseil de Sécurité ou le Président de la Cour internationale de Justice, auquel il est prévu qu'on peut faire appel pour assurer le fonctionnement de la juridiction arbitrale.

J'ajoute, Messieurs, que cette notion du degré de vérification du rapport existant entre l'objet d'une réclamation, la nature d'un grief et le moyen de droit, le traité ou la convention sur lesquels on prétend s'appuyer, j'en trouve également des exemples dans la matière des mesures conservatoires.

La Cour internationale de Justice a eu l'occasion, il n'y a pas longtemps, d'accorder des mesures conservatoires dans une affaire où ultérieurement elle s'est déclarée incompétente. Mais en accordant les mesures conservatoires, elle déclarait que la demande ne lui paraissait pas *a priori* comme étrangère au droit international — *a priori*. C'était, Messieurs, un examen qui était plus succinct que l'examen auquel elle se livre généralement pour vérifier sa compétence.

C'est ce que M. le Président Anzilotti, dans une opinion dissidente relative à la réforme agraire polonaise, AB/58, page 181, appelait la *summaria cognitio*, un examen très sommaire qui ne préjuge pas, lorsqu'il aboutit à des conclusions positives, ni du fond de la décision finale, ni même de la décision en ce qui concerne la compétence.

C'est la méthode que je me permets de recommander aujourd'hui à la Cour. C'est là, à mon avis, la seule façon pour la Cour de concilier la compétence qu'elle s'est à juste titre arrogée pour apprécier l'arbitrabilité de la réclamation Ambatielos avec le respect de compétence qui de plein droit appartient à la juridiction arbitrale pour décider

si la demande qui lui est soumise entre véritablement dans sa compétence à elle. Ainsi, Messieurs, dans ma pensée, la tâche qui incombe aujourd'hui à la Cour dans la présente instance est d'apprécier si les griefs formulés par le Royaume-Uni contre le recours à la procédure arbitrale sont tellement manifestement sans fondement, qu'il y aurait abus à prétendre imposer au Royaume-Uni de se prêter au déclenchement de la procédure ou si au contraire ils apparaissent comme suffisamment sérieux pour que, sous réserve de la décision finale de la commission de la juridiction arbitrale relativement à sa compétence, la Cour estime qu'il y a lieu, pour le Royaume-Uni, de se plier à la procédure arbitrale. Si, Messieurs, la Cour conçoit sa mission actuelle comme je viens de le définir, je serais surpris que M. l'agent du Gouvernement britannique insistât et prétendît vraiment que, même ainsi comprise, il est possible pour lui de combattre la thèse que la juridiction arbitrale doit en l'espèce être consultée.

Ceci dit, Messieurs, je veux rencontrer la deuxième conception que l'on peut se faire de l'objet de l'instance actuelle, conception suivant laquelle la Cour se prononcerait, dans la présente instance, sur la compétence de la juridiction arbitrale, et je désire montrer à la Cour — je le ferai brièvement — que même dans ce cas-ci, contrairement à ce que prétend l'agent du Gouvernement britannique, la Cour doit se limiter à vérifier la connexité du traité de 1886 et ne peut pas vérifier à ce stade de la procédure l'exactitude de l'interprétation que nous en donnons.

Ma thèse, Messieurs, me paraît commandée par le texte et la déclaration de 1926 et du protocole de 1886.

La déclaration de 1926 était rédigée comme suit :

> « Le traité de commerce et de navigation en date d'aujourd'hui ne porte pas préjudice aux réclamations faites au nom de particuliers qui sont basées sur les dispositions du traité de commerce anglo-grec de 1886 », mais elle continue : « et que tous différends qui peuvent s'élever entre nos deux gouvernements, quant à la validité de ces réclamations, doivent, à la demande de l'un des gouvernements, être soumis à l'arbitrage, conformément aux dispositions du protocole du 10 novembre 1886 annexé audit traité. »

Un différend, Messieurs, quant à la validité, c'est à la fois un différend qui porte sur la vérification des moyens de droit et de fait. Les uns et les autres ont trait au fondement, à la validité de la réclamation. Les uns et les autres sont déférés à la juridiction arbitrale. Et dans ces conditions, d'après la déclaration elle-même, un différend quant à la validité, sans qu'il y ait distinction entre le droit et le fait, doit être réservé à la juridiction arbitrale. J'attire du reste votre attention sur deux petits mots modestes de ce texte, deux mots qui passeraient volontiers inaperçus mais qui me paraissent essentiels, ce sont les mots « quant à », un différend « quant à la validité », et en anglais « *as to the validity* ». Ceci semble bien indiquer qu'il suffit qu'il y ait un lien sérieux bien entendu entre la base juridique donnée à la demande et les faits dénoncés, pour que la commission arbitrale doive se déclarer compétente.

Et cela devient encore plus clair, Messieurs, lorsque nous nous référons au texte du protocole de 1886 où il est prévu que « toutes questions qui peuvent s'élever *au sujet* de l'interprétation ou de l'exécution du

présent traité ou les conséquences de toute violation de ce traité seront soumises, quand les moyens de les régler directement seront épuisés, à la décision de commissions d'arbitrage ». Ainsi, Messieurs, il devient tout à fait clair que, pour que la juridiction arbitrale soit compétente, il suffit que le différend *porte* sur l'interprétation du traité, mais en aucune façon que l'interprétation du traité ait été reconnue fondée.

Bien entendu, Messieurs, cela implique pour la Cour un examen sans aucun doute plus approfondi de la connexité que l'examen *a priori* que je supposais devoir être tantôt celui auquel se bornerait la Cour, cette *summaria cognitio* à laquelle faisait allusion M. Anzilotti ; c'est l'examen que fréquemment vous avez appelé dans vos arrêts l'examen *prima facie*, lequel tout de même ne va pas jusqu'à empiéter sur le fond et en préjuger.

Je crois avoir trouvé dans une ancienne décision de la Cour, l'avis consultatif n° 4 relatif aux décrets tunisiens de nationalité, page 26, une bonne définition de ce que comporte cet examen sommaire, relativement sommaire, pour le distinguer de l'examen extrêmement sommaire que j'avais en vue tantôt. La Cour permanente s'exprimait comme suit :

> « Il est également vrai que le seul fait que l'une des parties invoque des engagements d'ordre international pour contester la compétence exclusive de l'autre partie ne suffit pas pour écarter l'application du paragraphe 8. »

Ce que la Cour dit à propos de la compétence exclusive est assurément vrai en ce qui concerne la compétence tout court, c'est un point sur lequel je suis d'accord avec mes collègues britanniques — des deux côtés de la barre — ; c'est qu'il ne suffit pas que nous invoquions un engagement d'ordre international, même flanqué d'une clause compromissoire, pour que la Cour doive se déclarer compétente.

> « Mais, continue la Cour, dès que les titres invoqués sont de nature à permettre la conclusion provisoire qui peut avoir une importance juridique pour le différend soumis au conseil et que la question de savoir si un État est compétent pour prendre telle ou telle mesure se trouve subordonnée à l'appréciation de la validité et à l'interprétation de ces titres, la disposition du paragraphe 8 de l'article XV cesse d'être applicable et l'on sort du domaine exclusif de l'État pour entrer dans le domaine régi par le droit international. »

Il suffit, Messieurs, de paraphraser cette disposition pour se rendre compte que, du moment qu'il apparaît que la compétence se trouve subordonnée à l'appréciation de la validité et de l'interprétation d'un titre invoqué par un État et pour lequel il y a compétence de la juridiction arbitrale, cette juridiction arbitrale doit être déclarée compétente.

Au surplus, Messieurs, je suis d'autant plus en droit de me montrer surpris des exigences formulées à cet égard par le Gouvernement britannique que nous nous sommes trouvés dans une situation identique eux et moi il y a peu de mois — sauf que nous occupions des positions inverses — dans le différend qui fut porté récemment devant la Cour, le différend anglo-iranien. A ce moment-là, c'était le Gouvernement britannique qui défendait la compétence de la Cour, et pour la justifier, il soulignait dans la procédure écrite (par. 9 de l'annexe 2 au mémoire) que les traités

qu'il mentionnait étaient ceux à l'application desquels se rapportaient les situations ou faits d'où était né le différend. Le mot anglais était « *have relation* », et il était suivi dans le texte des mots français « ont trait » pour bien montrer qu'il n'incombait pas au demandeur de démontrer que la demande trouvait, dès à présent, un fondement réel dans les traités qu'elle invoquait pour que la Cour puisse se déclarer compétente. De même, les représentants britanniques employèrent tout au long de leur démonstration l'expression *prima facie* pour indiquer l'examen auquel la Cour devait se livrer, examen auquel, en l'espèce, la Cour ne dut pas se livrer, puisqu'elle retint d'autres moyens pour écarter sa compétence. Et moi-même, Messieurs, lorsque je répondais au Gouvernement britannique, je ne songeais pas à dire que le Gouvernement britannique devait faire la preuve dès à présent, pour que la Cour se reconnaisse compétente, de l'exactitude de l'interprétation qu'il prétendait donner aux traités ; je me plaçais également sur le point de vue du *prima facie*, je prétendais, quant à moi, comme conseil du Gouvernement iranien, que les traités que l'on invoquait étaient *sans pertinence* avec l'objet de la demande.

C'est encore, Messieurs, la position que je prends aujourd'hui, lorsque je prétends démontrer que, pour que la Cour se déclare compétente, il suffit que la Cour constate la pertinence, la connexité des dispositions du traité de 1886 avec l'objet de la réclamation Ambatielos. Certes, comme vous le verrez demain, j'irai aussi loin dans la démonstration du bien-fondé de notre argumentation juridique que la Cour me le permettra.

Mais cette limitation que je lui demande d'observer dans l'examen du fond est vraiment, à mon avis, la seule façon concevable pour établir ce minimum de démarcation entre la fonction de la juridiction arbitrale et la fonction de cette cour de contrôle que plusieurs d'entre vous ont reconnu désirable. Si vous vous prononcez sur la compétence de la commission arbitrale, vous aurez atteint l'extrême limite de ce à quoi vous puissiez actuellement ambitionner, sans aller jusqu'à empiéter sur ou amputer la compétence de la juridiction arbitrale pour statuer sur le fond du différend, en décidant que l'interprétation donnée par le Gouvernement hellénique aux dispositions du traité de 1886 est fondée ou qu'elle n'est pas fondée.

Je me réserve demain, Monsieur le Président, si la Cour m'y autorise, d'aborder et de terminer très aisément, en une audience, la démonstration de cette connexité.

[Séance publique du 24 mars 1953, matin]

Monsieur le Président, Messieurs de la Cour, dans la séance d'hier après-midi, je me suis efforcé d'examiner la portée de cette mission que vous aviez accepté de décider si le Gouvernement du Royaume-Uni était tenu d'aller à l'arbitrage. C'est sous le bénéfice de ces considérations que j'examinerai aujourd'hui les raisons que le Gouvernement hellénique croit pouvoir invoquer pour amener la Cour à répondre de façon positive à la question qui lui est posée.

M. l'agent du Gouvernement britannique a dit que le Gouvernement hellénique avait la charge de la preuve, et il a incontestablement raison. Le Gouvernement hellénique, qui vous demande de décider que le Royaume-Uni est tenu de recourir à l'arbitrage, a assurément le devoir

de démontrer qu'il en est effectivement ainsi. Et la chose est acceptée d'autant plus aisément par lui qu'il considère que cette charge est en l'espèce fort légère.

De quoi se plaint-il ? De plusieurs choses.

D'abord, en fait. La réclamation a pour base un certain nombre d'allégations qui sont, du reste, pour la plupart, reconnaissons-le, contestées par le Gouvernement britannique. Le Gouvernement hellénique affirme que l'un de ses ressortissants avait fait l'achat, ce qui n'est pas dénié, d'un grand nombre de navires, que des délais de livraison avaient été convenus — ce qui est dénié —, que, tandis que son ressortissant exigeait en vain le respect des délais de livraison et ne l'obtenait pas, les navires ayant été livrés pour une partie très tardivement, il se trouva dans l'impossibilité de payer le solde du prix et qu'il fut poursuivi avec rigueur et intransigeance par le vendeur en retard qui réussit à l'exécuter sur les navires qui avaient été livrés.

Le Gouvernement britannique, d'après la plainte du Gouvernement hellénique, avait, dans ses dossiers administratifs, la preuve que des délais de livraison avaient été prévus; alors que le procès était pendant et qu'on lui demandait de fournir, de contribuer à l'administration de la preuve, en livrant à la justice les pièces essentielles qui étaient en sa possession, il s'en est abstenu et les demandes faites à ce sujet au tribunal ont été repoussées par celui-ci.

D'autre part, un témoin essentiel se trouvait avoir été cité par le Gouvernement britannique, en sorte que le ressortissant hellénique ne le cita pas, c'est le fameux major Laing. Et puis il se fit que, l'ayant cité, le Gouvernement britannique s'abstint de le faire entendre, tandis que le plaignant hellénique, plus exactement le demandeur reconventionnel, ne l'ayant pas fait citer ne pouvait pas le faire entendre. Ayant ensuite demandé de pouvoir aller en appel afin de produire des écrits qu'il s'était procurés pour parer à la carence du défendeur et afin de faire entendre ce témoin, cet appel lui fut refusé. Le Gouvernement hellénique, dans son mémoire, a affirmé que cette attitude du Gouvernement britannique était une attitude contraire à la pratique britannique et que les décisions judiciaires étaient contraires à la jurisprudence.

Voilà le fait.

Et alors le droit.

Le Gouvernement hellénique prétend que ces faits constituent des violations d'une série de dispositions du traité de 1886, et il cite quatre dispositions.

L'article premier du traité, qui assure aux ressortissants helléniques la jouissance des mêmes droits en matière de commerce et de navigation que ceux qui sont ou peuvent être accordés aux nationaux.

L'article XII du traité, qui garantit aux sujets des parties contractantes de ne pas être soumis en ce qui concerne leurs personnes et leurs biens à des taxes générales ou locales, à des impôts ou obligations, de quelque nature qu'ils soient, autres ou plus lourds que ceux qui peuvent être imposés aux nationaux. Le mémoire britannique signale à cet égard, à juste titre, que le mot « obligations » qui figure dans le texte officiel anglais, et vraisemblablement dans le texte hellénique, ne figure pas dans la traduction française qui apparut de ce traité dans la publication de Louis Renault et dont s'est inspiré le Greffe lorsqu'il a reproduit la traduction. Il y a donc lieu à ce point de combler cette lacune matérielle. Je signale à la Cour que, dans certains documents

produits par le Gouvernement hellénique, on a reproduit la même traduction et que le même mot « obligations », qui est essentiel, a été omis.

Le Gouvernement hellénique invoque l'article X du traité, qui garantit aux ressortissants de chaque pays en toute matière relative au commerce ou à la navigation, les privilèges, faveurs, immunités et, en général, le traitement des étrangers les plus favorisés.

Et, enfin, l'article XV, paragraphe 3, qui garantit aux ressortissants de chaque pays sur le territoire de l'autre le libre accès aux tribunaux pour la poursuite et la défense de leurs droits sans autres conditions restrictives ou taxes que celles qu'elle impose à leurs sujets.

Suivant le Gouvernement hellénique, M. Ambatielos n'a pas joui du traitement garanti par le traité. Dans ses relations avec l'administration britannique, il n'a pas été traité avec le *fair play* et il n'a pas bénéficié du traitement dont les nationaux britanniques en général et les étrangers les plus favorisés jouissent.

Et le Gouvernement hellénique invoque à cet égard, à la faveur de l'article X que j'ai lu tantôt, outre le bénéfice direct du traité, le bénéfice indirect du traité, à savoir ce qu'il trouve dans des traités assurément déjà anciens, mais toujours en vigueur, avec le Danemark et la Suède, remontant à 1660, 1670, 1654 et 1661, un devoir aux gouvernements de se conformer à l'équité et à la justice, et même suivant l'un des traités, au *common right*.

Jugé d'après ces critères, il ne paraît pas douteux que M. Ambatielos est en droit de se plaindre et le Gouvernement hellénique dès lors également.

Le Gouvernement hellénique considère spécialement que la procédure suivie devant les tribunaux ne correspond pas à cette notion de l'article XV, paragraphe 3, du libre accès, interprété suivant son sens véritable qui n'est pas seulement l'accès matériel aux tribunaux, mais l'accès dans des conditions assurant la défense ; selon lui, on a imposé à M. Ambatielos des conditions restrictives, lorsqu'on lui a fait assumer seul la charge de la preuve, sans pouvoir compter sur cette contribution à l'administration de la preuve qu'en Angleterre, que dans mon pays et dans la plupart des pays, l'on doit attendre des plaideurs de bonne foi même lorsqu'ils sont défendeurs.

Est-ce que, Messieurs, cette manière de voir est fondée ? Est-ce que les articles I, X, XII, XV, paragraphe 3, doivent être interprétés comme nous le faisons ? Est-ce qu'ils ont cette étendue ? Est-ce qu'à les supposer établis les faits que nous invoquons constituent des violations desdites dispositions ? Suivant ce que je vous ai expliqué hier, ce sera à la juridiction arbitrale d'en décider. Mais est-ce que la question que je pose, est-ce que les faits que je viens de vous exposer sont relatifs aux dispositions du traité invoquées, est-ce que les moyens de droit que j'ai développés devant vous posent une question d'interprétation et d'application du traité ? Ou bien est-ce que, *prima facie*, il est permis d'écarter ces dispositions comme sans pertinence ? Je crois, Messieurs, que la réponse à cette question est fort simple, qu'elle doit nous être favorable, le Gouvernement hellénique ayant amplement démontré que l'affaire pour laquelle il demande le recours à la procédure arbitrale est une affaire relative à l'interprétation et à l'application du traité de 1886 et que, dès lors, c'est à bon droit qu'il demande que le Gouvernement du Royaume-Uni soit tenu de recourir à l'arbitrage.

J'aurais pu m'arrêter ici si nous n'avions pas reçu communication de la part du Gouvernement britannique d'un mémoire très intéressant, très soigné, dans lequel le Gouvernement britannique formule ses objections à la thèse du Gouvernement hellénique de son obligation de recourir à l'arbitrage. Ces objections sont essentiellement au nombre de trois.

Premièrement : suivant le Gouvernement britannique, même si les faits allégués par le Gouvernement hellénique étaient vrais — ce qui est évidemment contesté par lui — ils ne constitueraient pas une violation par le Gouvernement du Royaume-Uni du traité de 1886, parce que celui-ci ne peut pas être interprété de cette façon et ne s'applique pas à la matière. Par conséquent, la réclamation Ambatielos n'est pas « fondée » sur ce traité ainsi que l'exige la déclaration de 1926 et elle doit, dès lors, être écartée : il n'y a pas obligation d'arbitrage.

Deuxième objection : le réclamant originaire, M. Ambatielos, n'a pas épuisé les voies de recours devant les tribunaux anglais et, par conséquent, le Gouvernement hellénique n'est pas justifié à demander que les faits dont il se plaint soient soumis au contrôle d'une juridiction internationale.

Troisième objection : dans la poursuite de l'affaire Ambatielos — je reprends les termes du mémoire — « le Gouvernement hellénique est responsable de retards si considérables et nuisibles à la conduite de l'affaire qu'au stade actuel le Gouvernement du Royaume-Uni ne devrait pas être contraint de le soumettre à l'arbitrage ».

Je vais examiner ces trois objections et commencer par les deux dernières, qui sont les plus simples et qui me retiendront le moins longtemps.

Tout d'abord, ce non-épuisement des voies de recours internes. La Cour, Messieurs, appréciera s'il convient qu'elle examine ce moyen à ce stade-ci de la procédure, ou si elle doit le laisser à la juridiction arbitrale. Si elle envisage sa mission comme une mission pré-arbitrale, une mission de contrôle du recours, de l'obligation de recours, je crois qu'elle devra nécessairement écarter provisoirement ce moyen.

Mais j'ai reconnu qu'il pouvait en être autrement et que la Cour pouvait se faire une autre conception de sa tâche actuelle ; si elle considère qu'elle doit apprécier la compétence de la juridiction arbitrale, il est possible, Messieurs, qu'elle considère également dans ce cas qu'elle doit de même se substituer à la juridiction arbitrale pour apprécier toutes les fins de non recevoir, exceptions dilatoires, et, d'une façon générale, les objections préliminaires qui pourraient être soulevées devant la juridiction arbitrale. Or, je suis de ceux, Messieurs, qui considèrent que le moyen de non-épuisement des voies de recours internes fait partie des objections préliminaires et des objections dilatoires. Je crois donc qu'il est possible que la Cour soit amenée à examiner dans la présente instance ce moyen du non-épuisement des voies de recours internes et il est, dans ces conditions, prudent de notre part que nous nous expliquions brièvement à ce sujet.

Je m'empresse de dire qu'il va de soi que le principe invoqué n'est pas contesté — c'est une règle actuellement bien acquise que quand un gouvernement intervient en vertu de son droit de protection en faveur d'un de ses ressortissants, il ne peut le faire que si le ressortissant, disposant ou ayant disposé de moyens de redressement fournis par l'organisation interne du pays qu'il accuse, a épuisé ces voies de recours internes. Mais, Messieurs, bien entendu, et sans que je doive fatiguer la Cour de

citations à cet égard, encore cela suppose-t-il que ces voies soient réelles, et qu'elles puissent être utilisées de façon efficace, que ce ne soient pas des voies purement apparentes et devant nécessairement conduire à des décisions d'incompétence ou d'irrecevabilité. Or, Messieurs, en l'espèce, il n'est pas contesté que M. Ambatielos s'est adressé aux tribunaux anglais. A vrai dire, il n'en a pas pris l'initiative, il a agi par voie reconventionnelle, mais il a soumis ses griefs aux tribunaux anglais. Il n'est pas contesté qu'après avoir perdu devant le tribunal de premier degré il s'est adressé à la Cour d'appel pour demander l'autorisation d'appeler, qui lui a été refusée. Aussi le reproche qui lui est fait est-il actuellement de ne pas s'être adressé à la Chambre des Lords pour obtenir une réformation éventuelle de la décision prise par le juge d'appel, de lui refuser l'appel, de ne pas l'entendre.

Messieurs, vous avez déjà entendu à cet égard, dans le bref échange de vues qu'il y a eu à ce sujet au cours des premières plaidoiries, vous avez entendu sir Hartley Shawcross — que je regrette de ne pas avoir à mes côtés, ayant été retenu par d'autres devoirs en Angleterre et, comme vous le savez, il sera remplacé, dans peu de jours, par sir Frank Soskice. Sir Hartley s'exprimait comme suit, à la page 303 des plaidoiries: « Il est inexact que la Cour suprême d'Angleterre pouvait autoriser Ambatielos à produire ses preuves additionnelles. La décision de la Cour d'appel avait trait à une question de procédure entrant dans la compétence discrétionnaire de la Cour d'appel, dont la Chambre des Lords ne pouvait réformer la décision. »

Aujourd'hui le Gouvernement britannique revient à la charge à ce sujet, et, dans son mémoire, paragraphes 55 et 56, il fait état de deux décisions qui auraient été rendues par des juridictions britanniques, la dernière par la Chambre des Lords en 1952.

La Cour comprendra que, n'étant pas familier avec le droit et la procédure britanniques, je préfère entendre d'abord à cet égard M. Fitzmaurice, auquel, sans aucun doute, avec son expérience beaucoup plus considérable que la mienne, qui est inexistante, sir Frank Soskice éventuellement répondra, laissant à M. Fitzmaurice le soin de répliquer en dernier ressort.

Je crois, dans ces conditions, pouvoir m'en tenir à ces brèves explications en ce qui concerne le premier moyen de non-épuisement des voies de recours internes.

La même question préalable se pose en ce qui concerne le moyen de prescription, avec cette différence que la Cour s'est déjà exprimée à ce sujet dans sa décision préparatoire du 1er juillet dernier et qu'elle y a consacré l'alinéa suivant (p. 39) : « pour ce qui est de l'argument présenté dans le contre-mémoire selon lequel le Gouvernement hellénique serait forclos, à raison de son retard à soumettre la présente réclamation, la Cour estime qu'il y a là une question à traiter avec le fond et non pas au stade actuel ». Évidemment, Messieurs, nous ne sommes plus à ce qui était « le stade actuel », le 1er juillet 1952 ; nous sommes au stade suivant, mais lorsque la Cour déclarait que le moyen de prescription devait être traité avec le fond, la Cour entendait-elle par là le fond du différend portant sur l'arbitrabilité de la réclamation Ambatielos ou bien la Cour entendait-elle par là le fond de la réclamation Ambatielos? Dans le premier cas, c'est elle-même qui devra, cette fois-ci, examiner la question de prescription. Dans le deuxième cas, au

contraire, c'est la juridiction arbitrale qui aura à examiner la question de prescription.

Dans le doute, Messieurs, je l'examine.

Le Gouvernement britannique renvoie dans sa duplique aux explications qu'il a déjà données à cet égard aux paragraphes 104 à 108 du contre-mémoire qui était soumis à la Cour dans la précédente instance. Nous nous y sommes référés et nous avons constaté que le Gouvernement britannique y faisait surtout une longue narration de l'échange de notes qui avait eu lieu entre les deux gouvernements depuis les faits de 1920/1923. Il y est relaté que la première réclamation datait du 3 août 1933, soit plus de dix ans après les événements, et qu'un nouveau délai de cinq ans s'était écoulé avant que, le 21 novembre 1939, le ministre de Grèce se soit expressément, pour la première fois, prévalu d'une violation du traité de 1886. Après quoi, le Gouvernement britannique, dans le paragraphe 108, exprime l'avis qu'il serait — là, il y a un mot qui m'a impressionné parce que je ne le connaissais pas, le mot « unconscionable » — qu'il était contraire à la conscience de permettre au Gouvernement hellénique de poursuivre l'affaire dans ces conditions. C'est une appréciation assez subjective. Ce que le Gouvernement britannique devait nous indiquer, c'est quelles étaient les autorités juridiques sur lesquelles il basait ses appréciations de sa conscience.

En ce qui concerne l'exposé des faits, j'aurais beaucoup de choses à dire : on se souviendra que la première note hellénique n'est pas de 1933, qu'elle est de 1925 ; que c'est en 1925 que le ministre de Grèce à Londres transmettait un premier mémorandum sur cette affaire Ambatielos sur laquelle il attirait l'attention du Foreign Office, demandant avec insistance que cette affaire soit revue. Assurément, ce n'était pas là une réclamation indiquant tous les moyens de fait et de droit comme on en réclame quand une requête est présentée à la Cour, mais les juridictions arbitrales et la Cour elle-même ont déjà apprécié qu'en matière diplomatique il est fréquent qu'une réclamation soit pour la première fois présentée sous cette forme extrêmement modérée et réservée où l'on se borne à faire appel au sentiment d'équité et d'amitié de l'État auquel on s'adresse.

Messieurs, je n'insiste pas sur la question de fait parce que j'attends que le Gouvernement britannique nous démontre — à supposer même que 1925 ne soit pas retenu comme la date d'une réclamation diplomatique et que cette réclamation date de 1933 et qu'il n'y ait pas eu d'autre note en 1934 et 1936 et 1940 —, j'attends que le Gouvernement britannique nous démontre où il puise cette règle de prescription décennale dont il paraît vouloir demander à la Cour de faire application à l'espèce. Il cite, Messieurs, assurément deux petites décisions arbitrales qui admettent le principe de prescription, sans qu'il soit possible de voir quel était le délai après lequel la juridiction arbitrale avait accepté cette prescription, mais nous avons de notre côté, dans le mémoire que nous avons présenté à la Cour dans cette affaire tout au début de l'introduction, nous avons, à la page 100, énuméré un grand nombre de sentences arbitrales remontant de 1886 à 1902, à 1927 et, Messieurs, dans lesquelles il avait été fréquemment déclaré que, comme le disait la notice de MM. de la Pradelle et Politis, vingt ou trente ans passés dans l'abstention ne permettent pas en droit international d'écarter la demande. Il ne nous a rien été répondu à ce sujet, et, dans ces conditions, j'attends avec un entier scepticisme que le Gouvernement britannique veuille bien préciser sa manière de voir.

Je relève du reste que vraisemblablement il n'a lui-même qu'une confiance limitée dans le moyen, puisque l'on y chercherait en vain le mot « prescription » qui paraît pourtant le terme technique et que le Gouvernement britannique se borne à intituler le moyen : le retard abusif de la part du Gouvernement hellénique à poursuivre sa réclamation. Il faut pourtant, Messieurs, avoir le courage de désigner par son nom le moyen auquel on a recours ; ce moyen, c'est assurément la prescription, ce serait une prescription décennale et cette fois, c'est bien au Gouvernement britannique à faire la preuve tout d'abord en droit que cette prescription décennale existe réellement en droit des gens positif, avant de vous en demander l'application.

J'examine maintenant, Messieurs, la troisième et principale objection du Gouvernement britannique, celle qui vise la compétence proprement dite de la commission arbitrale et qui dénie cette compétence pour le motif que les faits dénoncés n'entreraient pas dans la catégorie de ceux réglementés ou interdits par le traité de 1886 et qu'à les supposer démontrés ces faits ne constitueraient pas des violations de ces dispositions.

Ici je confesse mon embarras. Jusqu'où vais-je devoir aller dans l'analyse du traité de 1886 et l'interprétation de ses dispositions pour rencontrer l'argumentation de mes contradicteurs britanniques ? Jusqu'où vais-je pouvoir aller, sans que M. le Président de la Cour, que nous savons être un gardien vigilant des limites du débat, m'adresse le reproche d'empiéter sur le fond ? L'avenir, Messieurs, va m'en instruire.

Les tout premiers arguments se rapportent aux articles I et X du traité.

Le premier argument, contenu dans les paragraphes 27 à 29 du mémoire en réplique — tout au moins dans l'ordre logique, me paraît-il devoir être considéré comme premier —, est que lorsqu'on lit les articles intercalaires, les articles de II à IX, l'on constate que, bien que dans les termes de l'article premier et dans les termes de l'article X il soit question du commerce et de la navigation, le mot « commerce » ne veut pas désigner les opérations commerciales en général, mais uniquement les opérations d'échange de pays à pays et sans doute spécialement et nécessairement, puisqu'il s'agit d'une île et d'une presqu'île, les opérations d'échange maritime, d'où l'on conclut que l'opération d'achat de navires effectuée en Grande-Bretagne par Ambatielos ne serait pas une opération de commerce au sens du traité de 1886.

Messieurs, je n'ai pas besoin de vous dire que cette construction est extraordinairement hasardeuse, que le terme « commerce » a un sens bien clair en lui-même, que dans les articles I et X il s'ajoute au mot navigation et qu'on ne peut arguer du fait que d'autres articles suivants ont trait exclusivement à la navigation et pas au commerce pour en limiter la portée à l'extrême et considérer que l'achat de navires construits sur territoire britannique et qui constitue la première opération à laquelle songera n'importe quel armateur désireux de se livrer au commerce maritime, doit être exclu de son application. Vraiment, Messieurs, considérer qu'un traité de commerce et de navigation a fait abstraction de cette première et essentielle opération, c'est interpréter le traité à la fois contre le sens des termes et contre l'esprit de ses dispositions.

Deuxième argument, que je trouve dans le paragraphe 24 du mémoire en duplique, c'est que les dispositions du traité relatives au commerce ne seraient pas d'application en l'espèce, parce que nous nous plaindrions, dans l'affaire Ambatielos, de violations des obligations de droit privé

que le Gouvernement britannique aurait contractées comme un commerçant privé faisant un acte privé de vente de navires et non pas un acte de gouvernement. Il s'agit, dit le texte, d'obligations contractées à l'occasion d'un contrat de vente conclu par le ministère de la Marine marchande en qualité de commerçant privé, « *private trader* ». Je ne peux pas admettre ce raisonnement. Assurément, nous ne prétendons pas, comme l'a cru à tort le Gouvernement britannique, que les obligations dérivant du traité de 1886 ont pour effet d'imposer au Gouvernement britannique le respect de tout contrat commercial conclu entre négociants des deux pays en vertu du droit interne. En l'espèce, il ne s'agit pas d'un contrat conclu entre négociants de deux pays, il s'agit d'un contrat conclu entre négociants d'un pays et les autorités de l'autre pays, et si, d'une façon générale, nous pouvons nous attendre, en vertu du traité, à ce que les autorités britanniques assurent le respect des intérêts commerciaux helléniques en Angleterre et que ces autorités utilisent à cet égard les compétences de droit public, qui leur sont attribuées en vertu de la législation britannique, nous pouvons attendre aussi et *a fortiori* de ces autorités, lorsqu'elles sont elles-mêmes parties à un contrat, qu'elles donnent l'exemple à leurs compatriotes d'une exécution intégrale et de bonne foi du contrat ou de l'acceptation des sanctions qu'une inobservation doit entraîner.

Il y a, Messieurs, dans la jurisprudence arbitrale de nombreux exemples de décisions où fut admise la responsabilité d'États pour fautes contractuelles commises par des autorités publiques dans l'exécution de contrats privés, fautes grossières, fautes lourdes, fautes de nature à causer des dommages à un ressortissant. Dès lors, comme l'article I et l'article XII garantissaient le traitement national et le traitement de la nation la plus favorisée en ce qui concerne le respect des droits des commerçants helléniques en Angleterre, nous sommes en droit de faire entrer dans le cadre de ces obligations l'exécution d'un contrat commercial conclu par les autorités publiques.

Troisième argument, développé au paragraphe 29, alinéa 3, de la duplique: les articles I et X du traité qui emploient le terme « commercial » ne peuvent, suivant le Gouvernement britannique, même au cas où l'on donnerait au commerce le sens le plus large, permettre d'inclure dans le mot « *commerce* » les incidents relatifs à l'administration de la justice. Assurément, le Gouvernement britannique a raison : le mot « commerce » est par sa nature inconciliable avec l'administration de la justice, mais ce que nous soutenons, ce n'est pas que le commerce comprend l'administration de la justice ; ce que nous soutenons, c'est que *les droits* qui sont garantis en matière commerciale comprennent notamment et éminemment les droits relatifs à la protection judiciaire du commerce, qu'il en est ainsi en ce qui concerne le traitement national et qu'il en est ainsi également et *a fortiori* en ce qui concerne le traitement de la nation la plus favorisée visée dans l'article XII, et cela est d'autant plus important pour la cause que, comme nous l'avons vu, des traités conclus par d'autres États comportent la promesse d'un traitement basé sur le *common right* et que nous sommes en droit de considérer que par *common right* il faut considérer les principes généraux du droit, de même que l'équité, ce qui est également décisif pour l'appréciation de la cause.

J'arrive, Messieurs, au quatrième argument développé au paragraphe 31 de la duplique. Si les trois premiers se rapportaient aux articles I

et X, le quatrième se rapporte à l'article XII, aux termes duquel les sujets de chaque partie contractante qui se conformeront aux lois du pays ne seront pas soumis, en ce qui concerne leurs personnes ou biens, en ce qui concerne leur passeport, ni en ce qui concerne leur commerce ou industrie, à des taxes générales ou locales, ou à des impôts ou à des obligations de quelque nature qu'elles soient, autres ou plus lourdes que celles qui sont ou peuvent être imposées aux nationaux. Le Gouvernement britannique nous fait la même objection qu'en ce qui concerne les articles I et X. Le mot « commerce » ne s'applique pas, ne comprend pas le traitement en justice, et le mot « commerce » doit être interprété restrictivement. Messieurs, l'objection est particulièrement faible en ce qui concerne l'article XII, car dans son analyse générale du traité, le Gouvernement britannique a reconnu que si les articles I à X s'appliquaient plus spécialement au commerce et à la navigation, les articles XI et suivants visaient l'établissement, c'est-à-dire les conditions d'admission et le statut des ressortissants. Le fait est que l'article XII, très clairement, vise non seulement le commerce et l'industrie, mais vise le traitement des sujets en ce qui concerne leurs personnes ou biens ou leurs passeports, aussi bien qu'en ce qui concerne le commerce et l'industrie. C'est donc d'une façon tout à fait générale que le statut de l'article XII est garanti aux personnes helléniques.

Alors on nous dit aussi, Messieurs, que le mot « obligations », qui figure et sur lequel nous nous appuyons, la prescription que les ressortissants étrangers ne peuvent être soumis à des obligations différentes ; que ces obligations sont nécessairement des obligations du même genre, de même nature que les taxes ou impôts, il s'agirait donc d'obligations fiscales, obligations *ejusdem generis* dit le mémoire britannique. Encore une fois ce serait admissible, peut-être, si le mot « obligations » n'était pas accompagné des mots « de quelque nature qu'elles soient ». « Obligations de quelque nature qu'elles soient » interdit de concevoir les applications comme étant exclusivement les obligations fiscales.

Je crois que dans ces conditions c'est donc à bon droit que nous déduisons de l'article XII l'obligation pour les deux États d'accorder à leurs sujets réciproques des situations juridiques identiques à celles de leurs nationaux, de ne les assujettir à aucune obligation particulière. Parmi les obligations qui sont ainsi interdites se trouvent les situations défavorables en justice, que ces situations résultent de dispositions législatives ou d'une attitude de l'administration ou d'une décision judiciaire. En sorte que, suivant nous, M. Ambatielos, en se trouvant placé devant l'impossibilité d'extraire des archives britanniques les pièces essentielles de nature à établir le bien-fondé de ses griefs, a été soumis à des obligations contraires au traité.

A ce sujet je dois également signaler à l'attention de la Cour ce qui semble bien être un commencement tout au moins d'admission du bien-fondé de la réclamation hellénique sur ce point. Je le trouve dans l'échange de notes qui figure déjà dans le mémoire hellénique. Dans une note du 3 août 1933 (annexe R 3, p. 73), je lis :

> « Il fut admis au procès que des dossiers étaient gardés au ministère du *Shipping* dans lesquels des détails du contrat discuté par le *Shipping Control* étaient contenus.
>
> Mais lorsque M. Ambatielos demanda la production de ces dossiers, le privilège de la Couronne fut invoqué et ils ne furent pas produits. »

Le Gouvernement britannique peut devoir répondre à cela avec un certain retard : le 7 novembre 1934, dans une annexe S 4, page 121, il indique :

> « Pareille réclamation ne pourrait être faite régulièrement que si le Gouvernement hellénique était en mesure de montrer qu'il y a une obligation pour les gouvernements, lorsque engagés dans un procès devant leurs propres tribunaux, de produire les minutes écrites dans les départements gouvernementaux intéressés et en particulier que telle est la pratique du Gouvernement grec lui-même. »

A quoi le Gouvernement hellénique a répondu, le 2 janvier 1936, annexe R 5, page 90 :

> « J'ai l'honneur d'affirmer (I beg to state) que mon gouvernement est dans l'obligation de divulguer tout fait relevant lorsqu'il est engagé dans un procès. »

Je me trouve donc, Messieurs, devant une position officielle qui semble avoir été prise de bonne foi par l'administration britannique mais qui, en présence des renseignements dont il faisait lui-même dépendre son attitude ultérieure, aurait dû raisonnablement l'amener à reconnaître le bien-fondé de la réclamation Ambatielos, tout au moins en tant qu'elle se fondait sur la « *no discovery* » de certains documents figurant dans les archives britanniques.

J'en arrive maintenant, Messieurs, au cinquième argument développé aux paragraphes 32 et 40 de la duplique, qui a trait, lui, à l'article XV, paragraphe 3, du traité auquel le Gouvernement britannique n'a pas cessé d'accorder une attention particulière. Aux termes de cet article XV, paragraphe 3, les sujets de chacune des parties contractantes dans les domaines et possessions de l'autre, auront « libre accès aux tribunaux pour la poursuite et la défense de leurs droits sans autres conditions restrictives ou taxes que celles qu'elles imposent à leurs sujets ».

Bien entendu, le Gouvernement britannique s'efforce de démontrer que cette fois encore cette disposition ne nous fournit pas de base juridique solide pour la réclamation Ambatielos, à supposer que les faits allégués soient établis. Il nous dit à ce sujet, dans le mémoire en réplique, que cette disposition prévoit seulement le libre accès devant les tribunaux. Or, nous dit-il, vous avez eu le libre accès devant les tribunaux.

C'est là, je crois, une interprétation inadmissible de ce texte qui le vide à peu près de toute portée réelle, car le libre accès est mentionné comme ne devant être accompagné d'aucune restriction ou taxes que celles imposées aux sujets nationaux, et ces restrictions interdites peuvent être de nature diverse, elles peuvent survenir soit au cours du procès, soit avant ; elles peuvent avoir été instaurées par la loi ou bien elles peuvent être le fait des tribunaux ou de l'administration si celle-ci est partie au procès ou, même comme ce fut le cas en l'espèce, elles peuvent résulter à la fois de l'action du pouvoir exécutif et du pouvoir judiciaire. Nous sommes donc en droit d'invoquer l'article XV, paragraphe 3, comme les autres, comme base des faits que nous dénonçons.

Aussi bien le Gouvernement britannique ne s'étend pas sur son argument juridique, et je ne puis considérer que comme un aveu de faiblesse le fait que, dans son mémoire en duplique, il s'efforce de persuader la Cour qu'*en fait* nous n'aurions à nous plaindre de rien. Et il explique qu'il était loisible à M. Ambatielos à l'audience devant le tribunal anglais

de l'Amirauté de citer tout témoin, de produire tout document que lui-même ou ses conseillers auraient jugé bon. « Il ressort clairement, dit-on, de sa propre déclaration sous serment (annexe 3 au contre-mémoire versé au dossier de la Cour en tant que partie du compte rendu d'audience de la Cour d'appel britannique, audience citée au paragraphe 10 du mémoire hellénique) que le demandeur connaissait l'existence des lettres aux mains du major Laing. Il n'a pris aucune mesure pour obtenir ces lettres par la procédure judiciaire qui lui était offerte, ni pour citer à comparaître le major Laing ou sir Joseph McLay. Ses conseillers juridiques avaient sans doute de bonnes raisons pour s'abstenir de prendre des mesures de cet effet au moment approprié devant le tribunal de l'Amirauté. Mais on ne saurait prétendre que sa liberté d'accès aux tribunaux pour présenter son affaire ait été entravée par le Gouvernement du Royaume-Uni, ni par le tribunal de l'Amirauté, ni par les règles de procédure applicables. Il a choisi de ne pas invoquer cette preuve au moment voulu de la procédure. Si c'est là une entrave à la liberté d'accès, c'est une liberté qu'il s'est refusée à lui-même. »

Messieurs, si le Gouvernement britannique avait raison, assurément ce grief là en tout cas viendrait à disparaître, et c'est un de nos griefs principaux. Mais les affirmations du Gouvernement britannique prouvent tout simplement que les agents qui ont rédigé ce mémoire, sur base peut-être de l'impression qu'ils tiraient des pièces reproduites dans la procédure écrite, n'ont pas une connaissance complète de l'intégralité de la procédure qui s'est poursuivie devant le tribunal. Nous n'avons pas jusqu'ici répondu à l'argumentation qui figure à cet égard dans le premier mémoire en réponse. Mais nous n'aurons pas de peine, lorsque le moment sera venu, à faire la démonstration du fait que M. Ambatielos a officiellement demandé la production du dossier, et que cette production lui a été refusée ; que M. Ambatielos s'est ensuite adressé aux juges pour l'obtenir ; que Justice Hill a constaté que le Gouvernement britannique maintenait son refus ; que Justice Hill s'est déclaré impuissant à obtenir une modification de cette attitude, bien que, suivant certaines pratiques juridiques, il aurait pu l'ordonner ou du moins exiger certaines garanties quant au maintien du refus opposé par l'administration ; que d'autre part, en ce qui concerne le témoin major Laing, comme je vous l'ai dit, assurément il était loisible à M. Ambatielos de le citer, mais que s'il ne l'a pas fait, c'est parce que ce témoin l'était déjà et qu'on peut se demander s'il l'avait été de bonne foi étant donné que la partie citante ne l'a pas fait interroger et que sa citation n'a eu d'autre effet que de prendre l'autre partie et le juge par surprise devant l'absence d'un témoignage important, qui paraît vraiment peu équitable. Et je mentionne pour mémoire la difficulté qui s'est produite lorsque M. Ambatielos, ayant dans ces conditions perdu devant le premier juge, se vit refuser l'appel.

Nous sommes donc contraires en fait, Messieurs. Je pourrais faire la preuve de l'exactitude de ma rectification dans l'analyse de la procédure fort longue qui est publiée dans les comptes rendus juridiques anglais ; mais je crois vraiment devoir renoncer à faire pour l'instant la pleine lumière sur ce point devant la Cour, car je me demande vraiment ce qui resterait à examiner par la juridiction arbitrale lorsqu'elle devrait apprécier le fond, si nous devions nous engager dans cette voie.

Il me reste à dire un mot d'une circonstance qui semble avoir sérieusement préoccupé mes adversaires : c'est l'opinion déjà émise par un des membres de la Cour le 1er juillet 1952, suivant laquelle le Gouverne-

ment britannique avait déjà, tout au moins dans une large mesure, marqué son accord sur notre interprétation du traité de 1886, tout au moins en tant qu'elle devrait conduire à l'admission de la compétence de la commission arbitrale. Dans l'opinion individuelle de M. Levi Carneiro, le Gouvernement britannique a en effet lu ce qui suit (p. 49 de l'arrêt) :

> « Dans le cas actuel, la reconnaissance du fait que la réclamation est fondée sur le traité de 1886 découle même des déclarations des Parties.
>
> Dans le contre-mémoire (n° 11), après le résumé du raisonnement hellénique que j'ai déjà transcrit, l'agent du Gouvernement britannique a déclaré que ce raisonnement devrait être rejeté pour les raisons suivantes : « *a)* la déclaration ne fait pas partie du traité « de 1926 et l'article 29 du traité ne saurait par conséquent s'y « appliquer ; *b)* la déclaration était envisagée comme applicable « uniquement aux réclamations présentées avant la date de sa signa- « ture, le 16 juillet 1926 ».
>
> Le Gouvernement britannique n'a pas repoussé le raisonnement parce que la réclamation n'était pas basée sur le traité de 1886, quoiqu'il niât le déni de justice et l'inégalité de traitement. Au contraire, il a admis que la réclamation était, *prima facie*, fondée sur le traité de 1886.
>
> Sa conclusion première était que la Cour
> « n'est pas compétente pour connaître d'une demande du Gouver- « nement hellénique tendant à ce qu'elle ordonne au Gouvernement « du Royaume-Uni de déférer à l'arbitrage une réclamation du « Gouvernement hellénique fondée sur l'article XV ou tout autre « article du traité de 1886 ».
>
> Par la suite, pendant les débats oraux devant la Cour, la reconnaissance de ce fait est devenue très évidente. Le conseil britannique a posé, dans la séance du 15 mai, les conditions qu'il considérait nécessaires pour admettre la compétence de la Cour : 1) que la déclaration fît partie du traité de 1926 ; 2) que la réclamation hellénique fût, en même temps, « fondée sur le traité de 1886 » et couverte par la déclaration. Il a cherché à démontrer que la déclaration ne faisait pas partie du traité de 1926 et qu'elle ne couvrait pas la réclamation ; mais il n'a pas dit un mot pour affirmer que la réclamation n'était pas basée sur le traité de 1886.
>
> Pour terminer, le conseil hellénique a dit :
> « .... même nos adversaires étaient d'accord pour estimer que « parmi nos bases juridiques il y en avait une au moins dont ils « reconnaissaient la pertinence : c'était l'article XV, paragraphe 3, « du traité de 1886.... ».
>
> Je crois qu'il fallait reconnaître ce fait. La compétence de la Cour découle de ce que le différend est encadré dans la déclaration de 1926 : la réclamation est « fondée » sur le traité de 1886. »

Je crois, Messieurs, que dans la pensée de l'auteur de cette opinion, il n'était pas douteux que bien entendu le Gouvernement britannique n'avait pas souscrit intégralement à notre interprétation des diverses dispositions du traité, mais qu'il avait, au cours de notre première passe d'armes, admis tout au moins la pertinence du traité comme base de la réclamation Ambatielos et considéré qu'il ne pouvait pas trouver

dans l'analyse de notre argumentation juridique des raisons suffisantes pour inviter la Cour à rejeter de ce chef la demande de recours à l'arbitrage.

Messieurs, le mémoire britannique s'explique assez longuement sur les déclarations relevées par M. Carneiro dans la procédure écrite et dans les plaidoiries, et je ne vais pas m'attarder fort longtemps sur ce point parce que je vais donner tout de suite à nos adversaires une satisfaction majeure. Je ne considère pas que le Gouvernement britannique puisse être déclaré aujourd'hui forclos du droit de contester sous la forme qu'il l'entend, de la manière qu'il l'entend, qu'il y a un rapport de pertinence entre les dispositions du traité de 1886 que nous avons alléguées et les faits que nous avons dénoncés.

Mais, ceci dit, je crois pourtant devoir, à mon tour, souligner qu'il y a eu et qu'il y a encore, de la part des représentants du Gouvernement britannique, tout au moins en ce qui concerne certaines dispositions du traité, une hésitation et une timidité qui m'apparaissent comme décisives lorsque vous avez à apprécier non pas le bien-fondé de nos interprétations, mais la pertinence des dispositions que nous invoquons pour apprécier la compétence de la commission arbitrale. Dans la plaidoirie de mon très estimé ami et contradicteur, sir Eric Beckett, je lis à la page 289 : « Je peux voir, très vaguement, comment le Gouvernement grec essaie de placer l'affaire Ambatielos sous l'article XV, paragraphe 3, du traité de 1886. Mais je ne vois pas comment il pourrait le faire en ce qui concerne le traité de 1926. »

A la page 291, je lis : « Si c'était le cas que la Grèce était en mesure d'invoquer d'autres dispositions du traité de 1886 en plus de l'article XV, paragraphe 3, l'effet en serait seulement d'étendre les bases de réclamations des bases de réclamations qu'elle aurait compétence, que la Cour aurait compétence d'examiner dans l'hypothèse où, contrairement à ma prétention, la Cour trouverait qu'elle aurait juridiction pour examiner le moins du monde les infractions alléguées au traité de 1886. »

Il y avait donc, Messieurs, un traitement privilégié, plus favorable, en ce qui concerne l'article XV, paragraphe 3, et c'est ce qui m'avait conduit à le souligner, comme le signale M. Lévi Carneiro, dans la dernière partie de ma plaidoirie (p. 339) et ce sans m'attirer aucune interruption ou rectification de la part de mon contradicteur. Je disais : « Messieurs, je pense qu'en l'espèce vous ne devez pas joindre l'incident au fond, parce qu'il m'a semblé, parce que même nos adversaires étaient d'accord pour estimer que parmi nos bases juridiques il y en avait une au moins dont ils reconnaissaient la pertinence. C'était l'article XV, paragraphe 3, du traité de 1886, et que cela suffit, à mon sens, pour que vous vous déclariez compétents. »

Encore dans le dernier mémoire en duplique que nous avons reçu, je relève que le Gouvernement britannique fait une différence entre le paragraphe 3 de l'article XV du traité et les autres lorsqu'au paragraphe 32 il émet l'avis que cette disposition, l'article XV, paragraphe 2, est la seule du traité de 1886 « qu'on pourrait à la rigueur considérer comme se rapportant d'une façon quelconque à la réclamation Ambatielos ». Après quoi, bien entendu, il s'efforce de démontrer que notre interprétation n'est pas fondée. En sorte, Messieurs, que s'il est vrai qu'il suffit d'établir à ce stade-ci de la procédure que la réclamation Ambatielos se rapporte à une disposition du traité de 1886, j'aurais

le droit d'estimer que cette concession de la part de représentants britanniques doit emporter votre décision.

Telles sont, Messieurs, les explications que j'ai cru devoir vous donner à l'appui de notre mémoire, pour vous persuader que la question par vous posée de savoir si le Royaume-Uni est tenu de soumettre à l'arbitrage, conformément à la déclaration de 1926, le différend relatif à la réclamation Ambatielos en tant que cette réclamation est fondée sur la base du traité de 1886, doit recevoir une réponse affirmative.

Suivant nous, le Royaume-Uni est tenu de recourir à l'arbitrage parce que même s'il entend contester la compétence de la juridiction arbitrale, il ne pouvait pas, sans manquer à son engagement, décider unilatéralement de la légitimité de ces exceptions d'incompétence et se refuser à les soumettre à la juridiction arbitrale elle-même.

Le Royaume-Uni est encore tenu parce qu'à l'examen ces exceptions d'incompétence ou ces autres objections préliminaires s'avèrent également non fondées, parce qu'on ne peut pas contester que la réclamation Ambatielos présente un lien réel avec le traité de 1886, qu'elle soulève des questions d'interprétation et d'application qui sont très exactement celles pour lesquelles la procédure d'arbitrage a été prévue par le protocole de 1886 et maintenue par la déclaration de 1926.

Je pense que, bien entendu, la réponse affirmative que nous vous demandons de donner à cette question d'obligation de recours à l'arbitrage ne préjuge pas de la décision finale qui interviendra de la part de la juridiction arbitrale quant à la validité de la réclamation Ambatielos, pas plus en ce qui concerne l'interprétation du traité de 1886 qu'en ce qui concerne la preuve des faits qui nécessairement vont demeurer hors de votre contrôle actuel.

Même, Messieurs, s'il devait en être autrement et que, contre mon attente, vous estimiez devoir vous prononcer, de façon définitive, en ce qui concerne l'interprétation du traité de 1886, encore ai-je confiance que les explications que je vous ai données suffiront pour vous amener à la conclusion que notre interprétation est fondée.

Bien entendu, même cela, même si vous en arriviez là, ce ne serait pas encore le gain du procès, l'adjudication de notre demande, car il resterait plusieurs points de fait à vérifier, à savoir qu'il y a eu stipulation de délais pour la livraison de navires, que M. Ambatielos a vainement sollicité la production, que l'Amirauté lui a refusé la production des pièces qui étaient en sa possession dans des conditions qui sont irrégulières, que M. Ambatielos s'est vainement adressé au tribunal, que le refus du tribunal aurait pu être accompagné de certaines précautions auxquelles le tribunal n'a pas eu recours contrairement à certaines traditions britanniques, que, en ce qui concerne la Cour d'appel, il a été plus fréquemment jugé qu'il y avait lieu de permettre l'appel dans les circonstances où se trouvait M. Ambatielos et que, dès lors, le Gouvernement hellénique est fondé dans sa demande.

Sur ces points, cependant, nous reconnaissons que vous avez lu et entendu plus d'explications de la part du Gouvernement britannique que de la nôtre.

Nos adversaires ont tenu, dans leur premier mémoire, et je rends hommage à ce souci, à ne pas vous donner l'impression qu'en déniant d'abord la compétence de la Cour et aujourd'hui la compétence de la commission arbitrale, ils entendaient se dérober à la nécessité de répondre

au fond parce qu'ils connaissaient l'impuissance ou l'indigence de leur argumentation.

Je n'ai pas besoin de vous dire que la Cour commettrait une singulière imprudence si elle voulait se former même une première impression quant à la justice de notre cause d'après la lecture d'une documentation et d'une discussion qui a été sur ce point nécessairement, et spécialement de notre part, tout à fait incomplète.

Audiatur et altera pars.

En attendant, nous ne pouvons qu'opposer aux protestations de bon droit de l'État défendeur l'affirmation du Gouvernement demandeur que la cause qu'il défend est juste.

J'ai le grand espoir que nous ne devrons pas attendre beaucoup plus longtemps pour vous en faire la démonstration.

Nous en sommes encore aux technicalités, mais, comme le disait lord Halsbury dans un arrêt de 1936 qui se trouve mentionné dans notre mémoire, à la page 20, « il serait désastreux pour l'administration de la justice s'il pouvait être supposé qu'à raison de quelques technicalités la vérité réelle puisse être écartée ». Une heure viendra de jeter la lumière sur la vérité réelle. Nous l'attendons et l'espérons avec confiance.

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2. ORAL ARGUMENT OF Mr. FITZMAURICE

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM) AT THE PUBLIC SITTINGS OF MARCH 25th AND 26th, 1953

[Public sitting of March 25th, 1953, morning]

Mr. President, I should like to begin by referring to some remarks which were made the other day and by associating myself with those remarks about various colleagues, friends and Members of the Court absent through illness and, in particular, those made so graciously by Me. Rolin in regard to my friend, colleague and master, Sir Eric Beckett. I can assure Me. Rolin that his remarks will be transmitted to Sir Eric Beckett. I also thank Me. Rolin for the remarks he so kindly made about myself. I can assure him and I can assure the Court that I shall do my best to deputize in this matter for Sir Eric Beckett, conscious though I am of the difficulty of replacing him.

Mr. President and Members of the Court:

In the present proceedings the question at issue is quite a narrow one. It can be stated in a single sentence: is or is not the claim put forward by the Hellenic Government on behalf of Mr. Ambatielos a claim based on the Anglo-Greek Treaty of Commerce and Navigation of the 10th November 1886, and should the United Kingdom be required to submit this claim to arbitration? But although this issue is a narrow one, it is not altogether simple, and it seems to us that its outcome must depend on the view which the Court will take about certain basic points which seem to us to be fundamental, and which I will now try to define. But first, may I make one general remark? Throughout my speech there will occur phrases which, if not understood in their proper sense, might appear as if the United Kingdom was admitting the basic validity of the Ambatielos claim and was merely objecting to submitting to arbitration about it. This is quite definitely not our position. We emphatically deny that this claim has any sort of validity whatever, but on the present occasion we are not discussing the basic validity of the claim: we are not discussing whether it is good, bad or indifferent. We are simply discussing what its foundation is, purely as a claim, and whether it is a claim based on the 1886 Treaty. I ask the Court to note this fact once and for all, because it will avoid the necessity for me constantly to insert wearisome provisos in order to make it clear that, though I may be discussing the Ambatielos claim as if it might have some substance in it, we in fact deny that it has any substance and are only considering its formal basis.

With this introduction I will now proceed to define the questions which we regard as fundamental to the issue of what is the true foundation of this claim.

First, we start from the position that an obligation to submit the Ambatielos claim to arbitration only arises if that claim is based on the 1886 Treaty. That is, I think, axiomatic, and is indeed the foundation of the present proceedings. The first of our fundamental questions must therefore be: what do we mean by the concept of being based

on the 1886 Treaty; in what sense do we understand the term "based"; and what effect ought to be given to the requirement that the claim must be based on the Treaty?

Secondly, assuming, as I shall try to show, that the requirement of being based on the 1886 Treaty must involve *at least* that the Treaty or some provision of it relates, or contains provisions relating, to the same category or *class* of subject-matter to which the Ambatielos claim relates, we shall go on to enquire whether this is, in fact, the case, or whether, on the contrary, the Ambatielos claim relates to something of quite a different order from what the Treaty relates to.

Thirdly, there will arise another and very important question, which is this. We shall contend, and indeed we think it evident, that the Ambatielos claim is essentially a claim of miscarriage or denial of justice, or else a claim relating to State responsibility, based on the general principles of international law; whereas the 1886 Treaty is an ordinary treaty of commerce, establishment and navigation which could never normally constitute the foundation of such a claim, and, in our view, the direct language of which does not assist the case of our opponents. Can it nevertheless be said that the claim, although deriving from the general principles of international law, has a foundation in the Treaty because it can be argued that the Treaty incorporates the general principles of international law concerning the administration of justice and the responsibility of States, or because it could be argued that the Treaty refers to and incorporates provisions of other applicable treaties which would cover the Ambatielos claim? We do not think the Treaty incorporates either general international law or other treaties, but that will be the third question.

Fourthly, there arises in our view a question which, while related to the previous ones, involves a distinct issue, and which I will state like this: supposing our distinguished adversaries could show that the 1886 Treaty is not wholly irrelevant to the Ambatielos claim, that some of its provisions might have a bearing on that claim and that parts of the Treaty deal with matters of the same class or order as those which arise on the Ambatielos claim. We do not think that that is so, but supposing it were so, would that be sufficient to establish that the claim was "based" on the Treaty? In our view it would not. We submit that our adversaries must go further than this. They must show that there is some provision of the Treaty which would be violated if the facts they allege in relation to the claim of Mr. Ambatielos are true. They do not, at this stage, have to show that those facts actually *are* correct, for that would be a question of the merits. But they must show that, if these allegations *were* correct, a breach of the Treaty would be involved. Otherwise the claim cannot be based on the Treaty, for, if the position is that although all the facts of a given claim are established, those facts would still not involve a breach of a particular treaty, then, although the claim may have some other basis—for instance, the general rules of international law or some other treaty—it cannot be based on that particular treaty. Of course, we emphatically deny that the allegations of fact which are made in the Ambatielos claim *are* correct. We are merely considering whether, even if they were, this claim would be based on the 1886 Treaty. The fourth question will therefore be: which provision of the 1886 Treaty would be violated if Mr. Ambatielos had, in fact, received the treatment the Hellenic Government say he did?

These are four fundamental questions. I propose myself to deal with the first three of them and I shall then ask my learned friend and colleague, Mr. Fawcett, to address the Court on the fourth.

Before I take up the first of the four questions I have defined, I want to mention certain aspects of this case which have, in our view, an important bearing on the question of the attitude which the Court should (or at any rate would be entitled to) take up in regard to the present proceedings. I will state this matter as follows:

It is obvious, I think, that the Court is not enquiring into the question whether the Ambatielos claim is founded on the Treaty of 1886 merely as an abstract question of doctrinal interest. The object, as we all know, is to determine a concrete question, namely, whether the United Kingdom is under an obligation to submit the Ambatielos claim to arbitration, and the significance of this is that, only if the claim is a claim based, that is to say, in our view, arising out of, the 1886 Treaty—only in that event—can such an obligation exist under the Anglo-Greek Declaration of 1926, which the Court found in the previous proceedings it had jurisdiction to interpret and apply.

Now, Mr. President, I do not think that anyone who studies this matter with an open mind can fail to be struck by the considerable element of artificiality involved in our distinguished adversaries' case. I shall argue the point more fully in a moment, but I do not think anyone can seriously doubt that the obvious and *natural* foundation of the Ambatielos claim (in so far as it has any foundation at all) lies not in any treaty, but in the field of general international law, and that the validity of this claim, if it has any validity at all, depends on the application of certain rules and principles of general international law. In ordinary circumstances, it is on that basis and on that basis only that the claim would have been put forward. Moreover, this was the basis and the sole basis on which the claim was in fact put forward up to 1939. So clearly is this the case that I affirm with some confidence that it would never have occurred to the Hellenic Government—and we know that it did not in fact occur to them until 1939—it never would have occurred to them to bring the 1886 Treaty into the matter at all, if they had not been searching for some means to compel the United Kingdom Government to submit the claim to compulsory arbitration. Moreover, I venture to predict that, if the Court should hold (I hope it will not, but if it should hold) that this claim should go to arbitration under the Protocol of Arbitration attached to the 1886 Treaty, we shall thereafter hear little if anything more of the Treaty. Our adversaries will have achieved the object, and the only real object with which they cited the Treaty, namely, the reference of the claim to arbitration, and then they will go back to their original ground and argue the merits mainly on the basis of the general rules and principles of international law regarding the administration of justice and the treatment of foreigners before the courts, and I will go further and suggest that our adversaries, whatever they may say now as to the applicability of the Treaty, would be very relieved to get away from the Treaty and argue their case on the basis of what is obviously its true and natural foundation, instead of resorting to the mental gymnastics and verbal contortions which their present contention forces upon them. When I speak of the true and natural foundation of the claim being the general principles of international law, I am not of course admitting that the claim is *valid* in

international law, but merely that its basis (the possibility of its validity) lies there, and not in the Treaty of 1886.

Now I am not suggesting, of course, that our adversaries are not entitled as a matter of law to cite the Treaty in order to found compulsory arbitral jurisdiction, if they can, but I do suggest that, as a matter of justice so to speak, the extremely strained and artificial character of this argument (and I shall hope to demonstrate presently how very strained and artificial it is) and its obviously ulterior purpose—I do suggest that these considerations should influence materially the Court's approach to the present proceedings.

In the first place, I suggest that these considerations entitle the Court to scrutinize very carefully and strictly the plea that the Ambatielos claim is based on the 1886 Treaty, and that this plea should not be admitted unless the Hellenic Government establish beyond all reasonable doubt that the claim is so based, affirmatively and in substance. If the Court does not interpret the concept of being based on the Treaty strictly, there is a serious danger that the Arbitration Protocol of the Treaty, which was intended to relate to cases genuinely arising under the Treaty, will in fact be used for purposes that are really extraneous to the Treaty and that result would do violence to a principle which is fundamental to the international adjudication of disputes, a principle which has been emphatically endorsed by the Court itself in previous cases, namely, that an obligation to submit to international adjudication or arbitration can only exist by the consent of the States concerned, given generally or *ad hoc*, and that it must be clear that such consent, covering the case in question, was in fact given. This, if I may remind the Court, was the basis on which the Court declined jurisdiction in the *Anglo-Iranian Oil* case, and we submit that the Court should be no less willing to apply the same principle now, namely, the principle that there must be a true consent before an obligation to refer a claim to international adjudication or arbitration can exist.

Next, I suggest that the considerations I drew attention to a few moments ago have the further consequence that, in determining whether the United Kingdom is under an obligation to submit the claim to arbitration, the Court is entitled to take, and should take, into account the general character of the case, its history, the way in which it has been dealt with by the Hellenic Government and the conduct of Mr. Ambatielos himself in relation to it.

It cannot for instance be irrelevant to the question of whether the Court should find the United Kingdom to be under an obligation to submit the claim to arbitration, that, if this supposed obligation exists now, it must have existed also in 1926 and indeed from the start; yet its existence was not suggested by the Hellenic Government until 1939. This must reflect very gravely, I will not say, of course, on the good faith of the Hellenic Government in putting forward their present contention, but at any rate it must raise the question whether this contention is to be entertained seriously. It is, to say the least of it, suggestive that, when the Hellenic Government first took up this claim in 1925, they did not propose arbitration at all; that, when they first proposed arbitration in 1933, they only proposed arbitration directly between the United Kingdom Government and Mr. Ambatielos, and not between the two Governments; that they then made no mention of the 1886 Treaty; and that, when in 1933 or 1934 the United Kingdom

Government declined to arbitrate the case, the Hellenic Government did not so much as suggest that any treaty obligation to arbitrate existed. No mention of the 1886 Treaty was in fact made until 1939.

Mr. President, we feel justified in questioning, again I will say not the good faith, but the seriousness of the present contentions of the Hellenic Government about the relevance of the 1886 Treaty, because of the gradual and spasmodic way in which these contentions have emerged. It is not merely that the Hellenic Government never mentioned the 1886 Treaty at all until 1939, but that even then they originally only specified Article XV, paragraph 3 (the clause about free access) as being relevant. In the Greek Memorial they equally only referred to Article XV, paragraph 3, apart from an oblique and perfunctory mention of Article X. Articles I, X and XII were mentioned together almost for the first time in the Hellenic Government's Observations and Conclusions on the question of competence, and then for a different purpose, namely, to try and establish a correspondence and a continuity between the later 1926 Commercial Treaty and the earlier one of 1886.

Now what is the explanation of all this, for it is not as if these Articles only came into existence successively and at different times. On the contrary, they all existed together from the start. But the Hellenic Government not only took some fifteen years to discover the supposed relevance of the Treaty ; it took another twelve or thirteen years to discover that Articles I, X and XII as well as Article XV, paragraph 3, existed. The explanation is, I suggest, a very simple one. The real truth is that it was not until the judgment of the Court on the question of competence, and the Court's finding that it had jurisdiction to determine whether the United Kingdom ought to submit the claim to arbitration (I quote) "in so far as this claim is based on the Treaty of 1886"—it was not until then, and until the terms of the Court's finding forced the Hellenic Government to consider seriously what valid grounds they really had for saying that the claim was based on the Treaty, that they put forward fully in their written Reply the contentions they now rely on. Realizing that Article XV, paragraph 3, of the Treaty did not help them because Mr. Ambatielos obviously had full and free access to the English courts on the same terms as British subjects, they then and for the first time in this particular connection cited Articles I, X and XII as also covering the claim. Moreover, they went further, and realizing that these Articles equally had little or no direct relevance to the claim, and that its true basis, if any, lay in the field of general international law, they then tried to bring this field also into the orbit of the Treaty, by arguing that the Treaty incorporated the general rules of international law about denial of justice and State responsibility, or else incorporated other treaties.

This last factor is highly suggestive, because, if members of the Court will look again at the diplomatic correspondence of the 1930's, in particular for instance the Hellenic Government's note of January 2nd, 1936, which is Annex R 5 in the Greek Memorial, they will see, and I think they will be struck by the fact that, at that time, the Hellenic Government were arguing their case wholly and exclusively and very forcefully on the basis of the general rules of international law about the responsibility of States. No hint of the possible relevance of any treaty was given. Yet the Treaty of 1886 was not a document that lay buried and undiscovered all this time and only emerged into the light

of day in 1939. Its existence was, on the contrary, well known to the Hellenic Government. We can be certain that they would have cited it quickly enough if they had supposed it to have the least relevance. Of course they were quite right in thinking that it had no relevance, and no bearing on the substance of the claim. It was only when the possible utility of the Treaty as regards bringing about arbitration occurred to them, that the Hellenic Government shifted the whole ground of their argument and began to say that the claim had a foundation in the Treaty, subsequently followed by a further shift back to the general principles of international law by arguing that the Treaty incorporated these principles—this being evidently, as we think, because they knew that the actual terms of the Treaty had nothing to do with the claim.

What does this story of successive twists and turns, of new arguments suddenly produced after years, and almost year by year, like rabbits out of a conjuror's hat—what—to use a colloquialism—does it all add up to? Well, in our opinion, it adds up to this, that the contention that the Ambatielos claim is based on the 1886 Treaty is not a serious one, that it represents a view which has never been seriously entertained even by the Hellenic Government themselves, and that it is simply a stratagem or device employed for the ulterior purpose of trying to compel arbitration where no real obligation to submit to arbitration exists.

Mr. President, these are some of the reasons—and there are others—why my Government (usually, as I think is well known, a supporter of the principle of the international arbitration of disputes) has felt justified in refusing to submit this particular claim to arbitration voluntarily. This is also the answer we make to our distinguished adversaries if they say that they were obliged to bring in the Treaty of 1886 because there was no other way of compelling us to submit to arbitration. It shows that the whole process is clearly directed to forcing the United Kingdom to arbitrate a dispute on the basis of an alleged obligation to arbitrate which the United Kingdom was certainly never conscious of having entered into and to which it never consented as covering claims of this kind.

We shall accordingly reserve the right to make some further remarks concerning these aspects of the case at the end of our main argument.

Mr. President, I shall now begin the discussion of the fundamental questions I defined earlier. The first is: in what sense should the requirement that the Ambatielos claim must be based on the 1886 Treaty be interpreted. Now, I have already suggested that it must be interpreted strictly, and that the Hellenic Government must, in order to establish that the United Kingdom is under an obligation to submit to arbitration on this claim, prove beyond all reasonable doubt that the claim is based on the Treaty and is therefore subject to the Declaration of 1926 and to the Arbitration Protocol of the Treaty—for, after all, the consent which the United Kingdom gave under the Declaration and Protocol to certain disputes being referred to arbitration does not extend to just any dispute: it only extends to the class of disputes specified, namely, those concerning claims based on the Treaty. To interpret this as covering any claim that anyone likes to put forward as not being wholly unrelated to the Treaty *(sans pertinence)* would in our

view extend the consent given to a new and unspecified category of claims of almost unlimited scope.

Now, although I should have thought it almost went without saying that the requirement of being based on the Treaty must be interpreted in a positive sense, I am obliged to insist on it, because our distinguished adversaries, conscious, no doubt, of the artificiality of their position and of the difficulties it creates for them, and well aware that in fact the Ambatielos claim cannot in any natural sense of the term be said to be "based" on the Treaty, have argued, with their usual ingenuity, that they are not obliged to show that the claim is actually based on the 1886 Treaty, and that it is sufficient for them to show that the Treaty is not wholly *incapable* of having some relevance to the claim, or that it is not *self-evident* that the claim lacks a basis in the Treaty—or again, adopting the criterion suggested by Judge Spiropoulos in his separate Opinion in the earlier proceedings, that the Treaty is not so *clearly* unrelated to the case, that it would be a manifest abuse to argue that its arbitration clauses were applicable to the claim.

Now this interpretation, in our view, attributes to the term "based" a meaning so weak and tenuous as entirely to change the whole conception of being based, and to substitute for it a new and different idea which is not that of being based. Nevertheless, it is part of our case that, even if this perverted notion of "based" were the correct one to adopt in order to determine whether an obligation to arbitrate exists—even if, may I say, this "de-based" notion were adopted—the Hellenic Government's argument would still fail, for we contend that the 1886 Treaty is in fact so unrelated to the Ambatielos claim that to cite it in connection with that claim and, in particular, in order to argue that it creates an obligation to arbitrate the claim, is an abuse—that is to say, an abuse of language, and of the natural meaning and ordinary meaning of terms: so that, even if Me. Rolin were right in his view that all he need show is a *prima facie* connexity between the Treaty and the Ambatielos claim, it would be our contention that not even that degree of connexity exists. We shall try to establish that in due course, but our argument is (adopting Me. Rolin's language which he employed in the *Anglo-Iranian Oil* case) that the 1886 Treaty is "*sans pertinence*" as regards the Ambatielos claim—that is to say, is wholly irrelevant to it.

But, Mr. President, we go much further and contest the whole basis of the Hellenic Government's argument on this point of "based". The essence of that argument, as put forward by Me. Rolin the other day, is that it is not the function of the Court to interpret the Treaty of 1886, but merely to determine whether that Treaty has a reasonable *prima facie* degree of relevance (or apparent relevance) to the Ambatielos claim to make it appropriate for the Arbitral Commission to be set up—and that it will then be for the Commission to determine its own jurisdiction and for that purpose to interpret the 1886 Treaty. In short, Me. Rolin does not, as I understand him, contest that at *some* point the question whether the Ambatielos claim is affirmatively based on the 1886 Treaty will have to be gone into as a substantive issue. But he says it is for the Commission, not the Court, to do this, and that the Court has the purely preliminary or procedural—one might almost say "formal"—rôle, of merely verifying that the claim is not unrelated *(sans pertinence)* to the Treaty.

We reject the whole of this argument as incorrect, and even irrelevant, because it overlooks—indeed it almost deliberately ignores—what is obviously the cardinal point involved; for, whether or not it is the function of the Court to interpret the 1886 Treaty (a matter I shall come to in a moment), it certainly *is* the function of the Court to interpret the Declaration of 1926. I would go further and respectfully suggest that it is the inescapable duty of the Court to interpret and apply the Declaration of 1926. For consider what happened in the previous phase of the present proceedings. That phase turned wholly on whether the 1926 Declaration was part of the 1926 Treaty or not. If it was, then it came within the scope of Article 29 of that Treaty, which provided (I quote) that "any dispute that may arise .... as to the proper interpretation or application of any of the provisions of the present Treaty shall .... be referred to arbitration", and then it went on to provide that the Court should be the arbitral tribunal for that purpose. Well, it follows necessarily that, if the Declaration of 1926 is part of the 1926 Treaty (as the Court found that it was), any dispute concerning its interpretation or application (and there is such a dispute) is a matter for the Court to determine, and not for the Arbitral Commission contemplated by the 1886 Treaty.

Now, as regards the question whether the Court can interpret the 1886 Treaty, we consider that question to be largely irrelevant, because, even if it were admitted that the Court cannot interpret that Treaty *directly*, it can and must do so as part of its function of interpreting and *applying* the 1926 Declaration, and I lay stress on the word "apply", for what does the Declaration say? It says that any differences which may arise between the two Governments as to the validity of claims based on the 1886 Treaty shall be referred to arbitration. Since, therefore, the obligation to refer to arbitration exists solely with respect to "claims based on the 1886 Treaty", it must be the function of the Court to interpret the 1886 Treaty for the purpose of determining whether a given claim is based on it and is therefore a claim to which the 1926 Declaration applies. If the Court cannot do this, if it cannot interpret the 1886 Treaty, then it cannot interpret—still less apply—the Declaration of 1926. In the present proceedings the Court must apply the Declaration—that is, it must say whether the obligation to arbitrate exists. To do this it must interpret it and to do that it must interpret the 1886 Treaty. That, we believe, is the situation in a nutshell.

Mr. President, I have seldom come across a better example of trying to have matters both ways, as we say in England, than the argument which is now being advanced by our adversaries on this point. In the previous phase of this case we argued that the 1926 Declaration was not a part of the Treaty of 1926. Our adversaries argued strenuously that it was, and the Court agreed with them. But now that the logical consequences are manifesting themselves, our adversaries do not like them. Now in effect they are saying that, although the Court has found that the Declaration is part of the Treaty of 1926, and therefore falls under Article 29 of the Treaty of 1926, so that any disputes concerning its interpretation and application are to be determined by the Court, yet all the same now they say the Court cannot interpret the Declaration of 1926 because that would involve interpreting the 1886 Treaty. This view would stultify the whole finding of the Court in the previous phase

of this case and render it meaningless—for it would prevent the Court from properly applying the Declaration.

Our adversaries must accept the consequences of the argument which they themselves put forward, and one of those consequences we suggest is that the Court must be entitled (and is indeed in our view bound) to interpret the Treaty of 1886 for the purpose, and as part of the process, of interpreting and applying the 1926 Declaration. For this purpose we think that the Court must go into the question whether the claim is based on the 1886 Treaty, as a substantive issue.

May I, at the risk of some, but not much, repetition bring out the point I am trying to make by referring to certain observations made in the previous phase by Judge Spiropoulos. He drew attention to the distinction which we agree normally exists between the *obligation* to set up an arbitral tribunal, to constitute it, and the question of its jurisdiction to hear and decide the case concerned, which, as Judge Spiropoulos pointed out, is usually a matter for the arbitral tribunal itself to determine. He therefore suggested that, if the Court were to enter on the question whether the Ambatielos claim was based on the Treaty of 1886, it would in effect be assuming a function which should properly belong to the Arbitration Commission, since this question was really a question of the jurisdiction of the Commission.

Now we are far from suggesting that it is for the Court here to decide *every* question appertaining to the jurisdiction of any eventual arbitral tribunal. We do not suggest it. What we do say, and I ask the Court to take particular note of this, what we do say, is that the Court must decide all such questions itself *in so far as they involve, or are necessary for, interpreting and applying the 1926 Declaration;* for the interpretation and application of that Declaration is, according to the Court's own decision, a matter for the Court as part of the interpretation and application of the 1926 Treaty. Having so decided, it follows inescapably, we think, that, if one of the Parties contends that the Ambatielos claim has nothing to do with the 1886 Treaty and is not based on it, this is a matter affecting the interpretation and application of the 1926 Declaration which the Court must determine, and that for this purpose at any rate, the Court is, in this case, substituted for the Commission, to decide a matter that might otherwise ordinarily be for the Commission.

Now, in point of fact, the United Kingdom had put forward, in the seventh and last of its arguments in the previous proceedings, precisely the contention that the Ambatielos claim was not based on the Treaty of 1886 and that, in consequence, no obligation to refer it to arbitration existed under the Declaration of 1926. This argument, which is quoted verbatim on page 45 of the Court's judgment, was that the Ambatielos claim was founded on the general principles of international law with regard to the treatment of foreigners in courts of justice, and that as the 1886 Treaty contained no provision incorporating those principles, a breach of them (if there was one) was not a breach of the Treaty of 1886, and the claim was not therefore based on the Treaty. That was the seventh of the arguments which we put forward in the previous phase of the proceedings. Now the Court found expressly, and I think Members of the Court will find the reference on the same page 45, at the bottom, the Court found expressly that the point there raised by us in our seventh argument had not yet been argued fully by the Parties;

and could not therefore be decided at that stage. Hence, the present proceedings, which would obviously be rendered meaningless if the Court could not go into this question as a substantive issue.

To us the matter admits of no doubt whatever, and I would ask the Court to note this important point: that, if Judge Spiropoulos was right in suggesting that it was not the function of the Court to go into the question whether the Ambatielos claim was based on the Treaty of 1886, then it must have followed that the Court was wrong in holding that the 1926 Declaration was part of the 1926 Treaty (though in fact Judge Spiropoulos agreed with what the Court said about that); for, if the 1926 Declaration was in fact a part of the 1926 Treaty, as the Court found, then it followed automatically that any question of its interpretation or application was for the Court to determine under Article 29 of the 1926 Treaty. Therefore, as soon as one of the Parties disputed the obligation to submit the claim to arbitration on the ground that it was not based on the Treaty of 1886, as the 1926 Declaration required, that immediately gave rise to an issue relating to the interpretation and application of the 1926 Declaration; and it became a matter for the Court to determine. As it is obvious that the Court cannot do this unless it can interpret the 1886 Treaty as well, it must be entitled to do so for that purpose.

[Public sitting of March 25th, 1953, afternoon]

Mr. President, Members of the Court, it will only take me a few minutes to complete what I was saying this morning, after which I will pass on to the next stage of my argument.

We were considering the function of the Court in relation to the 1886 Treaty. What our adversaries are really suggesting, I think, is that the task of the Court in the present phase is a purely formal one, that it does not go beyond the more or less administrative function of verifying that the conditions necessary for setting up the Arbitral Commission are not manifestly absent. Our adversaries are, in fact, seeking to assimilate the function of the Court in the present case to that of a President of the Court when it is his rôle to nominate an arbitrator to decide a dispute. In such a case, they say, the President must no doubt assure himself that there exists a dispute *prima facie* of the kind contemplated by the parties but, subject to that, his function of nominating the arbitrator is virtually automatic. In our view this notion wholly misconceives the functions of the Court in the present proceedings and would, so to speak, degrade that function from what essentially is, or should be, a judicial rôle to a purely administrative rôle.

But now what are we to understand by the idea of "based", taken simply as a word? According to the view put forward by our adversaries—what I will call the administrative view of the Court's function in the present proceedings—the Court would not be determining at all whether the Ambatielos claim was, in fact, based on the 1886 Treaty as the 1926 Declaration requires; it would be determining the wholly different question whether there existed some kind of possible connexity between the claim and the Treaty. The two things are quite different and our adversaries are not only attributing to the idea of "based" a meaning which emasculates it, but one which altogether

changes it from a positive to a negative conception. The difference between the two ideas involved is well illustrated by the very example that Me. Rolin himself gave, namely, the *Anglo-Iranian Oil* case. He accused us—or charged us—with having argued that case on the basis that it sufficed if certain treaties were related to or had a connection with the matter in dispute between the United Kingdom and Iran. This is quite true. We did ; but why ? For the very simple and adequate reason that the Iranian Declaration, attached to its signature of the Optional Clause, on which the whole issue depended, spoke (I quote) of : "situations ou .... faits *ayant* .... *trait* à l'application des traités ou conventions acceptés par la Perse....". "Ayant trait" means "having reference to". In the present case the relevant term used in the 1926 Declaration is not "*ayant trait*", but "*fondées sur*" (based on), a very different—a totally different—conception.

The Hellenic Government therefore are not only asking the Court to carry out a purely formal and not a judicial rôle, but also to read the 1926 Declaration as if it said "claims relating to the Treaty of 1886", instead of "claims based on" that Treaty. We maintain that the notion of "based on" is substantially different from the notion of "related to". It is a positive and affirmative notion. A claim is, in our view, only based on a treaty if it is grounded in it, and not if the position merely is that the claim is not manifestly *not* based on the Treaty *(sans pertinence)*.

Now Me. Rolin admitted, as I understood him, that the burden of proof in this matter does lie with the Hellenic Government. But in purporting to admit that—that it was for the Hellenic Government to discharge the burden of proof involved in showing that this claim is based on the 1886 Treaty—although they admit that, our adversaries have, in fact, sought to evade that burden of proof—that is to say, they have sought to evade it in the present proceedings—either by contending that the question is really one for the Arbitral Commission to determine, or else by giving a special interpretation to the phrase based on the 1886 Treaty, so as to bring it about, as Me. Rolin said yesterday, that this burden is a "very light" one. In our view that burden of proof cannot be discharged merely by showing a negative, namely, that this claim is not manifestly *un*related to the Treaty of 1886. It requires the demonstration of a positive, namely, that the claim has its concrete basis, or at any rate, a definite basis, in the Treaty. The Hellenic Government, if I correctly understood Me. Rolin, do not say that the term "based on" is to be understood in a *purely* formal sense, as involving, not the substantive *fact* of being based on, but the merely procedural act of putting forward a claim on a certain basis, whether it really has that basis or not. They do not adopt that extreme and, so we would think, quite untenable position. But, we suggest, if they do not, then it must follow inescapably that the conception of a claim being based on a certain treaty involves that it has a definite and substantive foundation in that treaty. We say that it must and does involve this, and that, in order to decide whether that foundation exists, it is necessary—indeed, indispensable—to go into the treaty and to interpret it.

May I just summarize my argument on this point before passing on. In our view, the task of the Court in the present proceedings is a substantive and judicial task. It is a task not merely of interpretation

but of application. It constitutes for the Court and for the purposes of the present proceedings an issue of merits or substance, so far as the Court is concerned in the course of the present proceedings. These proceedings are not preliminary proceedings about jurisdiction. The Court has decided that it has jurisdiction to hear and determine a certain issue. Now it must hear and determine that issue, and the issue in question is whether a certain claim is based on a certain treaty: it is not whether the claim is not obviously unrelated to the treaty—which in our view is quite a different matter—and here equally lies the distinction between the present proceedings and those concerning the interim measures in the *Anglo-Iranian* case which Me. Rolin cited. That was a purely preliminary issue involving urgent measures of a conservatory character without which the whole of the future proceedings in the case might have been rendered useless and abortive. In such a case, it was entirely proper for the Court to decree interim measures on the basis that, although it had not yet decided finally that it had jurisdiction, it was not clear that it had not got jurisdiction—because, failing an order for interim measures, any subsequent finding of the Court that it *had* jurisdiction might itself have been stultified and rendered, in practice, inoperative. Now none of this applies to the present case. Not only are the circumstances wholly different, but the issue involved in these proceedings is not for this Court a preliminary issue. It is, for this Court, a substantive issue of interpretation: is or is not the claim based on the Treaty of 1886? If "based on" means something more, as we think, than it merely being said by our adversaries that the claim is based on the Treaty, then the Court must enquire: *is* it so based? (and must for that purpose interpret the Treaty). But, to come back to the point from which I started, in doing this, it is really the Declaration of 1926 which the Court will be interpreting and applying, and it has already found that it is its right and duty to do that, because the Declaration is part of the Treaty of 1926 and in interpreting—as I think the Court must do—the Treaty of 1886, the Court will be doing that for the purpose of carrying out its function of interpreting and applying the 1926 Declaration. Mr. President, in putting forward this we are not of course suggesting that the Court must decide whether the claim is valid or not, that is to say, *well* founded in the Treaty, for that would be a matter of the ultimate merits, and here I must reject Me. Rolin's charge that we were asking the Court to consider not only whether the claim was "fondée sur le traité" but "bien fondée sur le traité". We do not suggest that the Court must consider whether the claim is "bien fondée", but what we say is that it must at least consider whether the claim is "fondée", and that, if for that purpose it merely adopted Me. Rolin's criterion of not being wholly unrelated *(sans pertinence)*, the Court would not only not be determining whether the claim had a true and substantive foundation in the Treaty, but would also indirectly be giving a very wide and dangerous extension to the whole notion of what constitutes consent to the reference of disputes to arbitration.

Mr. President, I now pass on to the next stage of my argument, namely, whether the subject-matter of the Ambatielos claim is of the same class or order as that covered by some provision of the Treaty of 1886. Now I think it is obvious that if one contends, as our adversaries do contend, that a country is obliged to submit a given dispute to

arbitration under the provisions of a particular treaty, one is thereby saying that the treaty relates to the subject-matter of the dispute—that is to say that the treaty at least deals with matters of the same class or order as those which constitute the subject-matter of the dispute. That is a proposition from which I would have thought no one would dissent.

Now if that is so, the question posed here is clearly one of *classification*, and I need hardly remind the Court how important questions of classification are in the theory and practice of international claims, especially when it is a question of determining what the basis or foundation of the claim is—for, unless the claim is correctly classified, unless it is assigned to the right category, it will be impossible to determine correctly what its basis is, or whether its basis is a valid one.

Now we contend that the suggestion that the Ambatielos claim is based on the Treaty of 1886 involves a serious error of classification—in fact a double error, because it involves not only assigning the claim—or the subject-matter of the claim—to a class or category to which it does not belong, but it also involves interpreting the Treaty as covering or relating to a class or category of subject which is outside its scope according to the natural and ordinary meaning of language.

I have suggested—and we argued in our written Rejoinder—that the class or category to which the Ambatielos claim properly belongs is that of a claim based on the general principles of international law relative to the treatment of foreigners in the matter of the administration of justice. But in view of some of the arguments advanced by our adversaries, and in particular by Me. Rolin in his extremely able speech yesterday, I would like to analyze the position just a little further.

In its origin, the Ambatielos claim consisted of a complaint of an alleged breach of a contract made between Mr. Ambatielos and the United Kingdom Ministry of Shipping. Now, it is surely clear that this supposed breach of contract, even if it had occurred, could not have given rise in itself to an international claim, because the government of a country cannot be in a more onerous position in respect of an ordinary contract of sale than a private party would be, and here I must emphatically contest the proposition put forward by Me. Rolin yesterday that a government as party to what I may term a private law contract is under some *special* obligation of good faith. All parties to a contract are under an obligation to act in good faith. But there is no principle of law that I know of which imposes any *special* obligation or responsibility on a government, and in its capacity as trader or contractor it cannot be in a worse or more onerous position than its own citizens. Now, if Mr. Ambatielos, instead of buying his ships from a department of the United Kingdom Government, had bought them from a private United Kingdom shipowner or shipbuilder, and if this private party had failed to deliver the ships, or otherwise broken the contract, that clearly would not have given rise in itself to any international claim on the intergovernmental level, nor would it have entitled the Hellenic Government to intervene. Mr. Ambatielos, in accordance with well-known principles of international law, would have had his remedy in the United Kingdom courts, and only if he had exhausted his remedies there, and had suffered a clear denial of justice, as that term is understood in international law, would the international responsibility of the

United Kingdom as a State have been involved, or the Hellenic Government have been entitled to prefer a claim on behalf of Mr. Ambatielos.

Now the fact that the other party to Mr. Ambatielos's contract was the United Kingdom Ministry of Shipping makes no fundamental difference whatever to that basic position. Even if (which of course we do not admit) there was a breach of this contract, that could not of itself give rise to an international claim, but only, in the first place, to a right of action on the part of Mr. Ambatielos in the English courts. If, of course, English law had not afforded Mr. Ambatielos the possibility of any remedy in the courts against the Ministry of Shipping, then a direct right of intervention on the part of the Hellenic Government would have existed. But that was not the case. The ordinary remedies afforded by English law were available in full to Mr. Ambatielos, and in regard to his complaint, for instance, that certain material evidence was not produced, he knew that this evidence existed, and all the normal procedural methods of compelling its production, which under our law are very complete and rigorous, all these existed and were available to him. Therefore the position was essentially as if his contract had been with a private party, namely, that only if he exhausted his legal remedies, including, may I say, his procedural remedies, and suffered a denial of justice under the applicable principles of international law, could there be any question of an international claim on his behalf by his Government.

Now we of course deny that Mr. Ambatielos did suffer a denial of justice, or that he even exhausted his legal remedies. Still more do we deny that he exhausted his procedural remedies. I am not going into that question because that is a question of the merits, but I merely mention, in view of the fact that my friend, Me. Rolin yesterday did go at some considerable length into what really were merits, I simply mention the fact that in our view Mr. Ambatielos was very far from exhausting his procedural remedies and facilities accorded to him by English law. But that is beside the point in these immediate proceedings. Now I have given this description of the position simply in order to demonstrate that Mr. Ambatielos's claim is essentially a claim of denial of justice, founded and based on the ordinary principles of international law respecting the treatment of foreigners and the responsibility of States in regard to those matters; that that is its correct category is a matter of classification; and that neither the Treaty of 1886 nor any other treaty has anything to do with it as regards its actual substance. As regards its essential foundation and substance, the 1886 Treaty simply does not enter into Mr. Ambatielos's claim at all. This is easily seen by posing the question: would an international claim, simply as a claim, exist on behalf of Mr. Ambatielos, if the Treaty of 1886 had never been entered into? The answer of course is "Yes". If Mr. Ambatielos's claim is valid at all, it would be just as valid if the 1886 Treaty had never existed, because it is based on the general principles of international law. This can also be seen by asking whether Mr. Ambatielos, on the facts he alleges, would have had a basis of claim in 1870, or in 1880, before ever the Treaty was entered into. What magical change occurred in 1886 to give him a basis of claim he never previously had? The answer is really, "None". He had no other or better claim on the conclusion of the Treaty of 1886 than he would have had before. He would have had

just as good a *basis* of claim in 1870 or 1880 as now, because that basis is international law.

It follows, then, that, so far as the essence of Mr. Ambatielos's claim goes, so far as his substantive rights are concerned, and those of his Government on his behalf, Mr. Ambatielos has absolutely no need of the 1886 Treaty and never did have any need of it. That Treaty comes into the matter solely on the question of Mr. Ambatielos's *remedy*. It comes in solely on the question of compulsory arbitration. But the obligation to submit to arbitration itself only arises if the claim is based on the Treaty, and it is obvious that the essential basis of the claim is not the Treaty but the general principles of international law, because, as we have seen, the claim (so far as valid at all) would still exist even if there were no Treaty.

If, on the other hand, we enquire whether the claim would still exist if the Treaty existed, but if there were no general rules of international law about denial of justice or the treatment of foreigners or State responsibility—if we can imagine that position—we shall see at once that Mr. Ambatielos's claim would pretty well disappear, for we should search in vain in the Treaty for any provision which, according to its direct language and the natural and ordinary meaning of its terms in the context of a treaty of commerce and navigation, would have any real relation to Mr. Ambatielos's claim. It is only against the background of the general principles of international law, and indeed by importing those principles into the Treaty, that the latter could be made even to seem to have any connection with the claim.

Now I shall discuss later whether the Treaty does incorporate the general principles of international law on which Mr. Ambatielos's claim is based. My present object has simply been to demonstrate—and I hope I may have convinced the Court—that, as a matter of fundamental classification, Mr. Ambatielos's claim does not belong to the category of treaty claims at all, but to the category of general international law claims.

It is with these considerations in mind, and on the basis of this classification of the Ambatielos claim, that I suggest we should approach the second of the fundamental questions I defined earlier, namely, whether the 1886 Treaty relates to the same class or order of matter as the claim, and whether there is any real connection between the Treaty and the claim, such as would make it possible to say that the claim might be based on the Treaty.

This connection must, as I said earlier, be real and substantive, not artificial—that is to say, not purely formal or verbal: and I have suggested that the connection which our adversaries put forward on the basis of their argument is, in fact, a purely verbal one and that it involves an error of classification.

Now the cardinal fallacy in our adversaries' argument, and the way in which they seek to establish what is really a purely verbal and artificial connection between the Treaty and the claim, is this. They say, in effect, that the litigation between Mr. Ambatielos and the United Kingdom Ministry was a commercial matter because it was *about* a commercial matter—because it concerned a commercial contract. Therefore the litigation was a matter of commerce and, if it was a matter of commerce, then the provisions of the 1886 Treaty, which was a treaty of commerce, are relevant to it. That is their argument, as

we understand it, or something very near it. We say that this kind of connection is a purely verbal one, a sort of conjuring trick, a construct devoid of all real substance, that should not be permitted to lead to the result that an arbitration clause is brought into play and compulsory jurisdiction is founded where none really exists.

We say that a litigation, and a claim in respect of what occurred during or in consequence of a litigation, is never a matter of commerce, but is a matter of the administration of justice. A litigation may be about a commercial matter but is not itself a commercial matter. The fallacy involved in the contention of our adversaries can easily be seen by taking an illustration. Suppose, for instance, that a diplomatic courier travelling on an official journey was arrested and his diplomatic baggage was searched. No one would doubt that that would be a breach of the ordinary rules of general international law regarding diplomatic privileges and immunities. At any rate, no one would doubt that, if there was a claim in respect of that matter, that claim would be based on the general principles of international law concerning diplomatic privileges and immunities. It would obviously be immaterial what the mode of travel was and the fact that the courier was, for instance, travelling by air would not in itself be any ground for saying that the provisions of a civil aviation convention providing for air traffic rights was relevant to his claim. Two essentially different orders of subject would be involved and the connection between the two would be purely artificial and accidental—namely, that the courier happened to be travelling by air on the occasion when he was arrested in a manner contrary to the ordinary rules of international law. Well, now, we suggest that the process involved in the argument of our adversaries in the present case is almost precisely similar to this, and we contend that there is no more real or substantive connection between the provisions of an ordinary commercial treaty and the general principles of international law concerning the administration of justice and the treatment of foreigners than there is between an ordinary civil aviation convention or any other convention about passage or transit and the general principles of international law relative to the right of a diplomatic courier to travel unhindered and unmolested. To use the arbitration clauses of such treaties or conventions to found compulsory jurisdiction in disputes that really turn on the general principles of international law which are involved, is an abuse of the real purpose of those clauses and of the intentions of the parties in entering into them.

Now the illustration I have given not only brings into relief the process that is being employed by our adversaries in the present case, it also shows how easy it is, if you do not look below the surface, if you read terms only according to their literal and superficial meaning, to produce the appearance of *some* kind of a surface connection between the language of a treaty or convention and almost anything. The Court will see at once that the connections which it is sought to establish by this kind of process are purely verbal or apparent, not substantive. In order to show that I am not exaggerating, may I refer to one of our adversaries' arguments, which demonstrates the process very vividly, together with the fallacy involved.

The argument in question will be found on page 306 of the oral arguments in the previous proceedings and also in paragraph 12 of the Hellenic Government's written "*Mémoire en réplique*". By Article X

of the 1886 Treaty, the Contracting Parties granted each other most-favoured-nation treatment "in all matters of commerce and navigation". On that basis, in the passages I have mentioned, our adversaries have argued that the 1886 Treaty must include (I quote) : "all difficulties arising out of commercial transactions, such as litigation resulting from commercial contracts". And from this they argue that the Treaty gives most-favoured-nation treatment in all matters relating to commercial litigation. This deduction is, we submit, quite illegitimate. The fallacy involved is of precisely the same order as that of the courier and the transit by air. The courier was entitled to certain rights on the basis of the law relating to diplomatic privileges and immunities. His particular mode of travel was irrelevant. In the same way, private persons, including foreigners, are entitled to certain rights in the matter of the conduct of litigation, in the matter of the administration of justice, in the matter of their treatment before the courts. It makes no difference what the *subject-matter* of the litigation is, whether it is a commercial contract, a divorce case or anything else. Mr. Ambatielos would, according to general international law principles, have been entitled to certain treatment in regard to any litigation he was engaged in in the English courts, whether it concerned a commercial contract, the ownership of land, an action for negligence, divorce proceedings, or a criminal matter. But this right did not spring from the Treaty of 1886 ; even as regards commercial matters it did not spring from that Treaty, but from the general principles of international law. To argue that, because the Treaty conferred certain rights in matters of commerce, the rights which an individual may enjoy in regard to *litigation* about commerce spring from the Treaty, is a complete *non sequitur*. Rights relative to litigation, rights relative to the administration of justice, are rights relative to a certain *process*, that is to say, litigation, or the administration of justice. They are not rights relative to the subject-matter of the litigation. They would exist whatever the subject-matter was. A right relative to a certain subject-matter, for instance commerce, conferred by a particular treaty, might be given effect to by virtue of the treaty, but the *process* by which such a commercial right would be given effect to would be essentially non commercial, would be a matter appertaining to litigation as such, to litigation or the administration of justice generally, as a self-contained category. This process would not of itself be a matter of commerce and would neither have anything directly to do with the treaty, nor spring from it.

I would call attention to another fact. If the contention of the Hellenic Government about the effect of the 1886 Treaty were correct, it would lead to the curious and, I suggest, surely absurd result that Greek citizens in the English courts and British subjets before the Greek courts, would be in a better position when the subject-matter of the litigation was commercial than when it was not. But that is surely ridiculous and incorrect, for the principles that apply to the processes of justice as regards foreigners are exactly the same whatever the subject-matter of the litigation may be, and they spring from general international law. This is a very material point because yesterday Me. Rolin seemed to admit that the notion of commerce does not cover the administration of justice, if I understood him correctly ; at any rate at one point he seemed to admit that. But he said that the existence of commercial rights must include the protection of those rights by the

courts. Now, the right to protection on the part of the courts is quite a general right, arising from international law. It is in no way confined to the protection of commercial rights and has no specifically commercial basis, even if the transaction involved is commercial. Our adversaries, if I may say so, constantly confuse the existence of certain rights with the existence and the basis of those rights. We do not deny that Mr. Ambatielos had certain rights (though we say he was accorded those rights). What we contend is that the rights he is talking about do not spring from the 1886 Treaty, but from general international law. We fully admit that in the English courts Mr. Ambatielos had certain rights. Mr. Ambatielos, we know, is complaining that he did not get those rights. We do not admit his complaint but we know it exists. But we say that, when it comes to the question, not of the existence of the rights but of the basis of the rights, that when we look into what it is Mr. Ambatielos is really complaining about, then we find that the basis of his complaints is really general international law and not the Treaty of 1886.

I might perhaps also add here that, even if a litigation about a commercial transaction were itself a matter relating to commerce within the meaning of the 1886 Treaty, the only *specific* right the Treaty would confer in respect of it would be the right of access to the courts, which general international law gives in any case, which Mr. Ambatielos had, and which, as we shall show later, implies no more than actual access and gives no wider or more extensive rights.

Now I want to pass on to considering the actual provisions of the 1886 Treaty on which our adversaries rely, not in detail, but in relation to the question I am at present discussing, namely, whether the matters they deal with are of the same class or order as the subject-matter of the Ambatielos claim. I will preface my remarks by pointing out that, where you have a subject which is clearly governed by general principles of international law (and on any view that is true of the Ambatielos claim), when you have such a subject, any claim that it is also covered by the terms of a bilateral treaty is *prima facie* suspect, because bilateral treaties (and in particular commercial treaties) do not ordinarily cover or relate to matters already covered by general principles of international law. The object of such treaties is indeed precisely to cover matters *not* already covered by ordinary international law, because, where a matter is covered already by ordinary international law, it is not normally necessary to make it the subject of special treaty rights and obligations. If, therefore, a matter which is covered by general international law rights and obligations, such as treatment in the courts or in regard to the administration of justice, is said to be dealt with in a given commercial treaty, it must be shown that there is a provision which actually does this, either by express and direct language or by a clear process of incorporation or reference. Moreover, even then, the effect is obviously declaratory of the right concerned rather than constitutive of it, because the right has already been stated, it already exists under general international law, and the effect of its incorporation in the treaty is more of a declaratory character than anything else.

In short, whenever you have a matter which is already governed by well-known rules and principles of general international law—such as the Ambatielos claim—the natural presumption is that the parties did not intend to include it in a bilateral treaty dealing primarily with

matters not covered by general international law rules. Only express language could suffice to displace this presumption. Generalities are not enough, nor are forced and artificial constructions. This is easily seen by applying the following simple test. Would any jurist, would any responsible jurist advising his government have been satisfied with the type of generalities and with relying on the type of artificial and strange constructions that our adversaries have advanced in the present case if they had wanted to be certain of covering in a treaty such matters as the administration of justice and the treatment of foreigners before the courts ? Would any responsible jurist drawing up a treaty in which he wished to include, or in respect of which he wanted it to be certain that it covered such matters as the treatment of foreigners before the courts, would he have done it in the terms of an ordinary treaty of commerce and navigation ? Surely the answer is "no", he would not, and that I think establishes a very strong presumption against any interpretation of such a treaty of commerce and navigation as might bring about that result.

Mr. President, I come to the actual terms of these four Articles on which our adversaries have based their contention. I do not propose to submit them to any detailed analysis. A very full and careful study of those provisions was carried out in the United Kingdom Rejoinder (I would refer in particular to paragraphs 26-32, and, again, to paragraphs 41-50) and in addition to that my friend and colleague Mr. Fawcett will have something to say about the details of those provisions when we deal with our fourth basic question, but for my present purposes it will suffice if I simply read rapidly through the four main Articles, and ask the Court to consider whether it can really be said that, according to the normal use of language, the actual terms of these Articles have anything to do with the real essence of the Ambatielos claim. And after that I shall come to my third main question, time permitting this evening, namely, whether, if the Treaty does not have any direct connection with the Ambatielos claim, as we maintain that it does not, it can nevertheless be said to have an indirect connection by process of reference or incorporation either of general rules of international law or of the provisions of other treaties.

Now the first article relied on by our adversaries is Article I, and that reads :

> "There shall be between the dominions and possessions of the two High Contracting Parties reciprocal freedom of commerce and navigation. The subjects of each of the two parties shall have liberty freely to come, with their ships and cargoes, to all places, ports, and rivers in the dominions and possessions of the other to which native subjects generally are or may be permitted to come, and shall enjoy respectively the same rights, privileges, liberties, favours, immunities, and exemptions in matters of commerce and navigation which are or may be enjoyed by native subjects, without having to pay any tax or impost greater than those paid by the same, and they shall be subject to the laws and regulations in force."

The final words are significant. But it is in any case obvious that this Article is simply an ordinary provision for the freedom of commerce and navigation between two countries, in particular, as we pointed

out in our Rejoinder, regarding the movement of ships and goods between the two countries. It really envisages *trade*, and it certainly has nothing to do with questions of litigation or general rights relating to the administration of justice or the treatment of foreigners before the courts. All that this Article really gives, we suggest, is a right to commercial *activity*, to engage in certain kinds of activities. It is not a guarantee either of success in those activities or of immunity from the incidents of engaging in them. I shall have more to say about that presently.

Now the next article is Article X, which reads as follows:

> "The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour, or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation."

This is the ordinary common form most-favoured-nation clause found in nearly every commercial treaty, giving most-favoured-nation rights in matters not of the administration of justice or of the treatment of foreigners, but in matters of commerce and navigation. In itself, therefore, it obviously has nothing to do with the Ambatielos claim. I shall deal presently with the question whether this Article could be said to cover the Ambatielos claim by a process of reference or incorporation of the general rules of international law or of the provisions of other treaties.

Then next we have Article XII, which reads as follows:

> "The subjects of each of the Contracting Parties who shall conform themselves to the laws of the country:
>
> 1. Shall have full liberty, with their families, to enter, travel, or reside in any part of the dominions and possessions of the other Contracting Party.
>
> 2. They shall be permitted to hire or possess the houses, manufactories, warehouses, shops, and premises which may be necessary for them.
>
> 3. They may carry on their commerce either in person or by any agents whom they may think fit to employ.
>
> 4. They shall not be subject in respect of their persons or property, or in respect of passports, nor in respect of their commerce or industry, to any taxes, whether general or local, or to imposts or obligations of any kind whatever other or greater than those which are or may be imposed upon native subjects."

Now here again, in our view, it is quite impossible to see any reasonable or normal connection between the subject-matter of the Ambatielos claim, namely, treatment before the courts, and such matters as entry, travel, residence, permission to hire or possess houses, shops, premises, to carry on business and to employ agents, or the provision that nationals of the other country are not to be subject to greater taxes, imposts or obligations than are native subjects in respect of passports, commerce or industry. Now Me. Rolin's construction, may I say this, perhaps,

first, Me. Rolin's argument on this Article XII, turned almost entirely on the interpretation which he gave to the word "obligations", and his construction of that term seemed to us to be utterly fantastic. What obligations other or greater than those imposed on native subjects were in fact imposed on Mr. Ambatielos ? None whatever. Both here and in connection with the terms "conditions" and "restrictions" in Article XV, paragraph 3, to which I am coming, Me. Rolin put forward the extraordinary idea—at least it seems to us extraordinary—that it constituted an obligation, condition or restriction on Mr. Ambatielos if, in presenting his case, he failed to receive from the other party to the litigation the co-operation he was entitled to expect. Well now, leaving aside the question how far one litigant is under any duty to assist his opponent in establishing his case (which is what Mr. Ambatielos and Me. Rolin seem to be contending), it remains the fact that by no conceivable stretch of the imagination could such a failure to co-operate—if there were any obligation to do so—by no conceivable stretch of the imagination could it constitute an obligation, condition or restriction imposed on Mr. Ambatielos within the meaning of these provisions—let alone one not equally imposed on native subjects. Indeed, the very mention of "imposed on native subjects" shows that what these provisions contemplate is obligations, conditions or restrictions of a general character, rules and regulations in fact, which, if they exist, must then, under the Article, be imposed on native subjects and not merely on foreigners. But in Mr. Ambatielos's case no obligations, conditions or restrictions existed or were applicable to him that were not equally applicable to British subjects.

In addition to all this, Me. Rolin, if I may say so, totally misinterpreted the very notion of an obligation as that term is used in Article XII. An obligation imposed on Mr. Ambatielos under that Article would be something he himself was obliged to do, not something done to him. Something done to him might be an injury inflicted on him. Possibly. But it could not possibly constitute an obligation imposed on him under Article XII of the 1886 Treaty. That argument of our adversaries is typical of the travesty of language and of legal concepts which they have employed in this case.

The final provision relied on by our adversaries is the third paragraph of Article XV, which reads as follows :

> "The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the courts of justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys, or agents, from among the persons admitted to the exercise of those professions according to the laws of the country."

In our view this provision is equally not applicable to the Ambatielos claim, because it only deals with the question of access to the courts, and no question of Mr. Ambatielos's liberty of access—in the proper sense of the term, of his freedom of access—to the English courts has ever arisen. Moreover, the question of access to the courts is a separate question from that of treatment in the actual course of a litigation ; and a right to access confers no other specific rights than simple access.

The tendency of all tribunals called upon to interpret provisions about access to the courts has been to do so restrictively. Later, my colleague Mr. Fawcett will cite a number of cases demonstrating that in a very striking way. These cases will show that the free access clause means no more than it says and that it cannot properly be interpreted as conferring wider, more general or more extensive rights, or indeed any special rights, in regard to the treatment of the person concerned before the courts, once he is given access to them. Furthermore, reverting to the text of Article XV of the Treaty of 1886, I would point out that its third paragraph, about free access, must be considered in conjunction with the first two paragraphs of the Article. Now these read as follows:

> "The dwellings, manufactories, warehouses, and shops of the subjects of each of the Contracting Parties in the dominions and possessions of the other, and all premises appertaining thereto destined for purposes of residence or commerce, shall be respected.
>
> It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and premises, or to examine or inspect books, papers, or accounts, except under the conditions and with the forms prescribed by the laws for subjects of the country."

Now we suggest that if all these three paragraphs—not only the third paragraph of Article XV, but the other two as well—if they are all read together, it will be seen that the Article taken as a whole has one simple purpose, namely, to ensure that the nationals of each country in the territory of the other are free to exercise their legal rights. For this purpose, their dwellings, factories, warehouses, shops and other premises are to be respected; they are not to be subjected to domiciliary visits or an examination of their books or papers, except in cases equally applicable to native subjects, and they are to be allowed access to the courts on the same basis as native subjects and to employ Counsel and Agents. I suggest to the Court that, when those three paragraphs are taken together, it will be plainly evident what the very restrictive purpose of that Article XV is. Mr. Ambatielos's claim relates to what occurred when he did have access to the courts, which we maintain to be a distinct matter, and in any case there has never been any question but that he did have such access to the full extent in all respects as a British subject would have had. Clearly, therefore, this provision affords no foundation for his claim.

Me. Rolin, of course, pointed to the fact that under Article XV (3) the free access given must not be subject to conditions or restrictions; that is to say, conditions or restrictions not equally imposed on native subjects, and he then proceeded to put forward what I call the fantastic argument about the meaning of these terms "conditions" and "restrictions" which I have already dealt with and, I hope, shown to be inadmissible and incorrect.

Me. Rolin said something else. He said it was ridiculous to argue that because Mr. Ambatielos had access to the courts, he had nothing more to complain of. Now even if this is true, and, of course, we deny it, I am sure the Court will see the fallacy involved in that proposition. It is quite beside the point, even if it were true. As I have said before—it can hardly be sufficiently said in view of the character of the arguments with which we are faced—as I have said before, we are not in these

proceedings discussing whether Mr. Ambatielos had anything to complain of after he had access to the courts or in any other way, but whether his complaint is based on the Treaty of 1886. He cannot complain of non-access because he had access. If he complains of his subsequent treatment after access, that, we say, is not a matter of the Treaty but of general international law, and such a complaint cannot be based on the Treaty.

This is perhaps, in conclusion of this part of the subject and before, possibly at the next session, I go on to the third question, this is perhaps the appropriate moment at which to draw the attention of the Court to a point I mentioned in passing some time ago and which we regard as of great importance, and that is, the constant tendency of our adversaries to confuse and to treat as identical what are in fact two quite separate things, namely, the existence of certain rights under a treaty and the consequences of exercising those rights. In the present case, the Treaty of 1886 gives certain rights of entry, travel, residence, engaging in business, and other commercial activities. Now, if anyone is denied these rights, if he is refused permission to reside or to engage in business, there is a direct breach of the Treaty which will at once give rise to a claim on the inter-governmental level. But if, on the other hand, the position is that precisely in consequence of having been allowed to exercise his rights, as the Treaty requires, and to engage in business, the individual concerned has entered into a commercial contract, whether it be a contract with another private person or with the Government of the country, the Treaty does not in any way guarantee that that contract will necessarily be fulfilled ; nor is a breach of the contract in those circumstances a breach of the Treaty, even if that breach were committed by the government of the country as the other party to the contract. In such a case the individual would have exercised his rights under the Treaty, inasmuch as he would have been free to enter into a commercial transaction and would actually have done so. Anything further, any complaint of a breach of the contract which he has entered into in the exercise of his treaty rights, whoever the other party to it was, would be a matter governed no longer by the Treaty but by the ordinary law of the land. The Treaty would, so to speak, be *functus officio* and the complaint of breach of contract would be a matter for the remedies afforded in the ordinary courts of law; and any complaint as to what takes place in the course of pursuing remedies in the ordinary courts of law would be a matter of the general principles of international law and no longer of rights under the Treaty. And that is perhaps the cardinal reason why we say that the claim of Mr. Ambatielos in this case is not based on the Treaty of 1886 or any other treaty.

[Public sitting of March 26th, 1953, afternoon]

Mr. President, Members of the Court.

May I make two preliminary observations. On reading the transcript of my speech of yesterday, I see in one passage something which might be capable of being misunderstood, and I would just like to explain the position to the Court. The passage in question read as follows :

"Now we, of course, deny that Mr. Ambatielos did suffer a denial of justice or that he even exhausted his legal remedies, still more do

> we deny that he exhausted his procedural remedies. I am not going into that question because it is a question of merits, but I merely mention it in view of the fact that my friend, Me. Rolin, yesterday did go at some considerable length into what were merits. I simply mention the fact that, in our view, Mr. Ambatielos was very far from exhausting his procedural remedies and facilities accorded to him by English law, but that is beside the point in these immediate proceedings."

Well, now, in saying that, I did not, of course, mean to imply that the question whether or not Mr. Ambatielos had exhausted his legal remedies was a question which was beside the point, as such, in these immediate proceedings. Indeed, I agree with what Me. Rolin said on Tuesday morning, namely, that the objection of non-exhaustion of legal remedies is in the nature of a preliminary objection, which the Court might—and, indeed, should—examine in these proceedings. And Me. Rolin actually invited me to submit my observations on this question, to which Sir Frank Soskice—who, I am very pleased to see, is here to-day—would reply. That, my colleague, Mr. Fawcett, will do to-morrow. Meanwhile, all I want to say by way of personal explanation is that what I meant yesterday was simply this: that I regarded certain details of fact in connection with this question, for instance, such facts as whether Mr. Ambatielos was or was not obstructed from producing evidence and the question whether the United Kingdom did or did not subpoena Major Laing, and the further questions why Mr. Ambatielos did not himself call this witness and why he did not even apply for any order for discovery of the documents he wanted. I merely meant that all those were questions of fact in the case, which I will not touch on because in my view they, as questions of fact, really appertain to the merits of the case. But, of course, in so far as the question of non-exhaustion of legal remedies in regard to those facts goes, my position is that that is a matter which the Court *can* go into and *should* go into on the present occasion.

Then may I mention one more point arising from yesterday's proceedings. The Court asked our adversaries to produce the texts of certain old seventeenth century treaties which they had cited in their written pleadings, and the Court also asked our adversaries to produce any other and later similar treaties. Well, now, the Court no doubt was there referring to the possibility of the existence of other similar treaties because our adversaries, rather characteristically, I think, had, in their written pleadings, implied the existence of a great mass of such treaties, or at any rate the possibility of the existence of a considerable number of them. For instance, I see this in paragraph 3 of the Hellenic "*Observations et Conclusions*" on the question of competence; they said:

> "Le moment n'est pas venu d'examiner de façon approfondie les divers traités conclus par le Royaume-Uni, dont, par application des dispositions relatives à la clause de la nation la plus favorisée, la Grèce est fondée à réclamer le bénéfice. Bornons-nous à signaler qu'un traité avec l'Espagne datant de 1667...."

and so on, and then they cited the older seventeenth century treaties. But the implication is that there are "*divers traités*" and that the moment has not yet come to examine them in a "*manière approfondie*". Well,

apparently that moment has never yet come, even up to the present date, because in their subsequent pleading, their "Mémoire en réplique", there was nothing more said about those treaties except a bare allusion to them, and, of course, Me. Rolin said nothing about them again, beyond a bare allusion : and I imagine it is for all those reasons which the Court has asked our adversaries to name these treaties, if they exist. And my object is simply, as it were, to reserve our position in case our adversaries should produce a number of further treaties now which they may say will be relevant, and if so, I know the Court will appreciate that we shall naturally require time to examine them and, if necessary, an opportunity to express our views about them, if that occurs.

Now, Mr. President and Members of the Court, I will begin what I have to say on the third of the main questions which I mentioned yesterday, and that is really the whole question of the most-favoured-nation position, and, of course, including in that these older seventeenth century treaties.

It being clear, as we think, that the provisions of the 1886 Treaty relied upon by our adversaries have, as far as the direct language of the provisions of that Treaty goes, no reference to or connection with the Ambatielos claim at all, it remains to be considered whether the provisions of the 1886 Treaty cover the Ambatielos claim by any process of incorporation of, or reference to, either the general principles of international law or the terms of other treaties. I particularly noticed that Me. Rolin had little or nothing to say about this in his speech. But, since he did not withdraw the contentions about it put forward in the Greek written pleadings, I feel I must deal with it. For instance, a glance at paragraphs 8 to 13 of the Hellenic Government's written Reply shows that our adversaries do, apparently, rely on the contention that the most-favoured-nation rights conferred by the Treaty of 1886 are of such a character as in effect to give to Greek nationals a right to the enjoyment of the treatment required by the general principles of international law respecting the administration of justice—although, since Greek nationals already enjoy this right in the United Kingdom by virtue of international law itself, one cannot help wondering why it should have been necessary to cover the matter by a most-favoured-nation clause in a commercial treaty. However, this is the argument which we must now proceed to examine.

Mr. President, Members of the Court, there is really only one short, simple and all-sufficient answer to this argument. To begin with, there is only one relevant most-favoured-nation clause in the Treaty of 1886 relevant to this question—namely, Article X—and that I will read very rapidly again to refresh the mind of the Court. It says :

> "The Contracting Parties agree that in all matters relating to commerce and navigation—*in all matters relating to commerce and navigation*—any privilege, favour, or immunity whatever which either High Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party ; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation",

it being their intention that the *trade* and *navigation* of each country shall be placed, etc.

Now, it is surely self-evident that this provision, which only applies to matters relating to commerce and navigation, could only attract provisions in other treaties in so far as those also related to commerce and navigation. Similarly, as regards the general rules of international law. In so far as this clause could attract or incorporate them at all—a point I shall come to presently—it could only do so in respect of such rules of general international law as might relate to commerce and navigation. Whether there are any, I am not at the moment discussing, but those are the only rules of general international law that could be attracted by this particular provision. In neither case could this provision attract other provisions or rules about the administration of justice or the treatment of foreigners before the courts, for the simple reason that this clause—Article X of the 1886 Treaty—does not relate to the administration of justice or the treatment of foreigners before the courts. It relates to commerce and navigation, which, I very much hope I have convinced the Court, is a different thing.

So far as treaties are concerned, the principle involved is a well-known one: that clauses conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can only attract the rights conferred by other treaties in regard to the same matter or class of matter. That is really self-evident. But this principle was well expressed by M. Visser, whom some of the Members of the Court will probably remember, in an article on the most-favoured-nation clause in the *Revue de Droit international et de Législation comparée* for 1902. And this is what he said on page 81 of the volume. I will quote it in French first and then give an English translation. In French he said:

> "En ce qui concerne le contenu essentiel de la clause, il est clair que les droits qui en résultent s'étendent seulement aux intérêts dont on a convenu expressément."

In English:

> "As regards the essential content of the clause, it is clear that the rights resulting from it extend only to the matters which have been expressly agreed upon."

That is very clear, and it seems to us to furnish a conclusive answer to any suggestion that Article X of the 1886 Treaty can attract any provisions in other treaties except provisions about commerce and navigation—in short, to any suggestion that it can attract provisions in other treaties (should there be any) dealing with the administration of justice and related matters.

Mr. President, I should like now to consider a contention apparently put forward, or at any rate applied, by our adversaries in their various arguments. I would refer, for instance, to paragraph 12 of the Greek Reply and the middle paragraph on page 306 of the Oral Arguments in the previous phase of this case, and that is the contention, or so I understand the argument to be, that a most-favoured-nation clause such as Article X of the 1886 Treaty in some way incorporates or attracts the general principles of international law in general. Our answer to that is twofold. First, if a most-favoured-nation provision

can attract or imply the general principles of international law, a point I shall discuss in a moment, it can, as I think we saw a little time ago, only do so in respect of those principles of international law which have reference to the subject-matter of the particular most-favoured-nation clause concerned. Therefore, a most-favoured-nation clause about commerce and navigation (if it attracted any general rules of international law at all) could only attract the general rules of international law regarding commerce and navigation, if there should be any. But what is in question in the present case—what is involved in the claim of Mr. Ambatielos—is not the general rules of international law concerning commerce and navigation : it is the general rules of international law concerning the administration of justice and the treatment of foreigners before the courts. But, secondly, there is another and equally fatal objection to our adversaries' theory. It is this : we think that most-favoured-nation clauses do not in principle and indeed cannot of themselves include or attract the general rules of international law at all. It is neither their normal purpose to do so nor are they framed in such a way as to accomplish it. I suggest to the Court that the true purpose of the most-favoured-nation clause is to attract rights granted to another country as a matter of favour and not as a matter of inherent obligation. A most-favoured-nation clause between two countries (call them A and B) produces no effect as between them until one of them grants some *favour* or advantage to a third country, C. That is what most-*favoured*-nation treatment implies. Now if B (in my example) merely promised C to treat the subjects of C in accordance with international law, that would be no *favour* at all, and therefore would not constitute a grant to which the most-favoured-nation clause could attach itself. Perhaps I might go through that example again. We have a most-favoured-nation clause in a treaty between two countries, A and B. That clause can only come into operation when one of those countries grants to another country treatment which is a *favour*, so that if one of those countries grants to a third country treatment which is only the ordinary treatment required by international law, that does not constitute a *favour* and therefore the most-favoured-nation clause of the basic treaty between the two countries, A and B, will not have any operation because there will be no *favour* granted to another country to be attracted by that clause. Now, in the article by M. Visser, already referred to, this principle stated in the following passages taken from pages 79 and 84 of the volume (I quote) :

"…. il s'ensuit …. que la clause a l'intention de garantir à l'ayant droit des avantages dont celui-ci ne jouit pas en vertu de son propre droit ou de ses propres traités, mais qui ont été accordés à des tiers.

…. la clause …. comporte le droit d'être traité à l'égal des tiers ; afin que le droit puisse entrer en vigueur, il est donc nécessaire que quelque *privilège* ait été accordé à un autre".

Perhaps I might translate that. It says :

"It follows that the purpose of the most-favoured-nation clause is to guarantee to the interested party benefits which that party does not enjoy either by inherent or by treaty rights, but which had been granted to third parties. The clause involves the right

to be treated on a basis of equality with third parties. In order that this right may operate it is therefore necessary that some privilege should have been accorded to a third party."

Now, treatment in accordance with the rules of international law is not a privilege but a right, and since this treatment is something to which all countries have an inherent right irrespective of treaty, such a right cannot normally be regarded as being implicitly covered by the most-favoured-nation clauses of treaties. There would be no reason for such an implication because the treaty clause confers new rights, not already existing ones. If the parties, for any special reason, wish to include in a treaty a right they already have under general international law, they must do so expressly, because the presumption must be that they do not intend to include what they have got already. If for any reason they do include a general international law right in their treaty, the effect is obviously purely declaratory. The treaty does not *create* the right, and a claim based on this right would therefore still not be based on the treaty, but on the general rules of international law.

But it goes further than that. We think the whole conception of most-favoured-nation treatment is alien to that of treatment according to general international law principles, because most-favoured-nation treatment necessarily implies treatment which not every country gets, or to which not every country has a right. At least, it involves the *possibility* that all countries may not have the right to this treatment. But, in law, this possibility does not exist as regards treatment according to general international law principles. All countries necessarily have the right to such treatment.

For these reasons, we submit two propositions to the Court.

The first is that the most-favoured-nation provision of the Treaty of 1886 does not confer any right to treatment according to general international law principles at all. Such a right exists, of course—we do not for a moment deny that—but we say that it exists by virtue of general international law *itself*, and not by virtue of the 1886 Treaty. Mr. Ambatielos had and has the right to treatment according to the general rules of international law on which his claim is based, but it is necessarily those rules which gave, and give, him that right, not the Treaty of 1886. In so far as it is founded on the rules of general international law, therefore (as in fact it is—entirely), Mr. Ambatielos's claim is not based on the Treaty, either directly or by the operation of any most-favoured-nation clause.

Secondly, and this is my second proposition, and even if we are wrong in this, that is to say, if the Treaty does, by means of its most-favoured-nation clause, refer to or include any general rules of international law or attract such rules in some way, it can only do so in respect of the particular subject-matter which the most-favoured-nation clause relates to, that is to say, commerce and navigation, and that, as the Court knows, in our view does not include the true subject-matter of Mr. Ambatielos's claim, which, however much our adversaries may dress it up to look like a matter of commerce, in reality has reference to the processes of justice.

I now go on to the next stage of my argument. Our adversaries not only say that the Treaty of 1886 incorporates the general principles

of international law applicable to the Ambatielos claim, but that it also incorporates by reference and by means of the most-favoured-nation clause the provisions of certain older Treaties of the seventeenth century, namely, certain Treaties between the United Kingdom and Spain, Sweden and Denmark respectively made in the period 1650 to 1670 and still in force. We were interested and perhaps a little amused to learn that our adversaries, while citing these Treaties and relying, as apparently an important part of their case, on certain provisions of them, had never furnished the Court with any copies of the relevant provisions and the Court had to ask for them. Our adversaries have never even set out these provisions in their written pleadings. Well, perhaps we can assist our friends because we have all these Treaties here, and I shall presently quote some passages from them verbatim. Now the argument of our adversaries in regard to these Treaties which they have never really properly developed, but which, if I may venture to do so, I will, as it were, state for them, is first that the most-favoured-nation clause of the 1886 Treaty, namely Article X, gave Greek subjects and citizens a right to the treatment granted to Spanish, Swedish and Danish nationals under three older Treaties. I think they cited five older Treaties, but actually of those five Treaties two pairs are almost identical. In the case of both Sweden and Denmark Treaties which were made during the period known in England as the "Commonwealth", between the reigns of Charles I and Charles II, were re-made when, on the death of Oliver Cromwell, Charles II was restored to the English throne. Those Treaties were then re-made in almost identical terms with very small variations and, therefore, for all practical purposes there are only three Treaties with Sweden, Denmark and Spain.

Well now, the argument is, first, that the most-favoured-nation clause of the 1886 Treaty gives to Greek nationals the same rights as are given to Swedish, Danish and Spanish nationals under these older Treaties, and, secondly, that the rights contained in the older Treaties included a right to treatment according to the general principles of international law, either at large, so to speak, or at any rate as regards the administration of justice. That is how I understand the argument of our adversaries on these older Treaties. They say that Greek nationals have the right to the benefit of those Treaties and that those Treaties accord certain general international law rights, or rights concerning the administration of justice. Well, let us examine this argument. To it we oppose two objections both of which, we think, are conclusive. The first objection derives from the point I have already made so emphatically and with which the Court will certainly be familiar, that the most-favoured-nation clause of the 1886 Treaty only relates to commerce and navigation and, therefore, can only attract the provisions of other treaties, in so far as these provisions also relate to commerce and navigation. And I shall hope to show presently that the provisions of the older Treaties cited by our adversaries have, as far as that goes, no relevance at all to the subject-matter of the Ambatielos claim. They may of course deal with commerce and navigation, in fact they do, but for that very reason they have no relevance to the Ambatielos claim which, in our view, is not a matter of commerce and navigation. Next, assuming for a moment that they did have some relevance to the claim, it would, in

our view, still remain very difficult, if not impossible, to regard them as being included by reference amongst the rights conferred by the Treaty of 1886. The wording relied upon by our adversaries in these older Treaties, which I shall analyze in a moment and present in its proper context, consists of certain very general phrases about treatment in accordance with "common right", conforming in certain matters to "justice and equity", acting "in friendship and affection" and similar expressions, and it is, we submit, according to any normal or reasonable use of language, impossible to regard a clause conferring most-favoured-nation rights in matters of commerce and navigation as attracting phraseology of that kind in other treaties. The most that these older Treaties could do in relation to the Treaty of 1886 would be to entitle Greek citizens in the United Kingdom to treatment in accordance with common right, equity, justice, love and friendship and so on, in matters of commerce and navigation, but, according to the argument we put forward, we always come back to the same point: treatment in the courts is not a matter of commerce and navigation, but of the administration of justice generally. May I put the same point in another way. Assume that under these older Treaties Spanish, Swedish and Danish nationals in the United Kingdom are entitled to the benefit of the general rules of international law regarding the administration of justice, assume that such is the effect of these Treaties, though I hope to show presently that it is in fact very far from being the effect of them. Nevertheless, suppose it to be so—in what way is the benefit of such treatment, treatment in respect of the administration of justice generally, attracted in favour of Greek citizens by a provision giving them most-favoured-nation rights about the wholly different subject of commerce and navigation? We submit, Mr. President, that, even if these older Treaties have the effect contended for by our adversaries, even if they do relate and refer to the general principles of international law about the administration of justice, that is not a matter which would be attracted by a most-favoured-nation clause on commerce and navigation.

The second objection to our adversaries' theory about these older Treaties is that, when one examines their actual texts, it is clear that they have no real relevance to the Ambatielos claim—that is to say to a claim about treatment in the courts—even if they could be regarded as incorporated by reference in the 1886 Treaty. However, before I examine the texts, I want to draw attention to certain legal considerations of a general character as to the way in which provisions of old treaties such as these should be approached.

Mr. President, our adversaries have at various times reproached us for objecting to their invocation of other treaties—that is to say of treaties other than Anglo-Greek treaties—on the ground that we did the same thing in the *Anglo-Iranian Oil Company* case. But, of course, the truth is, we have no objection of principle to the invocation of other treaties, provided they are relevant. We have no objection to the process as such; all we say is that you cannot properly, by means of a treaty clause on one subject, invoke or attract clauses on a different subject in another treaty. Equally we say that the clauses you seek to invoke or attract must be clauses which relate to the matter in hand. Now the Court itself endorsed this view in the *Anglo-Iranian* case. The particular issue in that case, so far as this point goes, was

whether the most-favoured-nation clauses of certain Anglo-Iranian Treaties of 1857 and 1903 attracted the provisions of a Danish-Iranian Treaty of 1934, so as to give the Court jurisdiction in the case, and the Court found as follows. It said (I quote from p. 110 of the Report):

> "The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom had no relation whatever to jurisdictional matters between the two Governments."

That was the view of the Court. Sir Arnold McNair, who voted with the majority, said equally, in respect of the Danish-Iranian Treaty of 1934 (p. 122 of the Report):

> ".... the United Kingdom, before it can base its claim on the Irano-Danish Treaty, must establish a connection with it....".

Judge Hackworth also, though dissenting on the judgment as a whole, agreed with the Court on the principle here involved, or so it seems to us. He said (p. 139):

> "I readily agree with the majority that the most-favoured-nation provisions of the earlier treaties and the provisions of the later treaties are interrelated and must be considered together in order that benefits under the latter may be claimed."

However, our adversaries also remind us that in the *Anglo-Iranian* case we not only invoked treaties other than Anglo-Iranian treaties, but that we did so for the express purpose of showing that, by reason of most-favoured-nation clauses occurring in certain treaties between Iran and the United Kingdom, Iran was bound to treat British subjects in accordance with the general principles and practices of international law, as provided in Iran's treaties with a number of other countries. Our answer is as follows.

First of all, the relevant treaty clauses in the *Anglo-Iranian* case were quite differently worded from the treaty provisions in the present case and had quite a different effect. May I remind the Court what this wording was? Let us take first of all the clause, the benefit of which we claimed in that case, Article 4 of the Danish-Iranian Treaty of 1934. That said:

> "The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law."

Now that was an express and positive reference to treatment in accordance with general international law of the most definite and unequivocal character. We maintain that, in the present case, such a reference is nowhere to be found, either in the 1886 Treaty or in any of the other treaties or clauses cited by our adversaries. Moreover, and this is important I think, in the Iranian case there was a special reason for the inclusion in treaties between Iran and other countries of clauses embodying a right to treatment according to general international law, because I am conscious of the fact that it has been part of my argument that that is *not* a normal process. But there was a special reason for it in the Iranian case, which was this: that, at about

the time when the Danish-Iranian Treaty was entered into, about that time, round about 1928 and the early thirties, the capitulatory régime in Iran had not long come to an end and there might therefore have been some doubt what treatment foreigners in Iran were entitled to, and that was the reason why clauses were included in treaties between Iran and a number of countries embodying the general principles of international law, because, of course, in the ordinary way, as I have said, it is unnecessary to have treaties embodying the general principles of international law, since countries already have a right to it. But there may occasionally be cases where there are special reasons for doing so, and this, we think, was one of them, and so, in those cases where there is a special reason of that kind, as for instance in the Iranian case, as a result of the cessation of the capitulatory system, a clause expressly conferring on other countries the right to treatment according to general international law could be regarded as constituting some actual benefit or favour.

Let us now examine the wording of the most-favoured-nation clause under which the United Kingdom Government considered itself entitled to claim the benefit of treatment according to the general principles of international law as embodied in the Danish-Iranian Treaty, and for that purpose I will take Article IX of the Anglo-Iranian Treaty of 1857. Leaving out words which are not relevant in the present connection, this reads as follows :

> "The High Contracting Parties engage that .... the treatment of their respective subjects .... shall .... in every respect, be placed on the footing of the treatment of the subjects .... of the most favoured nation...."

Now there was a most-favoured-nation clause framed in the most general terms possible. It is true that it also referred to trade and commerce (in the portions I omitted), but the references to trade and commerce were additional, or rather in addition to the references to trade and commerce there was this quite general wording that the High Contracting Parties engaged to treat the subjects of the other in accordance with general most-favoured-nation treatment, and on that there were no limitations at all. Well now, that is something quite different from the Anglo-Greek Commercial Treaty of 1886, the most-favoured-nation provision of which is confined, and relates only, to matters of commerce and navigation.

It seems to us clear, therefore, and we do contend that the position in the *Anglo-Iranian* case was quite different from the present case and that the *Anglo-Iranian* case affords no precedent for the claim which is made by our adversaries in the present case.

I will now, after the translation, pass on to certain legal considerations of a general character affecting the approach to such treaties as these old seventeenth century Treaties.

The argument which I shall now put forward is a little complex, but, if the Court will follow me closely, as I know it will, I shall try and make it clear, and the argument is at least, I think, interesting.

My first point is this. The seventeenth century Treaties must be interpreted according to the condition of their own times and in the setting of the period in which they were concluded. It would be illegitimate to import into them ideas and legal concepts which either did not then

exist or were only in a rudimentary state of development. Now anyone who looks at the clauses of these Treaties—and I shall ask the Court presently to consider some of them—will see at once from the character of the language used and from the nature of the provisions in question, that they were framed with reference to conditions that were very different in important respects from those that exist at the present date. They cannot, in our view, be regarded as incorporating references to the general rules of international law as we understand them to-day, for the simple reason that those rules did not then exist, or existed only in a very partial and rudimentary form. The principle involved—that of the intertemporal law—is well known and was stated by the Arbitrator, M. Huber, a former President of the Permanent Court, in the *Island of Palmas* case, as follows. He said :

> "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when the dispute in regard to it arises or falls to be settled."

And I think that that maxim is now accepted as an established doctrine of international law.

Now, if we transpose this dictum into the terms of the present case, the principle will be this : that the effect of a treaty must be appreciated in the light of the legal situation and concepts that existed when the treaty was entered into. Now, of course, it is not my intention to embark on a study of the state of international law in the middle of the seventeenth century. But I do not think I need to, because I do not think anyone will deny that, at that period, three hundred years ago, when the ideas of Hugo Grotius even were barely starting to gain currency, and were still largely novel, international law existed only in a relatively primitive and elementary form. Phrases which, if they occurred in a treaty drawn up to-day, might be read as referring to the general corpus of international law, or some particular part of it, cannot be so read in treaties framed when this general corpus scarcely existed—or, at any rate, they cannot be read as referring to parts of international law which did not then exist.

And this last point is, I think, particularly important for us, because the general rules of international law relative to the treatment of foreigners are of comparatively recent development—at any rate, as regards their full development. These rules, now very full and elaborate—as witness, for instance, the drafts drawn up for the Hague Codification Conference of 1930, and by the Harvard Research—these rules were formerly the subject, not of general international law, but of special clauses in bilateral treaties, precisely because then they were not the subject of generally accepted principles of international law.

Now I can imagine our highly intelligent adversaries saying at this point that, so far as their argument goes, it is immaterial whether these older Treaties confer a right to certain treatment as part of the general rules of international law, or by means of specific *ad hoc* clauses. In either case, they would say, a Greek national in the United Kingdom acquired a right to the same treatment by virtue of the most-favoured-nation clause of the 1886 Treaty. Well, just pausing to remind the Court once again that the most-favoured-nation clause of the 1886 Treaty related only to commerce and navigation and would not attract provisions in older treaties about the treatment of foreigners in the courts,

I submit that, in any case, such an argument on the part of our adversaries would be superficial and would take no account of changes in the situation and in legal concepts which have occurred since the seventeenth century.

And here we encounter another aspect of the inter-temporal law which was also stated by M. Huber in the *Island of Palmas* case, namely, the principle that facts which conferred a legal right at one period may not necessarily do so at a later period, because of changes in the legal position that have occurred since.

Now, if we apply that principle to the present case, what do we find ? Suppose, for the sake of argument, that some clause of one of these seventeenth century Treaties can be read as conferring a right to certain treatment in the courts, which is now a general international law right. But that would mean that, precisely because the treaty right in question is to-day a general international law right, its treaty basis, though not formally destroyed, is no longer the real foundation of the right. It has been superseded, and, so to speak, engulfed, and rendered superfluous by the emergence of general rules of international law that take its place, that include it and, indeed, go far beyond it, so that the right now depends on and results from those rules rather than the treaty. These seventeenth century Treaties are, of course, still in force as treaties. But the operative effect of many of the individual provisions of those Treaties is spent, because they have been superseded, overtaken, caught up, rendered unnecessary, by the emergence of general rules of international law on the subjects of those provisions dealt with, which now constitute the real basis of the rights and obligations existing between the parties on this matter.

Well, now, what is the practical result of this ? The practical result, applying the principle of the inter-temporal law, seems to us as follows. If the Ambatielos claim had arisen in the period 1650-1670, or thereabouts, and if there had then existed a suitable most-favoured-nation provision in an Anglo-Greek treaty (and by that I do not mean a most-favoured-nation provision about commerce and navigation only), Greece might have been able to claim at that time the benefit of such clauses in the Treaties between the United Kingdom and other countries as might confer some right concerning (or covering) the treatment of foreigners in the courts, because *at that date* such a right would have constituted a favour or special advantage granted to those countries over and above what was required by general international law, and therefore a right that could be attracted by a suitable most-favoured-nation clause, appropriately framed so as to relate to the subject of treatment of foreigners in the courts. But that is no longer the case to-day. Rights of this kind, even if originally conferred by treaty, are now the subject of general international law obligations. They are no longer treaty favours or *ad hoc* advantages, unless the circumstances are very exceptional, and they can no longer be attracted by most-favoured-nation clauses. If we gave such rights to certain countries by the seventeenth century Treaties—and I shall go into the question in a moment whether we did—but if we did, the present position would be that we should in any case be obliged to give them those rights by virtue of general international law, even if the Treaties were no longer in force, for the rights in question no longer depend on the Treaties ; and, if they no longer depend on the Treaties, they cannot be attracted

by most-favoured-nation clauses in other treaties, for they are no longer a matter of favour but of inherent obligation. A position in which these rights were *ad hoc* favours capable of being attracted by most-favoured-nation clauses has been superseded by a position in which they have become inherent general international law rights to which the whole conception of most-favoured-nation treatment is alien and inapplicable.

For these reasons we submit to the Court that, even if the seventeenth century Treaties confer the sort of right which our adversaries contend they do, the clauses in question no longer have any relevance as such, because their operative effect has been swallowed up in general rules of international law to which the most-favoured-nation clause of the 1886 Treaty, on which our adversaries rely, has no application.

Mr. President, let us now take a look at the clauses in question of the older Treaties and see what they really amount to, and here may I be permitted to make the point that the way our adversaries have dealt with the matter of these older Treaties is, may I say, typical of their whole handling of this case, and of their—I might almost say—frivolous attitude to the issues involved. Me. Rolin hardly referred to these Treaties at all beyond the usual mention and claim in respect of the term "common right". He certainly presented no argument about them—no reasoned argument, that is. He simply assumed their applicability without citing them. Similarly in the Greek written pleadings, although considerable reliance is placed on these Treaties, there is practically no reasoned argument about them. Not once are their provisions quoted in full. On the other hand, words and phrases such as "common right", "justice and equity" and so on, are taken out of their context and made the basis of a supposed connection between the Ambatielos claim and the Treaty of 1886, by means of an involved process of reference. It is, as I have said, typical—a sort of trick, a magician's illusion. Ordinary words and phrases are taken out of their context and subjected to a process of metamorphosis that entirely changes their real meaning and effect. Well, let us now actually look at some of the provisions of these Treaties.

We may note at once that some of them, in particular the first one or two articles of each Treaty (which are amongst those cited by our adversaries), belong to what is known as the collective covenant type of provision—that is to say, the respective Heads of State or Governments give undertakings not only for themselves but on behalf of their subjects and citizens, the latter being in a sense also parties to the Treaty. This type of provision is now completely out of date. Now it is in these Articles that the phrases occur about "love and amity", "friendship and affection", "goodwill and respect" and so on, on which (amongst others) our adversaries rely. Well now, I will not weary the Court with reading all these provisions, but I will read one of them to illustrate the kind of thing that is involved. The phraseology differs slightly with each Treaty and various expressions are employed, but the phrases employed in each are fundamentally the same, and I will begin with selecting, as typical, Article I of the Anglo-Danish Treaty of February 13th, 1660. Well now, this says:

> "It is covenanted, accorded, and concluded that there be a sincere, true, and perfect friendship, peace, and alliance for ever, between both the Kings, their heirs and successors, kingdoms, provinces, and principalities, subjects and vassals, of what con-

dition, dignity, and degree soever, as well those who now are, as who hereafter shall be, both by land and sea, in rivers, fresh waters, and everywhere; so as they neither do wrong one to the other, nor the one cause any damage or harm to the kingdoms, provinces, subjects, and vassals of the other, nor as much as in them lies suffer or consent that the like be done by other persons; but that they adhere each to other in sincere amity and love, and that the one promote to his uttermost the advantage and commodity of the other, and of each other's subjects respectively as his own; but that they hinder and prevent each other's losses and destruction, both by fact, counsels, and all their power."

Well now, we submit, Mr. President, that the sort of phrase you find in this clause, about "sincere, true and perfect friendship", or the adherence of the parties to each other in "sincere amity and love" (and equally the phrases about "friendship and affection" and "goodwill and respect" in the similar clauses of the other Treaties) cannot properly be construed as importing the general principles of international law, or rules or obligations about the treatment of foreigners before the courts. We submit that they are much too vague and general. These expressions are not, in our view, couched in the language of precise obligation at all. They are more in the nature of general expressions of friendship and goodwill, such as habitually occurred in older treaties and cannot properly be given a more stringent interpretation. The truth is that these provisions of the collective covenant type have no real relationship either to present-day conditions or to such a treaty as the Anglo-Greek Treaty of 1886.

I will now turn to the second group of clauses cited by our adversaries, said to contain a provision about behaviour in conformity with "justice and equity". But what do we in fact find? I will cite as typical of this class of provision Article V of the Anglo-Swedish Treaty of April 11th, 1654. That says this:

"No merchants, captains, and masters of ships, marines, nor any persons, ships, goods, or merchandise, belonging to either confederate, shall upon any public or private account, by virtue of any edict general or special, within any the lands, havens, sea-roads, coasts, or dominions of the other, for any public service or expedition of war, or any other cause, much less for any private use, be seized, embarked, arrested, forced by violence, or be any way molested or injured: Provided only such arrests, as are conformable to justice and equity, be not hereby prohibited, so be it they are made according to the ordinary course of law, and not granted upon private affection or partiality; but are requisite for the administration of right and justice."

So the Court will see there that the words "justice and equity" are related to the arrests, that is to say, the seizures, embarkations, arrests, forced by violence, molestation and injury. That is the connection in which those terms "justice and equity" are used, and it seems to us clear that this type of clause has nothing whatsoever to do, even remotely, with such a case as that of Mr. Ambatielos. It has to do with arrests, seizures, physical injuries, and other violent actions, quite

different from the breach of contract or denial of justice which Mr. Ambatielos claims to have suffered from.

Finally, we come to the third type of provision, containing the famous phrase about "common right", on which our adversaries chiefly and so greatly rely, and that occurs as Article III of the Anglo-Spanish Treaty of Peace and Friendship of May 23rd, 1667. Let us read this Article in order to see what exactly is the context in which the expression "common right" occurs. It says:

> "That (it starts with a "that") the said Kings of Great Britain and Spain shall take care that their respective people and subjects from henceforward do abstain from all force, violence or wrong; and if any injury shall be done by either of the said Kings, or by the people or subjects of either of them, to the people or subjects of the other, against the articles of this alliance, or against common right, there shall not therefore be given letters of reprisal, marque, or counter-marque, by any of the confederates, until such time as justice is sought and followed in the ordinary course of law."

Well, that is half way through the Article, and pausing there I would draw attention to the fact that this provision does not in any case operate "until such time as justice is sought and followed in the ordinary course of law". This clearly implies the exhaustion of any legal remedies that may exist, and I would remind the Court that it is part of the United Kingdom contention that Mr. Ambatielos did not exhaust his legal remedies in this case. If not, then this provision of the Anglo-Spanish Treaty of 1667 would not in any case be applicable. However, the provision in question continues as follows:

> "But if justice be denied or delayed, then the King, whose people or inhabitants have received harm, shall ask it of the other, by whom (as is said) the justice shall have been denied or delayed, or of the commissioners that shall be by the one King or the other appointed to receive and hear such demands, to the end that all such differences may be compounded in friendship, or according to law. But if there should be yet a delay, or justice should not be done, nor satisfaction given within six months after having the same so demanded, then may be given letters of reprisal, marque, or counter-marque."

Such are the terms of this Article III of the Anglo-Spanish Treaty of 1667 and, Mr. President, we submit that its language is such as to render it completely inapplicable to the claim of Mr. Ambatielos in any shape or form. *First*, the circumstances which it envisages are utterly remote from those of to-day, and are quite unrelated to those contemplated by the Anglo-Greek Treaty of 1886 which is said by our adversaries to attract and incorporate this provision of the 1667 Treaty. *Secondly*, the real object of this provision was to define the conditions in which letters of marque, counter-marque and reprisals could legitimately be employed for the redress of wrongs or grievances —an archaic notion, I am glad to say, that cannot be imported into a modern treaty. *Thirdly*, the case contemplated by the Article, the type of illegality to which it applies is in the nature of force, violence and other wrongs and injuries *ejusdem generis*. Taken in their context, these conceptions have little or nothing to do with the allegations

of breach of contract, or of failure by the Crown to produce certain evidence, and so on, which form the subject-matter of Mr. Ambatielos's claim.

And therefore, Mr. President, we can only submit to the Court that it would be incorrect and inequitable to allow provisions of this kind, framed to meet a totally different state of affairs, and now obsolescent and superseded by general rules of international law, to be utilized in order to found compulsory jurisdiction by a process of supposed incorporation by reference, in a modern treaty of commerce and navigation. There is, we submit, a complete absence of any real relationship between the provisions I have read out and analyzed and the Treaty of 1886. Interpreted in their context and with reference to the period in which they were drawn up, these Treaties do not have the meaning and effect attributed to them by our adversaries. Furthermore, if they did have this meaning and effect, the most-favoured-nation clause of the 1886 Treaty, limited as it is to commerce and navigation, could not attract or incorporate these provisions of the older Treaties.

Le VICE-PRÉSIDENT faisant fonction de Président : Je vais demander à l'agent du Gouvernement du Royaume-Uni un renseignement : on m'a informé que la délégation britannique finirait sa plaidoirie dans la matinée des audiences de demain. Je voudrais m'assurer, n'est-ce pas, si c'est comme cela, si votre intention est de finir dans la matinée de demain, parce que, autrement, s'il vous manquait un peu de temps, on pourrait encore continuer quelques minutes.

Mr. FITZMAURICE : Mr. President, if you would be kind enough to grant me a few more minutes, I could finish completely my own section of our argument and Mr. Fawcett would then be able to finish the concluding section of our argument to-morrow morning.

Le VICE-PRÉSIDENT faisant fonction de Président: Je vous prie de continuer, M. Fitzmaurice.

Mr. FITZMAURICE : Mr. President, I have in fact finished already the substantive part of the argument which I wanted to address to the Court, and I have now dealt with the first three questions which we regarded as fundamental. I will not recapitulate them now because we shall do that in our final speech, but the Court will remember that there was a fourth question with which Mr. Fawcett will deal to-morrow, and the essence of that fourth question was this : that assuming, contrary to the argument which I have endeavoured to present to the Court, there is some—or the Court thinks there is some—relationship between the subject-matter of the Ambatielos claim and the class of matter which is in the Treaty, nevertheless, in our view, that would not suffice to establish that the claim is based on the Treaty. As I said at the beginning of my remarks, we think that, in addition, it would be necessary to show that, if the facts alleged by Mr. Ambatielos were correct, there would be some provision of the Treaty which would be violated, and what Mr. Fawcett will do to-morrow is to consider the facts—not whether they are correct, which is obviously a matter of the merits—but, assuming that the facts are correct, he will consider whether there is any provision of the Treaty which could be violated.

But now, in connection with that, there arises one other matter of considerable importance to which I would like to draw the special attention of the Court myself. If our adversaries were correct in their contention that the 1886 Treaty, either directly or by reference, incorporated the general principles of international law regarding denial of justice and treatment of foreigners before the courts, then it would follow logically that we on our side ought, as part of this fourth question on which Mr. Fawcett will address you—we ought, as part of this question, to argue that, even if the facts alleged by Mr. Ambatielos as to what occurred before the English courts were correct, these facts would not suffice to establish a denial of justice, as that term is understood in international law, and it is part of our case that, even if the alleged facts were correct, not only would no breach of the Treaty occur—no direct breach—but also, even if the Treaty incorporated the general principles of international law about the treatment of foreigners (which, of course, we deny), it would be our argument that those facts were insufficient to establish that such a breach of general international law had occurred and therefore that there was really nothing to go to an arbitral commission.

Now, Mr. President, it is obvious that, if we were to attempt to argue that matter before you on the present occasion, it would take us very far afield. It would mean going into the whole of the law relating to denial of justice and the treatment of foreigners before the courts. We should have to point out, for instance, that even if Mr. Ambatielos were correct in saying that the English courts came to a wrong decision, or failed to take account of certain evidence—which, of course, we deny—but, even if he were correct, this would still not suffice to establish a denial of justice as that term is understood in international law. We should have to point out that mere errors or miscalculations in the application of the law on the part of the courts, or mere irregularities of procedure, are not enough and that there must be something in the nature of actual dishonesty or gross incompetence or deliberate fraud. We should have to point out, if we were obliged to argue this matter, that, within certain limits, each country is entitled to have its own legal system and rules of evidence and procedure, and that, provided a certain basic standard of justice exists and is applied, foreigners before the courts must take things as they find them and cannot claim special treatment, so long as they receive the same treatment as a native of the country would have received in like circumstances.

And I am not going on, I am coming to an end—but we should have to point out that a litigant cannot complain that certain evidence has not been produced, or certain witnesses have not been called, when he himself has made no attempt to procure the production of that evidence or to call those witnesses, and has not availed himself of the procedural rights and facilities which the law gives him. We should have to point out that it is no part of the duty of one litigant to assist his adversary in establishing his case. All these principles, and others I have not mentioned and am not going to mention, are familiar and well-established principles of international law which are fully applicable to the case of Mr. Ambatielos, or rather, which would be fully applicable. These principles, in our view, would completely dispose of that claim, if it were argued on the basis of the general principles of international law.

Well, now, it is there, Mr. President, that we find ourselves in a certain difficulty, and we would request the assistance, or at any rate the special consideration, of the Court. The immediate issue in the present proceedings is whether the Ambatielos claim is based on the Treaty of 1886. When we say: "No, it is not, because it is based on the general principles of international law", our adversaries then reply that the Treaty incorporates the general principles of international law. Now, our difficulty is that we do not know at this moment, and we cannot know at present, whether the Court will accept that argument. We hope very much that the Court will not accept the argument that the Treaty of 1886 in any way incorporates the general principles of international law, because it seems to us to involve a wholly distorted view of what is the effect of a simple and ordinary treaty of commerce and navigation, and it would seem to us to be an extremely dangerous interpretation of the ordinary provisions of a treaty of commerce and navigation. If the Court does accept our argument, then, of course, no further difficulties will arise; but if, on the other hand, the Court should hold that the Treaty of 1886 incorporates the general principles of international law about denial of justice and related matters, then it would obviously become very material—and, indeed, a cardinal question in the case—whether, even if all these complaints made by Mr. Ambatielos were correct, there would have been any breach of the applicable rules and principles of international law: and we should really want to argue that as part of our fourth fundamental question, to which we are now coming. We should want to argue that, even if all that Mr. Ambatielos alleges to have occurred is correct, there would still be no denial of justice as understood in international law. But, as I have said, that would take us into a new and very extensive field, and it would obviously very much prolong the present proceedings.

Well, such is our quandary, and in the circumstances, with the permission of the Court, what we propose to do is this: we propose for the present to confine our argument on our fourth question to the simple issue whether, even if the facts alleged by Mr. Ambatielos were correct, any direct breach of any specific provision of the 1886 Treaty as such, and on its direct and actual language, would have been established. In doing that, in limiting ourselves in this way, we draw formal attention to the fact that if, *per impossibile* we hope, it should be held by the Court that the Treaty incorporates the general rules of international law about denial of justice and related matters, then there will arise a question which will not yet have been argued, namely, that, even if all that Mr. Ambatielos said is correct, any denial of justice would have occurred. It would be necessary to consider, not only whether the facts alleged by Mr. Ambatielos *are* correct, but even, *if* correct, they establish any breach of international law. Now that would have to be considered and argued at a later stage or during a further phase of the present proceedings, or before an eventual arbitral commission, and we must therefore formally reserve the right to do that. We therefore ask the Court to give specific directions about this matter either in its Judgment or by an interlocutory Order, if the occasion arises. Of course, as I have said, it will only be necessary to do this if the Court considers that this Treaty of Commerce and Navigation does incorporate the general rules of international law about denial of justice and similar matters. We think there is every reason why the Court should not give such a dangerous extension

to ordinary provisions about trade, shipping, residence, taxes, and so on, and we very much hope it will not.

With these explanations, and with this formal reservation, I will ask my learned friend and colleague, Mr. Fawcett, to conclude our statement to-morrow by addressing the Court on the fourth of our fundamental questions, limited in the way I have described.

3. ORAL ARGUMENT OF Mr. FAWCETT

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTING OF MARCH 27th, 1953, MORNING

Mr. President and Members of the Court:

In dealing with the fourth question, I will, if I may, begin by shortly reminding the Court of the main elements of the Hellenic Government's claim as it is set out in their pleadings, as this will be helpful in the discussion that I shall try to put before the Court. First, there is the alleged breach by the Crown of the Contract of Sale of July 1919 (Greek Memorial, paragraphs 8 and 22. Greek notes (Annex R 3), (Annex R 4) and (Annex R 5)) and also of the provisions of the mortgage deeds executed in November 1920 (Greek Reply, paragraphs 15). Then come three issues which are connected with the proceedings in the English courts in 1922 and 1923. There is first the assertion that the decision of Mr. Justice Hill in the Admiralty Court was contrary to the weight of the evidence brought before him (Greek Memorial, paragraph 8). Secondly, that by reason of the conduct of the case by the Crown's advisers, certain material evidence was withheld from the Court (Greek Memorial, paragraphs 12 to 17), and third, that the English Court of Appeal's refusal of the claimant's application to call new evidence on appeal was contrary to precedent and the practice of the Court of Appeal (Greek Memorial, paragraphs 18 and 19).

I must emphasize that we are not, at this stage, wishing to raise any consideration for your decision on the ultimate merits of the case. The United Kingdom Government, of course, denies each and all of the four allegations that I have just summarized. We have always denied them and we shall, if necessary, and at a later stage, show them to be false. But at the present stage the truth or falsity of these allegations is not in issue. For the purpose of our present argument and solely for that argument, we shall assume them to be true.

The substance of the fourth question was set out in the United Kingdom Rejoinder at paragraph 13, and I respectfully refer the Court to that paragraph, where we say that the Hellenic Government must, in our submission, establish that the alleged facts would, if true, constitute a breach of certain specified provisions of the 1886 Treaty. We are now familiar with the fact that it is upon Articles I, X, XII and XV of the 1886 Treaty which the Hellenic Government relies, and Mr. Fitzmaurice has already dealt with the issue of most-favoured-nation treatment which falls within the scope of Article X. The question which remains is whether the Hellenic Government has discharged, in respect of the other three Articles, the burden of proof which they have frankly accepted that the claim is based on one or more of them.

Now, what have the Hellenic Government said about Article I? They cited it for the first time in April 1952, in their "*Observations and Conclusions*". It was briefly referred to by Sir Hartley Shawcross and Me. Rolin at last year's hearings, but it is only in the Greek Reply, and in Me. Rolin's speech on Tuesday, that we find a vague and insubstantial attempt—but still an attempt—to interpret it and to apply it to the present case. It is said—and I refer to the Greek Reply, para-

graphs 12-15—that "commerce" in Articles I, X and XII covers "difficulties arising from commercial transactions such as litigation resulting from commercial contracts". Mr. Fitzmaurice has no doubt satisfied the Court that there is a gross error of classification here and Me. Rolin appears to agree, for in a passage of his speech, which I shall shortly quote, he puts this point another way. It is further said in the Greek Reply, paragraph 15, that the United Kingdom Government has failed to observe its guarantee of national treatment under Articles I and XII by reason of the breaches of contract of sale of ships and of the mortgage deeds, constituting what I have called their first allegation. It is, in general, impossible for the reader of paragraphs 12-17 of the Greek Reply to determine which Treaty provisions are said to be related to which allegations, and perhaps this imprecision is intended in the hope that the Court itself will make the desired marriage between one or other of the allegations and the Treaty provisions. But at least the Hellenic Government seems to be saying that the first allegation shows a breach of the national treatment provisions of the Treaty, and this is developed by Me. Rolin in his speech on Tuesday, which I will quote. At page 14 of the English text [1] of his speech he said:

> "Contrary to what is said in the pleading of the United Kingdom Government, we are certainly not asserting that the obligations arising out of the Treaty of 1886 have the effect of imposing upon the British Government respect for every commercial contract concluded by business men of the two countries under municipal law. In this case we are concerned, not with a contract between business men of the two countries, but with a contract concluded between a business man of one country and the authorities of the other, and if we are entitled, quite generally, to expect that by virtue of the Treaty the British authorities should ensure respect for Greek commercial interests in England and that these authorities should for this purpose make use of the public law powers granted to them under English law, we are also entitled to expect *a fortiori* that these authorities, when they are themselves parties to a contract, should set their countrymen an example by completely carrying out the contract in good faith, or by accepting the sanctions involved as a result of their failure to observe the provisions of the contract."

Now Mr. Fitzmaurice has already gone into the absurdity of suggesting that the Government, when party to a contract with an alien, is under a wider obligation to perform it in good faith than a private individual would be, and I would only add two observations. First, even upon Me. Rolin's criterion, the Crown *did* accept the sanctions involved in the conclusion of the contract, since it gave Mr. Ambatielos the fullest opportunity of making in the Admiralty Court, where he was defendant, what was in effect a counter-claim against the Crown in respect of the alleged breaches of contract and mortgage deeds. Second, there is not a single suggestion, not a single word, in the Greek pleadings or in Me. Rolin's speech, to show in what respect Mr. Ambatielos received less than national treatment in his transactions with the Ministry of Supply. Me. Rolin goes on, in the passage I have just quoted:

[1] See French text on p. 369.

"There are many examples, Mr. President, of States having been brought before arbitral tribunals in respect of failure to carry out obligations binding upon public authorities by virtue of private contracts, failure which has at times been gross and serious and such as to cause damage to a national; it is in these circumstances, Mr. President, that we submit that since Articles I and XII guarantee national treatment and most-favoured-nation treatment with regard to the respecting of the rights of Greek business men in England, we are entitled to include within this category the carrying out of a commercial contract."

I think that "Article XII" there may be a typing error for "Article X".

Now what does this mean—failure to fulfil obligations which caused damage to a national? Now that cannot surely refer to a national bringing a claim against his government in an international tribunal. What I take Me. Rolin to mean is that there are cases under municipal law of a national bringing a claim against his government. That may be: he has not cited any of these many examples, and it may well be that an alien is entitled to national treatment in that sense. But it is not sufficient simply to say: "We rely on Article I, or Article XII, because of the existence of this practice under municipal law." He must show, or at least attempt to show, a failure to grant that national treatment to Mr. Ambatielos. The question which the Hellenic Government so studiously avoids, whether Mr. Ambatielos received less than national treatment in respect of his contract, still waits for an answer.

Now what do we say that Article I means?

First we have a general sentence, which reads:

"There shall be between the dominions and possessions of the two High Contracting Parties reciprocal freedom of commerce and navigation."

There then follow a number of detailed provisions which extend over the succeeding articles. Now Article I does not provide for commercial equality between British and Greek nationals without some restriction of the subject-matter. The term "commerce" in that first sentence must, as we have said in paragraphs 27-30 of our Rejoinder, be understood in the light of the Treaty as a whole and particularly Articles I to IX. Further, it must be noticed that Article I provides for freedom of commerce and navigation between British and Greek territories. Articles I to IX deal essentially with the movement of goods and ships between the two countries. This factor of movement is stressed in a definition of the analogous notion of inter-State commerce by the United States Supreme Court, that is, commerce between and crossing the frontiers of the States composing the Union. This definition appears in the case of *International Textbook Company* v. *Pigg* (217 United States Reports, p. 106). There the Supreme Court said:

"Importation into one State from another is the indispensable element, the test, of inter-State commerce; and every negotiation, trade and dealing between citizens of different States which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of inter-State commerce."

But even if "commerce" be given a wider interpretation in Article I than we contend, the meaning of the whole expression "freedom of

commerce" is not greatly affected, for what the first sentence of Article I grants and protects is the *right* to engage in commerce, the right to trade; it does not guarantee the performance by the parties of particular contracts. Non-performance of a commercial contract cannot be an interference with the freedom of commerce, even though the party which fails to perform its contract is the Crown. What Article I says of commercial contracts entered into by a Greek national is that he shall have the same right or capacity to enter into contract under the law of England as a British national—no more, no less. Article I of the Treaty protects that right, but it does not protect the trader from the normal consequences under the local law of his commercial activities. He has the benefit of the Treaty, but, having exercised it and entered into an English contract, he is subject to the obligations and limited to such remedies as English law provides. As the Article itself says in its last sentence: "he is subject to the laws and regulations in force".

In the *Oscar Chinn* case (P.C.I.J., Series A/B, No. 63, p. 84), the Court said:

> "Freedom of trade, as established by the Convention of St.-Germain, consists in the *right*—in principle unrestricted—to engage in any commercial activity,"

and the Court will be aware, of course, that the language of that Convention was much wider than that which has to be considered here.

Now, I venture to remind the Court of the first allegation. It is that the Crown was in breach of the Contract of Sale of July 1919, and of the provisions of the mortgage deeds executed in 1920. Now, if these breaches were proved, they could not constitute violations of Article I of the 1886 Treaty, when properly construed, for the following reasons. First, the alleged breaches of contract and of the mortgage deeds cannot of themselves be violations of that Article for the reasons I have already explained, and for the reason that the Contract of Sale and the mortgage deeds were created under and governed wholly by English law. The obligations of the Crown under the Treaty are and must be kept wholly distinct from its obligations as a party to a private law contract; there is no provision of the Treaty relating to commercial contracts by the Crown, and the fact that the Crown was a party to the instrument does not bring an alleged breach of the contract by the Crown under the Treaty any more than if the parties were private persons. To argue that it does is to postulate an absurdity: that the terms of the Treaty are incorporated by implication into every commercial contract between the Crown and a Greek national. Even if they were, the Greek national still could not obtain better than national treatment.

My second point is that these alleged breaches do not involve any interference with the freedom of movement of goods or persons or shipping as would be required for a breach of Article I. Mr. Ambatielos employed his own agents in London to purchase the ships and he freely negotiated the contract of July 1919. What freedom was infringed? Again, if I may go back to the definition I quoted from the decision of the United States Supreme Court, there was no importation or movement of goods or ships between British and Greek territories here and no transaction which contemplated it. There was a contract for the sale of ships then under construction in Shanghai and Hong Kong; three of

the ships were not in British territory at all and it was not part of the contract that any of the ships were to be moved to Greece. They were to trade, and did trade, free of trading restrictions, in other parts of the world. On no possible meaning of words or construction of the Article can the first allegation be made to yield a breach of it. As to the other three allegations, those connected with the proceedings in the English courts, Me. Rolin admits that the term "commerce" cannot include the incidents of the administration of justice; but he goes on to say on page 15 of the translation [1] of his speech:

> "Articles I and X of the Treaty which use the term 'commercial' cannot, even if commerce is given the broadest sense, include within the meaning of commerce the incidence of the administration of justice. Of course, the United Kingdom is right. The word 'commerce' is naturally something apart from the administration of justice, but what we contend is not that commerce includes the administration of justice, but that the rights which are guaranteed in commercial matters must clearly and particularly include rights to the protection of the courts, rights relating to the protection of commerce by the courts."

But what can this right of protection be, other than the right of access to the courts covered by Article XV? It is because they cannot rely squarely on the provisions of Article XV that the Hellenic Government strive, by this obstinate error of classification, to bring denial of justice under Article I.

Now let us look at Article XII. We are faced here with the same lack of explanation by the Hellenic Government of how their allegations show a breach of this Article. We find the Article cited for the first time in April last year, in the Observations and Conclusions of the Hellenic Government, and there are some passing references to it in paragraphs 8 and 14 of the Greek Reply, where it is inextricably confused with the other Articles relied on. At last, on Tuesday, Me. Rolin addressed himself to the Article and based upon the term "obligation", to be found in paragraph 4, a bold and ingenious, but I am sorry to say, untenable argument which Mr. Fitzmaurice has already shown to be entirely false and misleading. The Hellenic Government does not, I think, attempt to base itself upon any other part of Article XII except that word "obligation", so I will again here only add two remarks before consigning this Article, I hope, to oblivion. First, Me. Rolin, if I understand him rightly, appears to be saying that the references to "commerce" in Article XII are a refutation of our interpretation of that term in Articles I to X. But the opposite is the case; Article XII confirms our interpretation, for Articles I to X protect the trader in the movement of ships and goods into the ports and harbours and his dealings with them there (and is it not significant that the entry of a vessel at Southampton was the only illustration of Article I which occurred to Sir Hartley Shawcross on page 307 of his speech?). Article XII protects the trader in his commercial or industrial activities within the country: paragraph 3 of the Article shows that he may, for example, have a shipping office in London, and the addition of "industry" in paragraph 4 is significant. Why was it necessary if "commerce" has the large meaning attributed

[1] See French text on p. 369.

to it by the Hellenic Government, covering any commercial activity and all its auxiliary processes ?

My second remark is simply to correct what I think may be a misunderstanding of our argument by Me. Rolin. He says on page 15 [1] of his speech that we try to limit the term "obligations" to "fiscal obligations" by applying the *ejusdem generis* rule. But this is not how we apply the rule here, as paragraph 45 of our Rejoinder shows. We are saying here what we say of all the conditions, restrictions and obligations referred to in the Treaty. They are conditions, and so on, having general application under the local law. They are generic concepts, not terms used to describe particular acts and particular incidents.

I now come to Article XV. This was first invoked in the note of November 1939 (Greek Memorial, page 96), where it is said that the alleged disregard, in Mr. Ambatielos's case, of the rules of procedure in the English courts as to full discovery of documents and the admission of fresh evidence infringed his rights of defence contrary to Article XV. Again, in paragraph 8 of the Greek Reply, it is said that Article XV guarantees national treatment in regard to access to the courts "in an entirely general way" (I quote these words). Now whatever Article XV says or means, it is not entirely general. It is on the face of it quite clearly limited. What is general is the argument in paragraphs 16-18 of the Greek Reply, for it is quite impossible to see whether or not Article XV is being pleaded: the cases cited in paragraph 18 refer solely to breaches of international law and paragraph 17 seems to rest on (I quote) : "the provisions of international law guaranteeing the treatment of foreigners". This kind of obscurity and vagueness characterizes all the Greek Pleadings in the case on the crucial issues. If we turn for enlightenment to Me. Rolin's speech, we find an interpretation of free access, which I shall quote in a moment ; but he goes on in that passage, I am sorry to say, to enter into the merits : he not only sets out a number of facts alleged by the Hellenic Government as to the production of witnesses and documents in the Admiralty Court—and this he is of course fully entitled to do—but he gives an incomplete account of our answers to these allegations of fact and then suggests, or tends to suggest, that the supposed inadequacy of our answer is an argument in favour of the applicability of Article XV. Now to this entry into the merits we must take objection, but we do not wish to engage with Me. Rolin in a dispute about them here. But what is Me. Rolin's interpretation of "free access" ? As usual it is wide—an elaborate gloss on what is really a perfectly simple concept. He says:

> "The free access referred to is one which must be unaccompanied by restrictions or taxes beyond those imposed on native subjects, and these prohibited restrictions may be of different kinds : they may intervene in the course of the proceedings, or before the proceedings ; they may be restrictions imposed by law or they may result from acts of court or of the government—if the latter is a party to the proceedings ; or, as in the present case, from both at once, from the acts of the executive authority and of the judicial authority. We are therefore entitled to invoke Article XV, paragraph 3, as we invoked the other provisions as a basis for the acts we complain of."

[1] See French text on p. 370.

Again, and this is alone conclusive against the applicability of Article XV, there is not an atom of proof, indeed no attempt even to prove, that any condition or restriction was imposed on Mr. Ambatielos other than those imposed on British nationals litigating in the English courts. In the latter part of the passage I have quoted, we hear nothing of national treatment; nothing of discrimination against Mr. Ambatielos. What were these restrictions imposed on Mr. Ambatielos—prohibited because they were not imposed on British subjects? How were they imposed, and what authorities imposed them? You, Members of the Court, and we are left to guess. Unless one of the four main allegations show that, if the facts alleged were true—a prohibited restriction was imposed on Mr. Ambatielos—the claim cannot be based on Article XV.

How, Mr. President, are we to interpret Article XV, paragraph 3? I will, if I may, just read it to you:

> "The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the courts of justice for the prosecution and defence of their rights, without other conditions, restrictions or taxes beyond those imposed on native subjects, and shall like them be at liberty to employ in all causes their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country."

The meaning of "access" is, I hope to show, plain; but there is some difficulty in construing the word "free", though there can be little doubt about what is the right answer, and I think the difficulty is perhaps largely a verbal one. The difficulty is this: that it may, on the one hand, be said that the paragraph establishes the principle of free access to the courts and that the reference to other conditions, restrictions or taxes is an additional safeguard for subjects of the Contracting Parties; or on the other hand it may be said that the clause "without other conditions, restrictions or taxes beyond those imposed on native subjects" in fact explains and gives its proper meaning to the word "free". In other words, on this second interpretation, we would read it thus: "access must be free, that is to say, without any of the conditions or restrictions specified". Now of these two interpretations I think the first would be almost self-contradictory, for the phrase "other conditions", etc., implies that access is already subject to some conditions, as it must be, namely those imposed on nationals, and if that is so access to the courts cannot be absolutely free. The word "free" therefore cannot be read in an absolute sense, but must be read according to the second interpretation as meaning that access to the courts for an alien must be as free as for a native subject—that is to say, his access may not be subjected to conditions, restrictions or taxes not imposed on native subjects. There are a number of reported cases in which this view of free access was adopted. They dealt with the question of the scope of the free access clause and whether it had wide implications; for example, whether it implied immunity for a foreigner from the normal obligation to give security for costs. My first case is from the *Annual Digest of Public International Law Cases*, 1919-1922, Case No. 170. There, Article 277 of the Treaty of Versailles was under interpretation. This provided that subjects and citizens of the Allied and Associated Powers should have

(I quote) "free access to German courts". Interpreting this, the German Reichsgericht in civil matters, in a decision given on March 18th, 1922, said (I quote):

> "The precise terms of Article 277 referring to free access to the German courts do not admit of an extensive interpretation."

Again, in the same Digest, 1929-1930, Case No. 162 concerning the interpretation of the free access clause, Article IV of the United Kingdom-Austrian Treaty of 1924. The Austrian Supreme Court in civil matters held there that the order to deposit security for costs could not be regarded as a limitation of the free access to the courts of justice. Again, the Court of Appeal of Karlsruhe, interpreting the free access clause of a German-Yugoslav Treaty, held, in a decision on January 14th, 1931, that freedom from security for costs was a special privilege which must be expressly stipulated—that is taken from the Digest of 1931 and 1932, Case No. 143. I would also draw attention to a similar finding of the Swiss Federal Tribunal given on July 12th, 1934, Case 126 in the Digest for 1933 and 1934, in the course of which it said that the plaintiffs in the case could not rely on (I quote):

> ".... the so-called free access clause of the Swiss-United States Treaty of 1850 which has a precise and limited meaning".

These cases show that the free access clause means no more than it says and that it cannot properly be interpreted as conferring wider, more general or more extensive rights or indeed any special rights in regard to the treatment of the person concerned before the courts, once he is given access to them. If the clause does not even confer on foreigners exemption from the obligation to give security for costs, which might well be regarded as being in a sense an impediment to freedom of access, it obviously can confer no express rights as to the conduct of the litigation, the behaviour of the Court, the evidence to be produced, or the actions of the other party to the litigation. These are rights going wholly beyond the scope of an access clause. These rights are derived from the local law—they cannot depend upon Article XV or indeed upon the Treaty at all.

The Treaty grants free access and this the claimant had, and there is really almost a touch of cynicism in suggesting that a defendant has been denied free access. But his substantive rights were a matter exclusively of English law. Now this interpretation of Article XV, paragraph 3, is strongly supported by a decision of the United States Supreme Court, *Maiorano* v. *Baltimore and Ohio Railroad Company (1908)*, 213, United States Reports, page 268, and if you will bear with me, Mr. President, I will lay this case before the Court as compendiously as I can. In this case the plaintiff's husband had been killed while travelling on one of the defendant company's trains in the State of Pennsylvania. Suits for damages for death, brought by a relative of the deceased, were allowed by an Act of the State legislature of April 1851, but the Supreme Court of the State of Pennsylvania had held that non-resident aliens, even though they were relatives of the deceased, could not sue under the Act. Now this interpretation of an Act of a State legislature by the Supreme Court of the State was binding upon the United States Supreme Court. The plaintiff therefore relied for

her appeal to the Supreme Court, and below, upon the United States-Italy Treaty of 1871, and particularly Article 23, which I will read. Article 23 said:

> "The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions or taxes than such as are imposed upon the natives...."

I will read no further, because the remainder of the Article gave certain ancillary rights to litigants, rather similar to the Article with which we are dealing, but it will be seen at once that that Article was really almost identical with Article XV. Now the plaintiff argued that the rule of law in the State of Pennsylvania, which excluded her as a non-resident alien from bringing suit under the Act of 1851, constituted a denial of free access under Article 23 of the Treaty. But the United States Supreme Court unanimously rejected the argument, and Mr. Justice Moody, giving the judgment of the Court, said:

> "This Article does not define substantive rights, but leaves them to be ascertained by the law governing the courts and administered and enforced by them."

That is the end of the quotation from this judgment.

The widow had a right of access and exercised it up to the Supreme Court, but her claim was unenforceable under the local law. In short, she had no right of action and she could not be given one by the Treaty. The Treaty did give her the right to have the question whether she had a right of action determined, but no more. Such was the interpretation of the Treaty language by the Supreme Court of the United States, and it is, in our respectful submission, correct. I ask the Court to consider its full effect. The State Court of Pennsylvania had ruled that relatives of the deceased, who were non-resident aliens, could not sue for damages for the death. On the face of it, this might seem to be a denial of access, even a denial of justice, and this is exactly what the plaintiff argued. But observe that she did have the right to argue it; she had access to the courts right up to the Supreme Court to determine this very question whether the Treaty overrode the local law of Pennsylvania. The Supreme Court is saying in effect that "free access" under the Treaty had been satisfied by allowing her to go to the courts to have her rights under the local law determined: but if the local law says she has no rights in the matter, that is not a denial of free access.

This case affords another striking confirmation of the limited interpretation which the courts have placed upon the free access clauses in treaties, and also of the fact that there is a clear distinction to be made and maintained between treaty rights which are general in character and particular rights arising under the local law. A meaning must not be given to a treaty clause such as Article XV, 3, which can override the local law, if a fair and effective meaning can be found for it, which is consistent with the local law. This interpretation takes further strength from the fact that Article XV is based on national treatment. Greek nationals are *not* to have special privileges, a special régime: they are to be governed like nationals by English law. The Hellenic Government have, of course, made its three allegations, but they do not allege that what was done in the courts was done because Mr. Ambatielos was

an alien, and without this the allegations must, in our submission, fail wholly to be based on Article XV.

To sum up what I have said about the attempt of the Hellenic Government to base the claim on Articles I, XII and XV of the 1886 Treaty, I will say this: it has not discharged the burden of proof it accepted—in fact, in some respects it has made no serious attempt to do so. On all the Articles the pleading is imprecise and obscure. Me. Rolin, with his great ability, has woven some very skilful arabesques, in which he hopes we shall become entangled, but on the issue of national treatment under all three Articles—I, XII and XV—we have from the Hellenic Government silence. By dark allusions and half-statements they hope to create an atmosphere of guilt around the United Kingdom; they hope the Court will say, even if it cannot see clearly through the circumambient smoke of the Greek pleadings: "There must be fire here—let us order arbitration." But we believe that the Court will not be diverted from its task of the interpretation of the Treaty and that it will, in giving its decision, look for the coherent and adequate interpretation of the Articles upon which the Hellenic Government says it relies.

Mr. President, Members of the Court. Me. Rolin has invited us to address you on the issue of the exhaustion of local remedies. He raised the question in his speech whether it is proper to deal with this issue at this stage and he takes the view—if I understand him rightly—that it is proper to go into it, and he has, in fact, as I say, invited us to do so. We agree that it is in order and, for our part, for the following reason: that the international responsibility of a State is not to be taken as engaged in a matter such as this which amounts, on the Greek case, substantially to a plea of denial of justice, unless and until the claimant has exhausted all his local remedies up to the highest court. This plea has always been on our pleadings—and I would refer the Court to our Counter-Memorial, paragraphs 77-79, and our Rejoinder, paragraphs 54-56—and with your permission, Mr. President, I will now try to deal with it. But I shall not attempt to go into any examination of the merits, the ultimate merits, of the case. I shall proceed now, as we have already done, in arguing that the claim was not based on the 1886 Treaty. I shall take the four allegations I set out and I shall assume, simply for the purposes of the argument, that they are true in fact. Now we say that Mr. Ambatielos had effective remedies still available to him in the English courts for the injury he says that he suffered, and that he did not exhaust those remedies. In other words, we say that there were certain issues of law raised before this Court which were substantially decided in the Admiralty Court and the Court of Appeal and which were appealable to the House of Lords and that successful appeal to the House of Lords would have led to an ultimate reversal of the Admiralty Court's decision. Now I will recall that the decision of the Admiralty Court was given in January 1923. Mr. Ambatielos entered an appeal against it, but pending that appeal he applied to the Court of Appeal for an order allowing him to adduce the so-called "new" evidence at the hearing of his appeal. The Court of Appeal refused this application and Mr. Ambatielos did not proceed with his appeal from the Admiralty Court. We have then two sets of facts to consider: first, that he did not pursue his appeal from the Admiralty Court to the Court of Appeal, and second, that he

did not appeal to the highest court, the House of Lords, against the Court of Appeal's refusal of his application to adduce new evidence. Now it is plain that in respect of the second allegation, that is, that Mr. Justice Hill's decision in the Admiralty Court was contrary to the weight of the evidence before him, there was in fact no exhaustion of the local remedies available to the claimant, for no appeal was brought from the decision of the Admiralty Court and such an appeal would inevitably have raised the issues set out in the first allegation of breaches by the Crown of certain obligations arising under English law. The appeal from the Admiralty Court's decision, which was in fact lodged, was never pursued, and the Hellenic Government has been at great pains, both in the diplomatic correspondence and in its pleadings, to show why that appeal was not pursued. But it is most important to notice that this allegation, that the Admiralty Court's decision was against the weight of the evidence, has nothing whatever to do with the third allegation that material evidence was withheld from the Court, for what the second allegation amounts to is this: that the evidence that was before the Court—and that excludes *ex hypothesi* the evidence which the Hellenic Government says was suppressed by the Crown—was by itself so much in favour of Mr. Ambatielos that the Court was wrong in face of it in reaching a decision against him. Now, if this were true (and we are, for the purpose of the argument, to suppose that it was true), appeal *could* and *should* have been brought against the Admiralty's Court's decision as it stood, and no claim can be made to this Court in respect of it, failing such appeal. The Hellenic Government has argued that no appeal was brought to the Court of Appeal against the Admiralty Court's decision, because such appeal was rendered useless by the Court of Appeal's refusal to hear new evidence. But this argument, as I have shown, is fallacious on this allegation, because the Hellenic Government's case on that allegation is that, even without the new evidence, a decision in Mr. Ambatielos's favour should have been reached in the Admiralty Court. The second allegation cannot, therefore, in our submission, show a breach of the Treaty or a denial of justice, even if it were true, for it is barred by the rule as to the exhaustion of local remedies.

If we now turn to the remaining allegations, we find that the first allegation of breaches by the Crown of its obligations under English law, and the third allegation, that by reason of the conduct of the case by the Crown, material evidence was withheld from the Admiralty Court, are, as far as concerns the exhaustion of local remedies, covered by the fourth allegation, that the Court of Appeal, in refusing the claimant's application to bring new evidence, acted against precedent and its own previous practice. This last allegation covers the others in this sense, that, if the Court of Appeal had decided to admit the new evidence, or, alternatively, if the claimant had appealed successfully to the House of Lords against the Court of Appeal's refusal, then the obstacles which the claimant and the Hellenic Government say were put in his way in getting justice in the English courts would have been removed.

Now let me just read a paragraph from the Hellenic Government's note of the 30th May 1934: that is on page 76 of the Greek Memorial. In this note to the British Government, the writer says:

> "My Government (that is, the Hellenic Government) considers that if it can now be proved that in fact there was a contract to deliver the ships on dates certain, then there has been a substantial miscarriage of justice which justifies the present claim, not only as a matter of international law, but also on grounds of natural justice and equity. If the real facts are, *and it can now be proved*"—and I ask the Court to mark those words—"that fixed dates were given to Mr. Ambatielos as a matter of contract, that he bought the ships at the price named because of that undertaking and would not have so bought them without it, then surely he has suffered a wrong which ought to be righted and for which his Government, injured in his person, is both entitled and bound to obtain redress."

I will not weary the Court with reading the paragraphs which follow, but they show clearly that when the Hellenic Government say they can now prove the real facts, they are referring to the famous Laing-Maclay letters. They say that those letters prove their case. Now that in itself is a complete answer to a suggestion we heard at length from Me. Rolin, that the Crown suppressed highly material, officials files. Here, the Hellenic Government says, our case is proved by these two letters and, of course, these two letters—and possibly the testimony of their writers—was the only evidence applied for before the Court of Appeal. I do not want to say more about those references of Me. Rolin to the official files, but I think that this demonstrates that that is a completely empty charge. Mr. Ambatielos applied to put these two letters in evidence to the Court of Appeal and that application was refused. Now, it is quite plain upon the paragraph I have read that in the Hellenic Government's view those letters were vital—they proved their case. If this new evidence, they say, could have been brought before the Court of Appeal, at the hearing of the Claimant's appeal from the Admiralty Court's decision—and I would remind the Court that all appeals to the English Court of Appeal are by way of re-hearing—then his case would have been transformed. Without it there had been a substantial miscarriage of justice, but they argue that, in the light of this so-called "new" evidence, it would have become manifest to the Court of Appeal that the Contract of Sale did provide for fixed delivery dates, as the Claimant maintained, and the Court of Appeal must have reversed the decision of the Admiralty Court on that question. To bring about this result, it was therefore essential for the Claimant to appeal to the House of Lords against the refusal of the Court of Appeal to admit the so-called "new" evidence.

Now, Mr. President, before I come to the Hellenic Government's explanation of all this, I would like to say shortly once more what the position was. The Admiralty Court had given a decision against Mr. Ambatielos on the issue of the breach of Contract of Sale by the Crown and the alleged breach of the mortgage deeds. It had also dealt with other issues, but those are not material at the moment.

Now the Hellenic Government's case is that these two letters to which I have referred, and perhaps the testimony of their writers, was vital, in that it would have proved that the Admiralty Court's decision on these two points were wrong. The fact that they did not have—and this is their case—access to those letters or that testimony at the trial,

meant that they must get them in on appeal if they were to reverse the Admiralty Court's decision. The Court of Appeal refused that; therefore appeal on the merits was in their view useless. We say that from that refusal of the application of the Court of Appeal to admit that so-called "new" evidence, they could have appealed to the highest court, the House of Lords.

Now they answer this in a number of ways. They suggest that appeal to the House of Lords on a point of procedure was not permitted under English practice, or that the House of Lords would not interfere with what was an exercise of discretion by the Court of Appeal. Alternatively, they say, appeal may have been possible, but it would have been futile. Thus, on page 73 of the Greek Memorial, we find it said:

> "Mr. Ambatielos could not, under English law and practice, have taken any appeal from the refusal of the Court of Appeal to admit the new evidence."

Again, at page 303 of his speech, Sir Hartley Shawcross said:

> "It was said by my learned friend that Mr. Ambatielos had not exhausted all his legal remedies before the municipal courts of England, that he might have appealed still further, to the House of Lords, and that that supreme Court of Appeal might have allowed him to call this additional evidence. But that really is not so. The decision of the Court of Appeal in England was in relation to a matter of procedure and it involved the exercise of a discretion by the Court of Appeal which the House of Lords would not upset."

Now I would ask the Court to observe that Sir Hartley Shawcross's words were somewhat guarded, for he says what is, in effect, his opinion that the House of Lords would not have upset the decision of the Court of Appeal: he does not say, and in our submission could not say, that the House of Lords could not upset that decision. There might have been many reasons why the House of Lords would not have upset it, and, of course, on our case, they would not, but that is not the point here. But I will state our reasons quite shortly in answer to these various ways in which the Hellenic Government says that no further appeal was possible.

First, there is the statutory basis of appeal to the House of Lords to which we have referred in our Counter-Memorial, paragraph 78, and I will just, if I may, read that again.

> "As regards the decision of the Court of Appeal refusing to admit new witnesses, no reason appears why the Claimant should not have appealed again to the highest Court, the House of Lords. The Appellate Jurisdiction Act, 1876, Section 3, provides:
>
> > 'Subject as in this Act mentioned, an appeal shall lie to the House of Lords from any order of judgment of any of the Courts following, that is to say (1) of Her Majesty's Courts of Appeal in England....'
>
> This right is not qualified in the Act itself. Further, it was not necessary in such a case in 1923 to obtain leave for appeal to the House of Lords, nor was this decision of the Court of Appeal in the class of decisions by that Court declared to be final by statute."

That is what we said in our Counter-Memorial.

And our second point is that the refusal of the Court of Appeal of Mr. Ambatielos's application to call new evidence was a decision or order on a procedural matter—that, I think, we must concede. But there was judicial precedent for a decision on questions of the admission of new evidence and, indeed, it is the whole of the Hellenic Government's case that it was precisely a deviation from its previous practice and precedent that rendered the Court of Appeal's decision wrong. There was judicial precedent on the question and so, in so far as it was an exercise of discretion, it was a judicial discretion, and whether it was exercised judicially must be a question of law.

My third point is that the House of Lords has itself declared that it is competent to hear appeals in procedural matters, and I will refer there to the case of *Blair* v. *Haycock Cable Co.*, 1917, reported in 34 Times Law Reports at page 39. The House of Lords did express there the view, and I think for obvious reasons, that appeals in procedural matters should be regarded as exceptional, and, I may add, the fact that appeal on such matters must be long and costly and does not decide the substance of a case, makes its exceptional character clear. I need hardly say that that decision is binding not only on the other courts of England but on the House of Lords itself. I will now turn to the second part of the test of the sufficiency of local remedies. The first part I hope I have established; that appeal was available. The second part of the rule I believe I shall state correctly when I say that recourse to a higher court can only be regarded as futile where there are appealable points of law but they are obviously insufficient to reverse the decision of the Court below. Now the test in the present case is this. It having been shown that there was a point of law upon which the Claimant might have appealed and could have appealed from the Court of Appeal to the House of Lords, would it have been sufficient to bring about a reversal of the decision on the merits in the Admiralty Court? In other words, if the House of Lords had on appeal reversed the order of the Court of Appeal and directed that the so-called *new evidence* be admitted, could that have resulted in a reversal of the Admiralty Court's decision? It is plainly not enough to show that appeal to the House of Lords was futile merely because it was not likely to succeed. It might have been unlikely to succeed for one of two reasons: either because the so-called new evidence was not in fact of such a nature as to make any important difference to the decision of the English courts in the case, or because the evidence was not in fact new at all but had already been presented in substance to the Admiralty Court. Now, I shall not ask the Court here to consider which of these is the proper reason for thinking, as we think and apparently the Claimant thought, that appeal to the House of Lords would have failed, for this would be to enter unduly into the merits of the case. But what I stress and what I ask the Court to hold is that insufficiency or futility of appeal to the House of Lords for either of these reasons is not insufficiency within the meaning of the rule that a Claimant is not required to exhaust local remedies where those are insufficient or futile. I need hardly add that the Crown cannot be held internationally responsible because Mr. Ambatielos was reluctant or unable to meet the costs of further appeal. Let us apply then the true test to the facts alleged in the Hellenic Government's pleadings.

The Hellenic Government's case is that the so-called new evidence which the Court of Appeal refuse to admit was vital to the Claimant's case ; and it is said that it was for this reason that the Claimant did not pursue his appeal from the Admiralty Court. It was, they say, evidence such that, if brought before the Court, it would almost certainly result in a reversal of the Admiralty Court's decision. Now this so-called new evidence, namely, the letters exchanged between Major Laing and Sir Joseph Maclay, were not in the possession or control of the Crown but in the Claimant's hands at the time of his application to the Court of Appeal ; therefore, even if we assume to be correct the Hellenic Government's allegation that the Crown was instrumental in preventing these letters from being laid before the Admiralty Court, there was nothing, either in the form of Crown privilege or any other supposed right of the Crown, to prevent the Court of Appeal or subsequently, on appeal, the House of Lords, from ordering the production of those letters. If this was so, then this was a case for appeal to the House of Lords falling exactly within the exceptional cases to which I have referred. If the Hellenic Government's allegations are correct, then upon their own showing—and I hope that I have not relied on any statement or allegation which is not to be found at some place in the Hellenic Government's pleadings —the Claimant has failed to exhaust his local remedies. He failed to have recourse to the highest court on a point which was appealable and which, upon the Hellenic Government's showing, was substantial and indeed conclusive. What the Hellenic Government are, therefore, in effect trying to do is to substitute appeal to this Court for appeal that should and could have been brought in the English courts thirty years ago.

Now, with your permission, Mr. President, I would like to put a question to Sir Frank Soskice. The Hellenic Government's case, as I have tried to show, and I hope fairly, is that the Court of Appeal's decision was against precedent, it was against its previous practice on these questions of the admission of new evidence. It was either a legal error or it was a wrongful exercise of judicial discretion ; it may be put forward in a number of ways. Now what we would like to ask Sir Frank Soskice is this : are the Hellenic Government really saying that if the Court of Appeal in England had been guilty of either legal error or a wrong exercise of judicial discretion, are they really saying that Mr. Ambatielos could not have appealed to the House of Lords or that, if he had appealed, the House of Lords would not have heard it ?

Mr. President, we ask the Court to hold that the Claimant failed to exhaust the local remedies available to him in England in 1923 and to hold that that failure bars the Hellenic Government's claim here.

I will now turn briefly to an equitable consideration which cannot I think be excluded from this case. That is the delay in the reference of the claim to this Court and its manner. The present reference to the Court rests wholly on the 1886 Treaty. The Hellenic Government waited sixteen years without referring to the Treaty at all, though it was, of course, well known to it ; and over twenty-four years before bringing the Treaty issue to the Court. We concede that there is no procedural limitation of actions before this Court under international law or its statute. Nor do we say that after some particular lapse

of time, say twenty or thirty years, a claim here is barred. But there are cases, of which the present case is one, in which the Court should refuse to grant relief on grounds of delay, and—what is more—abuse of process.

The reason why there is no fixed rule of prescription in international law has been explained in *Pomeroy, Lectures on International Law in Time of Peace* (1886), pages 126-129, in the following way. The notion of prescription in private law rests upon the presence of "requisite judicial means and instruments for asserting a claim" and failure to use these causes prescription to operate: there is no such rule in international law since there is no compulsory judicial process and war is the only remedy. This principle no longer can apply after the establishment of an International Court with compulsory jurisdiction. Many of the older authorities on this matter relate to the presentation of diplomatic claims and not to judicial settlement. Further, there have been cases of voluntary references of cases to arbitration where the plea of prescription has obviously been waived. I believe that neither this Court nor its predecessor have had to consider the question of delay and abuse of process in reference of a matter to them. We therefore ask the Court to make a ruling on it as a matter *primæ impressionis.*

The principle which in our submission the Court should apply here is stated in *Wharton Digest III*, page 972, where he says :

> "While international proceedings for redress are not bound by the letter of specific statutes of limitation, they are subject to the same presumptions, as to payment or abandonment, as those on which statutes of limitation are based. A government cannot any more rightfully press against a foreigner or State a claim which the party holding declined to press when the evidence was fresh than it can permit such claims to be the subject of perpetual litigation among its citizens."

In our submission, the delay of the Hellenic Government in referring the claim under the 1886 Treaty to this Court raises a presumption not only of defence for the United Kingdom but complete lack of seriousness in the claim. As Me. Rolin claimed on Monday, the 1886 Treaty was in full effect in 1923 and the Hellenic Government were of course aware of it. The fact that they did not have recourse to it in the first place or indeed at any time during the diplomatic exchanges of notes until 1939 demonstrates, in our submission, that the Hellenic Government never seriously supposed that any claim could be based on the 1886 Treaty, but they only resorted to it as a tortuous procedural device for getting the claim before this Court. The diplomatic notes are also marked by an inconsistency and shifting of ground whenever particular arguments were decisively met by the United Kingdom Government. Again, the delay prevents this Court or any arbitral tribunal that may be set up from doing justice since the principal witnesses are dead whom the tribunal could and should have heard give evidence which is said to be vital to the merits of the Hellenic Government's case.

In fact, the delay and lack of seriousness are such as to make the present reference an abuse of the Court's process, and we ask the Court, which is not a temporary international arbitral body but a permanent and long-established court of law, to observe the general rule *interest rei publicæ ut sit finis litium.*

4. REPLY OF SIR FRANK SOSKICE

(COUNSEL FOR THE HELLENIC GOVERNMENT)
AT THE PUBLIC SITTING OF MARCH 28th, 1953

[Public sitting of March 28th, 1953, morning]

Mr. President and Members of the Court:

After a comparatively lengthy hearing of what is really a preliminary issue, it quite obviously behoves counsel to pay special attention to what you yesterday said, Mr. President, when you expressed the wish that we should confine ourselves now to our final conclusions. It is always the vice of an advocate to be tempted to repeat what has been said before, and I now, in making the reply on behalf of the Greek Government, will do my best to avoid mere repetition. With issues as subtle as those which at present occupy the Court, it is not always easy to avoid traversing some of the ground which has already been covered.

Mr. President and Members of the Court, right at the very outset of the debate upon which the Court is at present engaged, there is, in the submission which I present to you, something fundamental to your decision. We have spent several days arguing matters which, if the submission which I now desire to make and which Me. Rolin has made already is correct, are irrelevant at the present stage. Mr. Fitzmaurice and Mr. Fawcett have addressed arguments to you which no doubt will be most important when and if an arbitrator is called upon to deal with this matter, but in the submission that I make, those matters at this stage are wholly irrelevant and do not touch upon the matter with which the Court is at the moment concerned.

Now, Mr. President and Members of the Court, what is that fundamental matter? That fundamental matter is what is the meaning to be attributed to the word "based". May I say at once what I submit is the meaning which the Court ought to attribute to that word? In my submission, the word "based" means "invoked". After all, what is the Court now dealing with? I would be grateful if the Court would be so kind as to turn to page 65 of the Greek Memorial, where the Declaration upon which the whole matter hinges is set out. It is my desire at this stage in the outset of my address to invite the Court to look very closely at the actual wording of the Declaration to the Treaty of 1926, because it is upon the actual wording that the question which you now have to decide depends. May I, at the risk of trespassing upon your time, ask you to look very closely at that wording. It is at the bottom of page 65:

> "It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice"—now, does not prejudice what?—"does not prejudice *claims*"—that is to say, pretensions, arguments, submissions—"on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886...."

May I pause there, at that first half of the Declaration. You are here considering claims. What is there contemplated is that one government has advanced a claim ; it has said, for certain reasons : "I, the Greek Government, am entitled to certain relief against you, the United Kingdom Government." Nothing has yet been established, one is not talking about a proved case ; we are still at the time when one government avers that it is entitled to certain relief and the other government denies that its arguments are correct or that it is entitled to that relief.

Now that is fundamental. When you ask of a claim, on what is it based, in what sense can you use the word "based" ? There is only one sense in which a claim can be "based" on provisions of a treaty. It is based on the provisions of a treaty because those who prefer the claim, who advance the claim, and support it with argument, or desire to support it with argument, say : "We rely upon certain specific provisions of the treaty in order to support our claim." When they, in other words, invoke certain specific provisions of a treaty, they are then basing their claim upon the treaty. Of course, if you are talking of an established right, and you say of a person, his right to enter a particular building is based upon a particular provision of a statute or a treaty, of course, then you are using the word "based" in a somewhat different sense. You are then saying the particular provision of the treaty or the statute *does*, on its true construction, entitle the person in whom the right is vested to enter, if I may use that example, a particular building, but when you are not talking of an established right, when you are in the earlier stage simply talking of a claim, you then must perforce use the word "based" in a different sense—namely, in the sense of "invoke". A judge, or an arbitrator, or anybody, has two persons in dispute before him. He looks to one and says : "Are you preferring a claim ?" and the answer is "Yes", and he asks that person : "On what do you base your claim ?", and the claimant will then answer : "I base it on such and such a section of a particular statute." The judge will then turn to his adversary and say : "Do you defend the claim ?", and the answer is "Yes", and the judge will then say to the adversary : "On what do you base your defence ?" The adversary may say : "I base my defence on the same section, which I say does not justify the claim." The claimant and the adversary are both, in those circumstances, basing, the one his claim and the other his defence, on the same section of the statute, which each of them says has a different meaning. Either the claimant is right or the defender is right : they cannot both be right. Ultimately, it will be decided which is right, but throughout the whole period, when one is advancing his claim and the other is disputing that claim, both the claimant and the defender are respectively basing their claim and their defence upon a particular section—say, the same section—of a statute.

Here we look at the wording of the Declaration and we find that it contemplates that one government, a party to the Treaty, has preferred a claim. It contemplates, presumably equally, that the other government disputes the claim, but the government which prefers the claim is obviously preferring it in reliance upon some provision of the Treaty. It is then basing its claim on that provision. The government which disputes the claim will point to that, or some other provision of the Treaty, and will say : "Upon the interpretation that we put upon the Treaty, the claim does not arise." Both governments cannot be right,

but each government, that which prefers the claim and that which disputes the claim, are both, while they are so doing, basing, the one its claim and the other its defence, on certain articles of the Treaty.

Therefore, Mr. President and Members of the Court, I do advance this as a proposition which is fundamental to the issue which you have to try, that when one speaks of "basing a claim", one is simply talking about the formulation of the claim. You base your claim upon Article X of the Treaty of 1886 in that you rely upon that Article in formulating your claim, and it is in that sense, and only in that sense, in my submission to the Court, that the word "based" is used.

Mr. President, Members of the Court, I want to make what may seem somewhat of a hardy excursion for a moment or so in inviting the Court, and particularly Judge Spiropoulos, to look at the Greek text of the Treaty. I do not know whether you have before you the Treaty of Commerce and Navigation of 1926; it is published as what we call a Command Paper 2790 of 1927. May I just quote one or two words, because I am advised by those of my Greek speaking supporters who have looked more closely at these words, that they emphasize the point that I am trying to make. It is easier when one looks at the Greek text to ascertain that you are using the word "based" in the sense for which I contend, namely, "invoke", "formulate your claim upon the basis of". If Judge Spiropoulos will forgive my accent, the relevant words are:

> "Δηλοῦται ὅτι ἡ ὑπὸ σημερινήν χρονολογίαν
> Συνθήκη .... δὲν δύναται νὰ παραβλάψη ἀπαιτήσεις
> ἰδιωτῶν βασιζομένας ἐπὶ τῆς .... Συνθήκης...."

Now I am advised by those who speak Greek as their own language—and no doubt Judge Spiropoulos will form his own view about this—that when you talk about ἀπαιτήσεις, that is to say, "requests", "claims", "arguments", being βασιζομένας on a treaty, you are in terms and perfectly clearly referring to the situation in which one of the contesting Parties says: I have an ἀπαίτησιν; I have a claim. You then ask him; on what βασιζετε, on what do you rely in formulating your claim, and he then says: I rely, for example, on Article X of the Treaty. Now I do not know whether Judge Spiropoulos will feel that that argument is an argument which commends itself to him, but I do put it before the Court that if it is clear, as I submit it is clear in the English language, that "claim" and "based" are used in the sense for which I contend, it is even more clear when one finds in the Greek text the character of the claim as it were emphasized by the use of the word ἀπαιτήσεις, "requests", and that the word βασιζομένας indicates "rely on" or "formulate on the basis of". Now I advance an argument of that sort with trepidation because I am referring to the nuance to be put on words in a language other than my own, and I leave the argument there, but I am advised that that is the conclusion which should be drawn from the precise wording used in the Greek text of the Treaty.

Mr. President and Members of the Court, supposing I am right in what I have said as to the opening words of the Declaration, let us now look to the words which follow those opening words in the Declaration. I submit they precisely support what I have just said, what I have just advanced as the true interpretation of the opening words. The Declaration goes on:

"Any differences which may arise as to the validity of such claims shall be referred to arbitration."

What is it that is to be referred to arbitration? The arbitrator is not to be asked to pronounce upon an established right, he is to be asked to decide a difference. He is to be asked to address his mind to this task. One Government is in difference with the other. One Government places one meaning on an article of the 1886 Treaty; the other Government places a different meaning upon it. Both cannot be right. It is precisely that difference which the arbitrator is to be called upon to resolve. That emphasizes what I have been submitting that you are here wholly in the realm of claims, formulations, of requests for relief; and what, in my submission, the Court to-day should say to itself is simply this: Have we claims before us? Quite obviously we have got claims before us—the Greek Government is making a claim—that is beyond dispute. On what is that claim based? In other words, on what article of the 1886 Treaty, if any article, does the Greek Government as a matter of fact rely? What is the article which it quotes in putting forward its claim? That is the first question that you have to ask yourselves, and if you find, as you do find, that the Greek Government, in putting forward its claim, does inform the Court and maintain in its pleadings that Article X or Articles I and XII of the Treaty or Article XV of the Treaty are the articles on which it proposes to rely in supporting its claim, then you have the very words of the Declaration fulfilled, you have a claim, and that claim is based upon certain articles of the 1886 Treaty. If that is so, then the preliminary style has been got over by my clients, and all that the Court has to do then is to say: Is that claim disputed? That is equally obviously the case—the British Government disputes their claim. There is therefore a difference—there is a difference within the meaning of the Declaration. The result of that is that that difference must be referred to the arbitrator who is provided for in the 1886 Treaty.

Now, Mr. President and Members of the Court, I hope that you will not think that I have unnecessarily stressed that. What are the implications of it? If that submission is right, the whole of the argumentation that you have listened to—although, as I have said, it will be most relevant when the arbitrator comes to ask himself: is the claim well founded?—is, for the purposes of the issue which is before you to-day, wholly irrelevant.

Mr. President, I hope that my opponents will not think when I say that their arguments were irrelevant that I mean any disrespect either to them or their arguments, they were obviously closely reasoned arguments, but they proceeded upon an interpretation of the Declaration which, if I am right, makes their arguments in my submission irrelevant. It does depend, therefore, on the interpretation, and on the interpretation alone. Now, Mr. President and Members of the Court, I want, in support of that submission, to ask you to be so good as to turn to page 53 of the Memorial, where you will see the Protocol to the 1886 Treaty set out. I put this question, what are the disputes that one is contemplating that are to be referred to arbitration under the Declaration to the 1926 Treaty? Those disputes are the disputes which are referred to in the Protocol to the 1886 Treaty. What are they? I quote the second paragraph of the Protocol to the 1886 Treaty:

"Any controversies which may arise respecting the interpretation, or the execution of the present Treaty, or the consequences of any violation thereof, shall be submitted .... to the decision of commissions of arbitration."

Just look at the opening words which I have quoted, any controversies which may arise respecting the interpretation, controversies in other words in which one person alleges that an article of the Treaty means one thing and his opponent alleges that it means something else. It is precisely those controversies which it is contemplated are to go to arbitration, controversies in other words as to the interpretation, controversies also as to the execution and consequences of a violation. But the words to which I attach importance for the purpose of my submission are the words "controversies as to the interpretation". In other words, when you are asking what disputes does the 1886 Treaty contemplate are to be arbitrated upon, those disputes include disputes as to what the 1886 Treaty means. Those disputes are preserved inviolate by the Declaration in the 1926 Treaty. In other words, the 1926 Treaty Declaration in terms contemplates that you will have one Government putting one meaning on the 1886 Treaty and another Government denying that meaning, and it is precisely that controversy which it is contemplated under the Declaration to the 1926 Treaty that is to be referred to arbitration, and I do pray this in aid and support of what is absolutely fundamental to my submission, that my opponent's argument has proceeded upon a wrong reading of the Declaration to the Treaty of 1926.

Mr. President and Members of the Court, I would ask you now to be so good as to glance at one or two passages in the judgment of the Court of July last year. On page 44 of the opinion of the Court, the Court decided this—and I quote:

"The Court would decide whether there is a difference between the Parties within the meaning of the Declaration of 1926.

Should the Court find that there is such a difference, the Commission of Arbitration would decide on the merits of the difference."

Now, I respectfully submit that that is precisely in accord with what I have just been submitting to the Court. The Court's decision is that it will decide, having jurisdiction, whether there is a difference between the Parties within the meaning of the Declaration of 1926. What does that mean? It means that you, to-day, will decide whether there exists between the Parties rival contentions as to what the 1886 Treaty means, and therefore, there being such a difference, there is a difference within the meaning of the 1926 Declaration. It is for you now to decide that question and that question only. That is what you have said in your judgment that you regard as now your task to perform, and if I may, with the very greatest deference to the Court, submit, that is precisely what the situation must be, as it arises as the result of your deciding that you have jurisdiction in your judgment of July last year.

I simply ask you to say that obviously there is a "difference" within the Declaration of 1926. If there is, then, as you say in your own judgment, it must be for the Commission of Arbitration to adjudicate upon the merits of the dispute—to say, in other words, which of the Parties is right and which of the Parties is wrong—and the arbitrator, in making up his mind as to which is right and which is wrong, must ask himself

first : "Which version of the facts do I accept as between the rival versions of fact?", and then he must ask himself: "Which version of law—which interpretation in law, as between the rival interpretations—do I accept as the correct one ?" Therefore, Mr. President and Gentlemen, now simply, in my submission, you should ask yourselves : "Is there a difference between the Parties, such as is contemplated in the Declaration of 1926 ?", and as to that, there cannot, in my submission, really be the slightest room for doubt. We rely on the Treaty : the British Government says : "Your reliance is ill-conceived." We therefore base our claim on the Treaty, they base their defence on the Treaty. That gives rise to a difference. Therefore your answer to the question which you posed in your judgment in the passage which I have just read out, must, I respectfully submit, without saying more and without traversing the ground traversed by my adversaries, *must* be in the affirmative.

May I just remind the Court as to how the problem was presented to the Court last July. It was argued by our adversaries that the Declaration did not form part of the 1926 Treaty. If the Declaration did not form part of the 1926 Treaty, then Article XXIX of the Treaty, on which your jurisdiction is founded, clearly could not apply to what the Declaration dealt with. That question as to whether the Declaration was part of the Treaty or not, was fully argued before you and you delivered your decision that it was part of the Treaty. It followed from that that, under Article XXIX, you had jurisdiction to deal with what the Declaration provided for. Then it was said by our adversaries last July that if you looked at the Declaration itself and upon the assumption that you had got jurisdiction under Article XXIX, you would nevertheless find that the Declaration upon its true construction only applied to claims formulated before the 1926 Treaty. That argument you rejected. If the argument that the Declaration of 1926 only applied to claims formulated before 1926, our adversaries would have been in the position to say that this claim, as a claim, was formulated after 1926 and that therefore the Declaration was not applicable. But you in terms rejected that submission : you took the view that the Declaration would cover a dispute—claim—which was formulated after the 1926 Treaty was entered into and so, Mr. President and Gentlemen, that you decided, on page 44, which again I would like to refer you to in support of my contention. The sixth argument (I will read the last paragraph) of the United Kingdom Government is that "the claim that the Greek Government is making on behalf of Mr. Ambatielos, in so far as it is based on any provisions of the Treaty of 1886, is not a claim covered by the Declaration of 1926 because that Declaration only covered claims which had been formulated under that Treaty before the Declaration was signed, and the Greek Government did not formulate any legal claim in respect of Mr. Ambatielos until 1933, nor indeed, any legal claim under the Treaty of 1886 until 1939". That argument you rejected. In the next paragraph you consider it and you reject it. Therefore, as at that stage, you had decided that under Article XXIX you had jurisdiction to deal with what the Declaration contemplated. What did the Declaration contemplate ? It did contemplate, *inter alia*, claims formulated after 1926. This is a claim formulated after 1926. Now I respectfully submit that it follows from the very language of your own judgment and from the language, may I respectfully add, of our adversaries, as

deployed in the sixth argument, which I have just quoted from the bottom of page 44 of your judgment, that here is, within the Declaration of 1926, a claim based on the Treaty. It is a claim formulated upon the Treaty of 1886: the objection that it was only formulated after 1926 you have rejected—it is therefore a claim formulated or based within the meaning of the Declaration to the 1926 Treaty upon the provisions of the 1926 Treaty. And I submit that that does lead, without more, inevitably to the conclusions for which I contend.

It may be asked: do you advance that argument without any qualification at all? Are you arguing, the Court may say to me, that it is enough that a person who is a litigant before it says "I rely upon a clause". Is that an assertion which the Court cannot possibly go behind? In answer to that, I say: "The Court has the right to restrain an abuse of its own proceedings." If you had before you a claimant who obviously was trying to practise a fraud upon the Court, supposing you had a claimant who, for purposes of blackmail or for some wholly improper purpose, untruthfully was saying to you, and as a mere pretence, "I base my claim on Article X of the 1886 Treaty", if you thought that then, acting in your inherent jurisdiction to say that, you would not allow your process to be abused, you could obviously say to him: "You are not really basing your claim on Article X at all; what you are saying is a mere pretence; your assertion that you base your claim on Article X is a pure fraud which you are trying to practise upon us, and we will not refer what you say is your claim to arbitration." The Court then is saying, and rightly saying in a case like that: "You, the litigant, may be asserting that you base your claim on Article X, but we do not believe you, you are not doing so at all, you are merely pretending it is a sham, and you have some ulterior improper purpose—for example, blackmail, as your object in asserting that you are basing your claim on the Treaty." Now, that is a hundred miles away from this case. Me. Rolin dealt with that point, he cited from what Judge Carneiro had said, and may I again, at the risk of possibly going over the same ground, invite the Court to look at a passage in his judgment which precisely represents the submission which I have just been making. In his individual opinion, he dealt with the matter on page 49. What Judge Carneiro said, and, if I may submit, said entirely rightly, was this: "The invocation of these provisions of the Treaty seems to be relevant." In other words, the Parties are basing themselves on that Treaty in the sense that they are invoking it. "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." In other words, Judge Carneiro is saying: "Their invocation may be well-founded or not, but that they are invoking the Treaty is the important and material consideration." He goes on: "The Court cannot do so at this stage of the proceedings." In other words, the Court cannot finally pronounce upon the question whether the invocation of the articles is or is not well-founded. "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."

Mr. President, Members of the Court, may I, with great deference, say that I entirely would adopt that language as part of my argument, it is precisely what I am submitting to you. Now you will remember

that Me. Rolin, when he was addressing you, said "supposing a litigant asserts a plainly absurd claim". He gave the example of a litigant relying on a treaty for the protection of whales. "Supposing a litigant obviously asserts as the basis of his claim something which *ex facie* and obviously could have nothing whatever to do with it, well then you may be in the realm of an abuse of the process of the Court. You may then say to the litigant who relies on the treaty for the protection of whales : 'You tell us that you are basing your claim on that treaty but you are perfectly obviously doing nothing of the sort. You have some motive which impels you to assert that you are basing your claim on the treaty, but in fact you are not doing so, and if you tell us that you are doing so, you are virtually abusing the process of the Court.' " Judge Carneiro goes on : "If the claim manifestly went beyond the terms of the Treaty of 1886, the Court would have no jurisdiction." He means no jurisdiction to refer the dispute to arbitration. Then he said : "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 then 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. That is to say, whether the Treaty could possibly embrace the claim. Now I respectfully would submit that that is exactly the right test. If you say "I am relying upon the Treaty of 1886" and in the same breath you say "the facts which underly my claim took place in 1800", eighty-six years before it, well obviously, though you may be saying that you are basing your claim on the Treaty of 1886, you are doing nothing of the sort, because the Treaty of 1886 could not by any conceivable stretch of language apply to facts which took place in 1800 ; but short of that, it is for the Parties to decide whether they propose to base their claim on the Treaty of 1886. If they wrongly so base it, if they take a wrong view as to the meaning of the Treaty of 1886, then the blood be on their own heads, they will lose the arbitration, the arbitrator will decide against them, but they are still basing, for good or ill, their claim on the Treaty of 1886.

Now, Mr. President and Members of the Court, what is the prime significance of that ? I said that, if that view is right, all of the arguments addressed to you by our adversaries are beside the point, and may I emphasize that I say "beside the point" with the greatest deference to those arguments ; they were obviously, as I have said, careful arguments, but they do not assist you because they are arguments which could be usefully addressed to the arbitrators but not to you. May I try and precisely pin-point, therefore, the difference between *our* view and our *adversaries'* view. Our view is what I have just stated. Now Mr. Fitzmaurice and Mr. Fawcett, both in their arguments, made the point which was fundamental to the view that they were presenting, and that point was this, they both made the point, they both said "in order to succeed in the present application the Greek Government has got to establish before you, here and now, that if the facts which they allege are correct, the Treaty of 1886 would apply", and they would be entitled to their relief. Now that is what they said. The kernel of their argument was that if the facts are correct the Treaty must have been broken, that they repeated ; both learned Counsel put that in the forefront of their argument.

Starting from that proposition, it was naturally necessary for them to proceed to try to persuade the Court that the real meaning which should be placed upon the Treaty of 1886 would not give rise to the result that its provisions were broken, even if the facts were correct. It was, therefore, quite pertinently to their own point of view that they proceeded to argue as they did that this was not a commercial matter, that the commercial clauses of the earlier treaties were not brought into operation by the most-favoured-nation principle in Article X; from their point of view all that was relevant. If it is necessary to establish, as they say it is necessary to establish, that upon the assumption that the facts are correct the 1886 Treaty was broken, then all their arguments were relevant, but if I am right in the submission I am making to you as to the meaning of the word "base", then all their arguments are wholly irrelevant.

I want to make one short comment at this stage. If the view I am presenting is right, this is not a matter of discretion at all. If there is a claim based on the 1886 Treaty, then I would respectfully submit to the Court that there cannot be any discretionary bar to the request that I now make, that the matter should go to arbitration ; the Governments have, in fact, agreed by the Declaration, and it is a contract between them, that such a claim should go to arbitration. This is not, therefore, a matter of discretion. It is a matter, I respectfully submit to the Court, of right. If I have brought myself within the Declaration, then in my respectful submission, my clients are entitled to ask the Court to say as a matter of right : your dispute with the British Government is to be referred to the arbitrator. No discretionary questions arise or are under discussion.

Mr. President and Members of the Court, that completes what really is the fundamental argument that I want to present. If I am right on that, I need go no further. If I am right upon that, then I am entitled to the relief for which I am to-day asking. Speaking to you as an advocate, I feel in a difficulty for this reason: I am most anxious not to take up your time by going over matter which, in the submission which I make to you, is wholly irrelevant to the question that you have to try, but I am in the difficulty that my opponents have already done so, and I, therefore, am bound to challenge what they have submitted to you, but I hope that it will be borne in mind by the Court that every single remark that I proceed to make from now on should be understood to be prefaced by the preliminary observation that what my opponents submitted and what I submit in reply, is irrelevant to the question that you have to decide to-day. I hope that the Court will therefore insert for me before each of the arguments that I desire now to address, that preliminary qualification that both my argument and my adversaries' argument is irrelevant to what you have to decide, and I only address those arguments to you from now on, because I cannot allow to go unchallenged what has been averred against them, and it is upon that understanding that I now proceed further in my argument.

It must not be a very common experience of the Court to be addressed by an Advocate who says: what I propose to say to you is wholly irrelevant; but that is forced upon me by the necessity of the case. What I want to deal with first, upon that basis, are two preliminary matters. I want to say first a few words with regard to the contention that was raised that Mr. Ambatielos had not exhausted all remedies open

to him under English law. Me. Rolin, in his speech to you, indicated that possibly as I was a little bit more familiar with English legal process than of necessity he was himself, he would deal only very briefly with that particular aspect of the case. That question presents two different problems. First, what is the true principle of international law; second, how does that principle impinge upon the circumstances of this case? The true principle of international law I believe to be hardly in dispute. You must use such methods as are open to you to obtain recourse in the domestic tribune, but that does not involve your vainly having recourse to a Court of Appeal when it is either certain, or reasonably certain, or highly probable that your appeal will not succeed. If you find yourself in that situation, and thinking to yourself that an appeal would be highly unlikely to succeed, you do not resort to appeal; you are entitled to say that in conformity with the relevant principle of international law, you have exhausted the remedies which you have before the domestic courts.

Mr. President and Members of the Court, that principle I think perhaps was most precisely formulated in the case which is known as the *Finnish Vessels* case. I would refer you to page 16, paragraph 10, of the Memorial. You will there see that we have set out the authorities on which we propose to rely in support of that principle. You will see that we cite the *Finnish Vessels* case, and that we also cite the *Undén* case, and I do not want to take up your time by re-reading that paragraph in our Memorial—it is on page 16, and it is paragraph 10; but I thought that it might be of some assistance to the Court if I draw the attention of the Court to the conclusions from the Finnish case which were drawn by Judge De Visscher, and which were set out in the 1935 volume of the *Académie de Droit international, Recueil des Cours*, in which there is a passage in a work of Judge De Visscher, in which he deals with the Finland case, the Finnish Ships case, and he states the conclusions in international law that he draws from that case on this particular problem. The Court will remember that the case concerned the requisitioning of certain ships belonging to Finland during the First World War. It was asserted by the Finnish Government that those ships had been requisitioned by the British Government. The British Government denied that assertion of fact and alleged that the vessels had been requisitioned by the Russian Government, and that was the issue of fact, and that being so the Finnish Government sought redress before a special Admiralty Tribunal, the Admiralty Transport Arbitration Board, and failed before that Tribunal. Now it is perfectly true that the finding of fact of that Tribunal was under the English law declared to be final, and the question arose as to whether the Finnish Government should have appealed against that decision, and whether, not having appealed against it, it could not say that it had resorted to all methods of recourse before the English courts. May I quote a short passage from page 429 of the volume to which I just referred? The question whether the Finnish Government had used all available methods of recourse before the English courts was referred to a Swedish judge to decide, and M. de Visscher says:

> "Cette question préliminaire de l'épuisement des recours internes fut soumise à l'arbitrage de M. Algot Bagge, juge à la Cour suprême de Suède. En substance, la décision de l'arbitre fut favorable à la

thèse finlandaise. Son principal intérêt se trouve dans une étude très fouillée des conditions d'application de la règle de l'épuisement des recours internes. L'arbitre a admis que, du point de vue formel, il existait une possibilité pour les réclamants d'interjeter appel, mais que les points de droit qui auraient pu en former la base n'étaient aucunement susceptibles de modifier la décision rendue par les premiers juges. Formellement ouverte aux intéressés, la voie de l'appel ne pouvait leur être d'aucun secours pratique. Tout comme le Gouvernement finlandais, l'arbitre a fait ressortir qu'aucun grief de déni de justice n'était articulé ni contre la législation britannique ni contre les juridictions britanniques ; les réclamants étaient dispensés d'épuiser une voie de recours théoriquement ouverte, non parce qu'il y avait déni de justice, mais simplement parce qu'on ne pouvait considérer comme une voie de réformation une instance incapable de réformer la décision entreprise, ni comme un « remède local » un recours qui, clairement, ne pouvait plus remédier à rien."

That is the general principle. You cannot be obliged to have recourse to a Court of Appeal if, taking a fair view of the law and the circumstances, it is virtually a foregone conclusion that the Court of Appeal would be bound to reject your appeal. I would like just to quote very shortly from the decision on that particular point which is contained in a Foreign Office publication of 1934, "recording the decision rendered in conformity with the agreement concluded on September 30th, 1932, between the Government of Finland and the Government of Great Britain and Northern Ireland for the submission to arbitration of a question connected with a claim in respect of certain Finnish vessels used during the war". For the purpose of my citation, Mr. President and Gentlemen of the Court, I do not want to read much, but simply to give you page references in case you may find it of interest to look at them hereafter, but I want simply to read one sentence. The page references, to begin with, are on pages 16 and 17, where it will be found that the principles that I have read from Judge De Visscher's publication are confirmed in what the Arbitrator says. The first reference, therefore, is on pages 16 and 17, but there is a reference also on pages 26 and 27 from which I would like to quote one sentence which does perhaps expand a little on what Judge De Visscher said. I would remind the Court, and I say it against myself, that in that case there was in law no appeal from a decision of fact from the Maritime Tribunal, but in spite of that, the learned Arbitrator says:

"The Parties in the present case agree that the local remedies rule does not apply where there is no effective remedy",

"effective" is the word used. And the British Government, as previously mentioned, submit that this is the case where a recourse is obviously futile. It is evident that the British Government there include not only cases where recourse is futile because on formal grounds there is no remedy or no further remedy, for example where there is no appealable point of law in the judgment, but also in cases where on the merits of the claim recourse is obviously futile, for example where there may be appealable points of law, but they are obviously insufficient to reverse the decision of the Court at first instance. Now I, with

respect, call attention to the words "where, on the merits of the claim, recourse is obviously futile". If you can say that the Appeal Court, looking at the case you will present, is, I do not say certain, but from a common-sense point of view almost certainly will reject your appeal, it cannot be said against you that you should have appealed in spite of that advice which was given to you by your legal advisers and in spite of that opinion which you yourself formed.

Mr. President and Members of the Court, how, then, does that principle apply in the circumstances of this case? May I first make this preliminary observation, which I would have hoped it might not even be necessary to make. There is, of course, not the slightest suggestion against the good faith of any English judge: if there had been, I would not personally for one second have consented to be associated in any way with this case. That is not said for one second. Now what is said? Mr. Justice Hill tried the case for eight days; it was a case which involved very largely questions of fact depending on what view Mr. Justice Hill took of particular conversations, particular interviews and so on. Without the evidence which we say the British executive, not judicial, authorities wrongfully withheld from the Court and from us, there would have been very little chance indeed of inducing the Court of Appeal to take a different view on the facts from that reached by Mr. Justice Hill after a prolonged enquiry lasting for the period that I indicated. It is, I think, of great importance to bear in mind what is the gist of this complaint. The complaint centres upon a series of facts: the breach of contract, the contract itself, and then, as an incident in that series of facts, the circumstance of the British executive authorities, having in their knowledge certain information as to evidence which could affect the issue of this case, proceeding to keep that information to themselves and to present a case which was contrary to what that information would seem to indicate. That is the gist of the complaint here. It is not necessary for the purpose of the immediate point to which I am addressing myself, to argue whether or not, under rules of court, the British executive authorities were justified in keeping these letters, or minutes, to themselves. That does not arise at the moment. But they did, in fact, do so, and Mr. Justice Hill, in the absence of that information, arrived at a conclusion of fact which, in the absence of that information, it was in the highest degree unlikely that a Court of Appeal would interfere with. So far as appeal from Mr. Justice Hill's decision, therefore, is concerned, within the meaning of the general principle which I have sought to formulate from Judge De Visscher's formulation of it, appeal from Mr. Justice Hill's decision without that further information would have been virtually doomed to failure. There would have been little matter to enable the Court of Appeal to say that they thought that the judge of the first instance had come to a mistaken conclusion. Therefore, the mere fact that without that further information Mr. Ambatielos did not appeal from Mr. Justice Hill's judgment does not produce the result that he failed to have recourse within the meaning of the relevant international legal principles to all remedies open to him under domestic English law. Then comes the question of the appeal to the Court of Appeal on the question of the admission of evidence. It is said against us: "You could have appealed to the House of Lords from the Court of Appeal's refusal to allow you to use the

fresh evidence that you obtained"—when I say "you", I mean Mr. Ambatielos. That is what is said. Now, Mr. President and Members of the Court, here I do appeal, and rely upon the circumstance which I can fairly say is very well known as deeply ingrained in English legal principle, that an appellate court is very slow indeed—and reluctant—to interfere with the decision on a matter of discretion of the court below. I am not arguing before you that an appellate court will *never* interfere on a matter of discretion upon which the judge below has decided, but broadly speaking an appellate court will not interfere unless it is perfectly clear that the judge in the court below, in exercising his discretion, proceeded to exercise his discretion upon some mistaken principle of law. We, in our jurisprudence—when I say "we", I am now speaking from that side of the table and not this side of the table—in English jurisprudence, if I may so put it, we do accept it as of cardinal importance that if an Act of Parliament says to a judge: "This is a matter on which you are to exercise your discretion", an appeal court should not overrule him, except, as I have said, in circumstances in which he has proceeded on a mistaken principle of law.

Now, the British Government cite in their Rejoinder two cases decided in the English courts. One is the case of *Evans* v. *Bartlam*; it is on page 267 of the British Rejoinder—in a note on the bottom of this page—one is the case of *Evans* v. *Bartlam*, and the other is the case of *Ellis* v. *Leeder*. The Court will see the citation at the bottom of page 267. It is perfectly true that in *Evans* v. *Bartlam*, the House of Lords did say that there is an overriding discretion in an appellate court, even on a matter of discretion on which the judge below decided, to interfere if the general requirements of justice so require. It is in practice—and I do not know whether this submission would commend itself to Judge McNair and whether it would coincide with his experience—very difficult, if the court below has proceeded upon principles of law as to which criticism cannot be directed, to satisfy a court of appeal or the House of Lords that they ought to interfere. *Evans* v. *Bartlam* is the first case which the British cite. The second case is the case of *Leeder* v. *Ellis*, which was decided in the Privy Council and in which I personally appeared for one side. I would simply say this about *Leeder* v. *Ellis*. *Leeder* v. *Ellis* was a case which exemplifies, in point of fact, the difficulty of satisfying an appellate court in our jurisprudence that where the matter decided is one of discretion, it ought to interfere. In *Leeder* v. *Ellis*, the matter had come from New South Wales in Australia. The claim was a claim under the New South Wales Testators Family Maintenance and Guardianship of Infants Act. That was an act which provided, broadly, that if a testator died and did not make adequate provision for his wife or certain other dependants, she could go to the court and the court *in its discretion* (and I underline the words "in its discretion") could make provision for her if it thought fit. In the particular case, a wife went to the court, and the court in New South Wales refused to make an order in favour of the wife because the judge thought that the estate turned out to be so small that there would be little object to be gained by making an order in her favour. Part of the estate consisted of a cottage, and the evidence before the learned judge, such as it was (it was not very convincing evidence), was to the effect that the cottage was worth £1,000 and

that there was a mortgage of some £880 upon it. After the learned judge had refused to give her relief on the grounds which I have indicated, namely, that there was practically nothing in the estate, further evidence came to light which would seem to establish that the cottage was worth some £2,500. It might well have been thought that had that further evidence been before the learned judge, he might have come to a different view and might, had he known that the cottage was really worth £2,500, have granted her something out of the estate. The case was appealed, ultimately to the Supreme Court of Australia, and from the Supreme Court of Australia it was appealed to the Privy Council. The Privy Council affirmed the decision of the learned judge. The Privy Council said that it would not allow the further evidence to be admitted and the further evidence not being admitted, there was no reason to interfere with what the decision of the learned judge had been on the evidence that he had before him. Now that I do refer to in a little more detail, as indicating in practice the reluctance which our judges—judges in the United Kingdom—feel in acceding to applications to interfere with a matter of discretion on which they ruled in the courts below. And I thought it might just have been of some assistance if I cited from the report of the case which is in 1952 2 All England Reports a short passage in an earlier case dealing with the admission of evidence, and the passage that I would desire to cite which was cited in the opinion of the Privy Council, is this :

> "The appellant"—it is at page 818—"The appellant has applied for leave to adduce fresh evidence, but I am of opinion that it ought not to be granted. The application is for an indulgence. He might have adduced the evidence in the court below. That he might have shaped his case better in the court below is no ground for leave to adduce fresh evidence before the Court of Appeal. As it has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced after a case has been discussed in court."

Now, Mr. President and Members of the Court, the Privy Council were approving and acting upon that statement of principle. Going from that situation, therefore, to the situation which confronted Mr. Ambatielos when the Court of Appeal had refused to allow him to introduce further evidence that he had obtained, how must the matter have seemed to his legal advisors at that time ? You have, in the documents before you, in the Annex to the English Counter-Memorial, the decision of the Court of Appeal, and it appears on page 205 of that document. I do not want to read it, although it is short, but I would ask the Court to be so kind as to study it, and the Court will there see that the Court of Appeal do deal with the matter as a matter of discretion : they give their consideration to it, and in the exercise of their discretion, they form the view that they ought not to allow the further evidence to be adduced.

In the light of the principle which I have cited from our English jurisprudence, what real chance must there have seemed to be to the advisors of Mr. Ambatielos of successfully appealing to the House of Lords from that judgment of the Court of Appeal ? It was a matter of discretion. Lord Justice Bankes cites a well-known passage from the case of *Nash* v. *Rochford Rural District Council* in terms very similar to the citation that I made from the opinion of the Privy Council in the

case of *Leeder* v. *Ellis*, and I put it to the Court that it must have seemed to those who were advising Mr. Ambatielos when the Court of Appeal rejected his application for permission to introduce further evidence that an appeal against that decision in a matter of discretion to the House of Lords would have been virtually hopeless.

Mr. President and Members of the Court, it is said: "You should have appealed from the judgment of Mr. Justice Hill." The answer I give is: that without the further evidence which we say was wrongfully withheld, there would have been very little, if any, chance of successfully appealing from Mr. Justice Hill's judgment. Then, with regard to the further evidence, the Court of Appeal having refused to allow that evidence to be given, there would have been very little, if any, and I think I may go further and say, no, chance of successfully appealing from that judgment of the Court of Appeal. I, therefore, to sum up this particular part of my submission, would say this: in the circumstances, there would have been virtually no prospect of successfully appealing from either judgment. Applying, therefore, the principle as enunciated in the Finnish shipping case, it cannot be said against Mr. Ambatielos that he ought nevertheless to have gone through what would have been *a priori* a procedure doomed to failure, namely, appealing against two judgments, when there was virtually no ground for challenging them at all in the actual circumstances.

And that throws out into relief and makes clear and highlights what is a substantial ground of complaint that the Greek Government in these proceedings has against the United Kingdom Government, and that is: having broken this contract, it is not content to let the matter rest there, but by failing to produce vital evidence, it prevented Mr. Ambatielos from getting the relief to which he was plainly, in my respectful submission, entitled, before the courts of the United Kingdom, who, I respectfully submit, when their reasoning is examined, had they had that further evidence before them, would undoubtedly have afforded him the relief for which he counter-claimed in the action before Mr. Justice Hill.

[Public sitting of March 28th, 1953, afternoon]

The second subject which I would like to dispose of is the question of delay. The Court will remember that I have just completed my submission on the exhaustion of the domestic remedies, and I now want to deal with the cognate subject of delay which was a matter relied upon by our adversaries. I would like, by way of introduction, to refer to a passage on page 39 of your judgment, because, although there seems to have been a little uncertainty in the minds of those who have addressed the Court as to what was intended by this passage, I respectfully submit to the Court that it is clear what the Court had in mind. On page 39 in your judgment of last July, you said:

> "As regards the reference in the Counter-Memorial to the Hellenic Government being precluded by lapse of time from submitting the present claim, the Court holds that this is a point to be considered with the merits and not at the present stage."

The question is, what the Court meant to convey by the words: with the merits". I would respectfully submit that those words were meant

to refer to the stage at which the final substance of this case is adjudicated upon ; "with the merits" must mean when the matter finally comes to be disposed of, if it does, before a Commission of Arbitrators, or before this Court, sitting as an arbitral tribunal. I would respectfully submit that the words "with the merits" can bear no other signification than that.

Mr. President, that is my first submission with regard to this particular defence that is raised, and I would prefer not to treat of it further in my address to the Court to-day. However, my adversaries have dealt with the matter, and therefore, against my will, I feel constrained to offer some observations to the Court. I, however, do not resile from what really is a preliminary objection that I take, that my adversaries are precluded by the direction of the Court in July last, in the words to which I have just referred, that this topic of lapse of time is not to be discussed to-day, but is to be reserved to the stage when the final merits of the case are discussed. Having made that preliminary objection, I would desire, as I have said, to offer some observations on this defence. It was a defence, or argument, which was advanced by Mr. Fawcett. I confess that I found it difficult to follow what his argument was. He started off, as I understood him, by conceding that the doctrine of prescription by time finds no place in international law. If he meant to concede that, I should have thought that that was an end of that particular point, and I do not really know what more there is to discuss on that matter. I would add this : I submit that in making the admission that he did, that prescription is not part of international law, he was making an admission that he was bound to make, because the whole current of authority in point of fact establishes that prescription, although forming part of the domestic juridical systems of many, if not most, countries, in international jurisdiction finds no place at all. I would refer the Court to page 100 of the Greek Memorial, where we seek to refer to certain authorities that establish that proposition. If the Court would be so good as to turn to page 100, they will see a reference to the case of *David Adams*—that is a case in which there was a claim by the United States for compensation for loss through seizure of ships. The ships had been seized and condemned as prize, and that had taken place in 1889. The dispute, however, was tried as late after 1889 as 1922—thirty-one years later than the incidents out of which the dispute arose took place. Therefore, one has positive authority in the *David Adams* case which is reported in the *American Journal of International Law, 1922*, Volume 16, at pages 315-322, in support of the proposition which Mr. Fawcett started by admitting.

Mr. President and Members of the Court, we also have the high authority of the Permanent Court of Arbitration at The Hague in 1902. That again is a case which is referred to in sub-paragraph *(b)* on page 100 of our Memorial, and it is referred to and set out in the *Revue générale de Droit international public, 1902*, document page 25. We cite also a third case, the case of *George W. Cook;* that is referred to in our sub-paragraph *(c)* on page 100. I think I should disclose this as a matter of frankness to the Court in pursuing my researches last night and looking again at that case as reported, I found that the case immediately before that case contained expressions in a contrary sense by the judge that tried it. If the Court would desire to look at that case, I will give the reference which is in the *Annual Digest of Public International Law Cases*, years 1927 and 1928, and the case in which the doctrine was

recognized is on page 263, *Saropoulous against the Bulgarian State.* There is a case which Mr. Fawcett did not cite, but I feel that in candour I ought to call the attention of the Court to it because I lighted upon it by accident, but in spite of that one contrary statement, the whole current of authority, as Mr. Fawcett no doubt agrees, is categorically in favour of the view that prescription finds no place in international law. It is categorically laid down in the case to which I referred, which was tried by the Permanent Court of Arbitration at The Hague in 1902, referred to in sub-paragraph *(b)* on page 100, and I think I would just call the attention of the Court to the short and concise statement to that effect contained in the judgement rendered in that case. The reference is in the *Revue générale,* and it is, as I have said, on page 25, and at the bottom of page 25 the Court will find this passage as forming part of the judgment of the Court :

> "Considérant que les règles de la prescription étant exclusivement du domaine du droit civil ne sauraient être appliquées au présent conflit entre les États en litige."

There is, therefore, Mr. President and Members of the Court, the clearest authority in favour of the view which I am supporting, and indeed which I am supporting possibly unnecessarily, because Mr. Fawcett admits it as being a correct statement of international law. Apparently what Mr. Fawcett was doing was to say : I concede that prescription does not apply in international law, and I concede that that is established, but I ask this Court, as a matter *primæ impressionis*—to quote, I believe, the words that he used—to overrule what is the established principle of law. I can only say that I respectfully submit that there is no conceivable warrant for Mr. Fawcett asking the Court to do that—this is a court of law, and I respectfully submit that this Court would desire to abide by the established rules of international law of which that is one. I would accordingly ask the Court to say that the objection based upon prescription cannot find any place in the decision which the Court arrives at in this case. I would only add this : Mr. Fawcett, in asking this Court to overrule the existing law, did not refer to a vestige of authority which might justify him in making that request, but referred to *Pomeroy's Lectures,* 1886. I would only call attention to the fact that the cases and judgments to which I have referred were all later than that in date—one being, as the Court knows, in 1922 ; one being in 1902 ; and one in 1927. Therefore that is the law, and I would ask this Court to say unhesitatingly : we accept that as the law—as indeed Mr. Fawcett agrees that it is—and we will not think for a moment of overruling an established principle of law. Certainly we would not think of overruling it when the subject has been only sketchily touched upon, as it necessarily has been, within the ambit of this particular debate that we are having at a preliminary stage in this case. If you were ever asked to establish a new principle of law, I would apprehend that the Court would desire to have extremely full argument and citation of all the relevant authority and would not dream of setting up a completely new principle at an intermediary stage of the case on such very sketchy argument as perforce has been addressed to the Court at this stage.

Mr. President and Members of the Court, I would nevertheless like to make one or two observations on what in fact took place. You have heard it said on more than one occasion that the years rolled by and the Greek Government did nothing. In point of fact, if you study the notes that passed between the two Governments, you will find that that is very far indeed from the truth, and I must in any event ask the Court to be so good as to look again at the Mémoire and to take note of certain page references which I would like to call to the attention of the Court. In the annexes to our Mémoire possibly the notes from the Greek Government to the British, and the British Government's replies have been set out in slightly inconvenient form, and I apologize that that should be the case. If you look at the many notes that passed, you will find that those who put the Memorial together first set out all the notes from the Greek to the British Government and then set out all the replies from the British Government to the Greek Government. It is therefore possibly not very easy to get a chronological view of what took place, but if the Court would be so kind as to take note of these page references they will get a better apprehension of what really passed between the two Governments. I would summarize what passed between the two Governments in this way. The Greek Government first took this matter up within a year or so after the case had been tried before Mr. Justice Hill in 1925. They then asked in a purely friendly way that the matter might be considered by the British Government because they, the Greek Government, felt that their national, Mr. Ambatielos, had been extremely badly treated. That was a polite beginning. They met with a blunt refusal. The matter then did not progress further, I agree, until 1933, but from 1933 onwards there was a succession of Greek notes, all asking for a friendly arbitration. They set out in great detail the complaint that the Greek Government was making of the treatment meted out to Mr. Ambatielos, and they asked that the British Government should agree upon a voluntary basis that the Greek Government's grievance should be tried before some friendly voluntary arbitral tribunal. Those notes came almost annually from the Greek Government. There was absolutely no attempt by the British Government to meet that request. Each Greek note was met by a long reply by the British Government ending up in each case with a most categorical refusal to accept any voluntary arbitration at all.

Now, Mr. President and Members of the Court, how far all this may be relevant I am not certain, but I have to deal with it because it was relied upon against us, but the fact is, as emerges from these notes, that the Greek Government was saying year in and year out we have a grievance against you, the British Government, let us be sensible and arbitrate it, let us set up some kind of arbitral commission, and bring it before that commission, and I would put it before the Court, put the view before the Court, that the replies of the British Government were very unhelpful to what was a perfectly reasonable suggestion made by the Greek Government, and so matters dragged on. This annual, or almost annual, controversy went on through the nineteen hundred and thirties, until at long last the Greek Government becoming convinced that if there was to be an arbitration it was not going to be an arbitration by consent, as one might have hoped, but it would be necessary to make the British Government arbitrate. Then at long

last, having no doubt been reluctantly impelled towards that conclusion did the Greek Government in 1939 say: "Well, if you will not be sensible and arbitrate voluntarily, we will see whether there is any legal method whereby you can be made to arbitrate." Now if one is considering upon the footing of merits the rival attitude of the two Governments, one Government has a grievance which it considers sufficiently important to bring to the notice of another Government, the Government which asks for voluntary arbitration is pursuing the sensible course; and it is not the less sensible when, having met with no response to a reasonable proposal at long last, it forms the conclusion there is no course open to it but to say: "If you will not arbitrate voluntarily, we will see whether there is any process of legal compulsion whereby you can be made to arbitrate." Having formed that view in 1930, the Greek Government does then rely upon this Treaty of 1886. Now I think, I put it before the Court, that really the Greek Government is certainly not the Government that has anything to apologize for in its behaviour before this Court so far as the interchanges are concerned.

Now, Mr. President and Members of the Court, the paging which I would respectfully draw the attention of the Court to is as follows: page 66, on the 12th September the Greek Government asked the British Government to investigate the matter; page 103, on the 30th October 1925 they meet with a blunt refusal; page 70, the Greek Government ask for voluntary arbitration on the 7th February 1933; page 105, a blank refusal from the British Government on the 29th May 1933; page 74, the Greek Government again asks for arbitration on the 3rd August 1933; page 113, the United Kingdom Government again blankly say "No" on the 28th December 1933; page 83, the Greek Government says: "Well, at least arbitrate on a preliminary question whether Mr. Ambatielos exhausted all his remedies in the domestic tribunal." That note was dated 30th May 1934. Page 121, on the 7th November 1934, the United Kingdom Government again say "No", just "No". Page 96, the Greek Government send another note on the 2nd January 1936 suggesting arbitration by a mixed arbitral tribunal; page 127, the United Kingdom Government on 1st July 1936 again refused. Then comes page 98, the Greek Government say "Well if you will not", they say in effect: "If you will not be reasonable and arbitrate this by agreement, we are going to rely upon the 1886 Treaty", and they say that on the 21st November 1939. Page 127, the United Kingdom Government on the 26th December 1939 again say "No"; and then the war intervenes and by the end of the war we are not so far away from to-day, and this case has been dragging on for some months already. Well, now, I would ask whether the more sensible behaviour is on the part of the Government which suggests reasonable measures of adjusting this difference between them or on the part of the Government which puts up a completely blank stone wall? "No". Well, now, I simply leave those considerations before the Court because if it is said that my Government is the Government, that the Greek Government is the Government which is open to criticism, I would very respectfully submit that there is a very different view from that which might well be entertained by a completely impartial observer from outside of the attitude adopted by these two Governments.

Mr. President and Members of the Court, I became more puzzled as the argument progressed. I looked again at Mr. Fitzmaurice's speech : I think it would be hardly an exaggeration to say that something like the first seventeen pages of it was a constant repetition of the theme that the presentation by the Greek Government of its claim, based on the 1886 Treaty, was tongue-twisting, mental gymnastics, verbal contortions, deliberate obscurity and a number of other similarly picturesque and graphic expressions. And when I got to page 382, I found this passage :

> ".... in our opinion, it adds up to this, that the contention that the Ambatielos claim is based on the 1886 Treaty is not a serious one, that it represents a view which has never been seriously entertained, even by the Hellenic Government themselves, and that it is simply a stratagem or device employed for the ulterior purpose of trying to compel arbitration where no real obligation to submit to arbitration exists".

I, representing the Greek Government, must try and resist, I know, the temptation to be drawn into matters which have precisely nothing to do with the question at present before the Court. Let us assume that all those graphic descriptions are accurate descriptions of the argument which my clients advance, based on Articles I, X, XII and XV of the 1886 Treaty. Let us assume that that is all correct. What in the world has it got to do with the short point that this Court is at present concerned with, namely, the question whether a claim has arisen which is based on that Treaty ? But, of course, appearing for the Greek Government, which has been the victim and object of these slightly vituperative descriptions of its case, what am I to do ? One course might be to dismiss them with contempt ; another course is, perhaps, to point out that if our argument, based on the 1886 Treaty, represents a process of mental gymnastics, we, after all, have a very respectable precedent in the British argument in the Anglo-Iranian case. We are putting forward precisely the same argument as the British Government did in the Anglo-Iranian case. Mr. Fitzmaurice, when he was addressing you, said (I think I remember his words correctly) that we reproached him for putting forward that argument. He really must disabuse his mind of that : we do not "reproach" him—this is a court of law. The British Government, in the Anglo-Iranian case, was trying to find a legal way of establishing before a court of law that there was jurisdiction in the court to try the grievance of which the British Government complained : so exactly are we. The Greek Government is doing precisely the same as the British Government. I feel sure that Mr. Fitzmaurice will not contend before you that there is any copyright in the argument, and what it was right for his clients to contend, it must necessarily be wrong for my clients to contend. He did offer a few observations to try to dispel grounds for a reproach which he wrongly conceived had been levelled against him, and he said it was quite different when the British Government wanted to advance this argument. But I would like you to look at what the British Government said. I would be grateful if you would take the record of the judgment in the Anglo-Iranian case : the reference I would like to give you is on page 108 of this Court's judgment in the Anglo-Iranian case. This Court was trying the following issue then : the Iranian Government had made a Declaration in 1932, accepting the jurisdiction

of the Court in respect of disputes touching upon treaties, but the British Government felt, or feared, and this Court actually held, that that Declaration by the Iranian Government on its true construction only related to treaties entered into after the Declaration was made in 1932. Mr. Fitzmaurice's clients, perfectly properly, and I certainly do not criticize them in the slightest bit for it—on the contrary, I applaud them—faced with that legal difficulty, thought to themselves: well, how could they get round it—and the way that they thought they would get round it was to rely upon a treaty of 1857 which contained a most-favoured-nation clause, just in exactly the same way as the Greek Government rely on a most-favoured-nation clause in a treaty dated 1886, and the British Government, relying on that most-favoured-nation clause in that Treaty of 1857, said : oh, in 1934 the Iranian Government entered into a treaty with Denmark, Article IV of which contained the promise that subjects of each government would be treated according to the practice and principles of international law. So, said they—perfectly properly said—we can get round this legal difficulty with which we are confronted and we can say : after all, that treaty with the Danish Government was entered into by the Iranian Government after 1932, namely, in 1934, so that we can say that there was, within the meaning of the Declaration, a dispute between the British and the Iranian Government, touching upon a treaty entered into after 1932, namely, touching upon the 1934 Treaty between the Iranian Government and the Danish Government. Well, now, that was an argument. I do not know—would Mr. Fitzmaurice call that "tongue-twisting" and "mental gymnastics" ? Is that mental gymnastics ? It is more elaborate as an argument than the argument that we are presenting : it really does border a little on the burlesque if the British Government, having put that argument forward themselves in 1952, in 1953, through their legal representatives, think it proper to load the Greek Government with nearly seventeen pages, I will not say of solid invective, but diluted invective at any rate, for really following the highly respectable precedent set by the British Government themselves one year before. I look again at this passage, the passage which I cited, *Compte rendu* of Wednesday, page 382 : "it is simply a stratagem or device employed for the ulterior purpose of trying to compel arbitration where no real obligation to submit to arbitration exists". Well, there is a Latin tag : *Mutato nomine de te fabula narratur*. I wonder whether Mr. Fitzmaurice would like to substitute in the passage that he has used his own clients for my clients, and I am quite certain that the answer is, and the proper and right answer that he would give : of course, he would not, because the British Government were perfectly entitled to use that argument, it was not a stratagem or device on their part, it was a legal submission to a legal court of law. But just as it was not a stratagem or device on the part of the British Government, so is the argument which we now propound not a stratagem or device on the part of the Greek Government. The Greek Government desires its grievance to be tried, and desiring its grievance to be tried and finding itself in the presence of a court of law, asks itself : is there any legal ground upon which it can base its request in exactly the same way as the British Government, faced with a similar situation last year, sought on the same lines in asking whether it could find a way of legally presenting its request that its grievance should be tried as against the Iranian Government ?

I could not help remembering the argument that Mr. Fitzmaurice addressed to this Court yesterday or the day before, to the effect that a most-favoured-nation treatment could not absorb or incorporate an obligation to treat subjects of another country according to the principles of international law. He expatiated upon that in some detail. I wonder whether, when he was presenting that argument to this Court, it occurred to him that he was using his industry and ingenuity to destroy the argument which the British Government, his own clients, had equally presented to this Court in 1952 on exactly the same lines.

Mr. President, I do not want to take more time on this particular matter, but I think I must say this. My astonishment at this line of argumentation on the part of my adversaries really reached the summit when we listened to Mr. Fawcett's argument. I took down, because I thought it was such a remarkable passage, what he read out, and he read out, Thursday, page 427, the following passage:

> ".... By dark allusions and half-statements they hope to create" —"they" is the Greek Government—"an atmosphere of guilt around the United Kingdom; they hope the Court will say, even if it cannot see clearly through the circumambient smoke of the Greek pleadings: 'There must be fire here—let us order arbitration.'"

Mr. President, Members of the Court, it occurred to me to wonder whether, when Mr. Fawcett was composing that passage (and it must have taken him some time), he was under the impression that this Court sat with a jury. I should have thought that when he got here and found that this Court does not try cases with a jury, he might have thought it right to put a pen through that particular passage. I would like to make a reference to Greek literature, the literature of my own clients. Aristophanes, some 2000 years ago, wrote a comedy about Cloud Cuckoo Land, and I could not help thinking to myself that conceivably Mr. Fawcett thought we were living for the time being in Cloud Cuckoo Land, and it might be of some use if, in order to try to make my way through the "circumambient smoke" which shrouds Cloud Cuckoo Land, if I just try to recall to Mr. Fawcett something of the reality of this case. What is the reality? It is said that I am weaving "dark allusions" to try to attribute blame to Mr. Fawcett's clients. The plain, unvarnished truth here is that the Greek Government complain of the fact that one of their nationals paid £1,600,000 for nine ships, got no ships, got nothing for his money: £500,000 of that £1,600,000 was specifically paid in order to ensure that the ships should be delivered at a certain time—half a million pounds—they were not delivered at that time; the British executive authorities then kept back evidence which prevented Mr. Ambatielos getting relief from the British courts. He got no relief but was ordered to pay some £350,000 instead, and now, all that having happened, what are we discussing to-day? The Greek Government wants to get its grievance tried: the British Government is mustering all the industry and the ability and the research of the Foreign Office to try to establish a preliminary technical objection to prevent the Greek Government even getting before an arbitrator to see whether they can establish their grievance. I really think that I ought to remind the Court and Mr. Fawcett, if he has forgotten it, what that letter, about which there is so much controversy, does say on page 32

of the Memorial, and I would be grateful if the Court could just glance at it. The substance of this case is held in that letter. Mr. Laing writes at the bottom of page 32:

> "The Eastern freight market at that time being very high, I came to the conclusion and made my deductions before yourself and the Committee of the Ministry of Shipping, that provided these ships could be delivered at the times stated by our clients on behalf of the builders, they were worth, with their position, owing to the freight that they could earn, another £500,000, and this I added to what I considered an outside price for the ships. It was only by this argument that I induced Ambatielos to purchase the ships."

Now that is the gist of this case. That was what was withheld from the British courts and it was withheld from the British courts by the action on the part of the British executive authorities, of which the Greek Government complains, and it is to avoid that issue being tried that all this industry is being deployed before the Court to-day in order to establish a preliminary technical obstacle in my way. I will not say more than that I very much hope—and I hope Mr. Fawcett will forgive my saying this—that the Court will not, in the further stages of this case, be invited to listen to any more of these slightly ridiculous purple passages.

Mr. President and Members of the Court, having passed from those troubled waters into more smooth waters, I considered what should be the points that I should make on the actual legal submissions that Mr. Fitzmaurice and Mr. Fawcett advanced. On page 377 of Wednesday's *Compte rendu*, Mr. Fitzmaurice summarizes in four propositions the arguments on which he relies. The first is one that I have already dealt with, that the claim must be based on the 1886 Treaty. As to that I say no more. His next point is that the 1886 Treaty must relate to the same subject-matter as the claim in this particular case, and he goes on to argue that it does not, because it refers to matters of commerce, and this is not a claim relating to commerce. The next argument was that really the substance of the claim here was for a denial of justice, but the treaty in question is a treaty of commerce and navigation and cannot incorporate either the general principles of international law or any other provisions of any other treaty which would cover a claim based on a denial of justice. His final argument is one to which I have already referred, and which includes really all the others: it is the argument that for the Greek Government to succeed in its present request, it must itself establish that if the facts it alleges are true, the provisions of the 1886 Treaty would be broken, and that part of the argument was actually left to Mr. Fawcett, and he developed it yesterday. I want now to make some observations on those three last arguments. I do not want in this reply to canvass them all again in detail, because that has already been done by Me. Rolin, but may I make these few comments.

I take, first, the second of those arguments: the argument which was to the effect that really the claim put forward here is a claim in respect of a faulty legal process, a denial of justice, not a claim in respect of some commercial subject, and that, as the 1886 Treaty dealt only with matters of commerce, it could not and did not cover

or relate to the subject of the present dispute. That is Mr. Fitzmaurice's second argument, and I want to offer one or two comments on that. I want to begin by reminding the Court that we rely on Articles I, X, XII and XV of the 1886 Treaty, and that has been frequently stated. Let us look at Article X. Article X is on page 50 of the Memorial. It is the article on which we rely for the purpose of incorporating the most-favoured-nation provisions of other treaties entered into by the United Kingdom Government. The words which are relevant in that Article are these :

> "The Parties agree that [now these are the relevant words] in all matters relating to commerce and navigation",

the words are "in all matters relating to commerce". Those words are wide. Those words include not merely the core and kernel of commerce itself, but they cover all words which, as it were, describe those things on the outside, the circumference of what may be described as commerce itself. They are matters relating to commerce—matters which have some connection with commerce—matters which touch commerce—matters which in some way are placed in relationship to immediately commercial transactions. It is a wide scope that those words cover, and the question which the Court really has to investigate is whether it can be said that the gist of the Greek complaint comes within those wide words. Now I would respectfully say to Mr. Fitzmaurice and Mr. Fawcett that they make a slight error in describing the Greek Government's claim as simply a claim in respect of a legal proceeding. It is not. The claim is a claim which centres upon a series of transactions which form one coherent whole. What is the grievance of the Greek Government ? It begins with the breaking of the commercial contract relating to the purchase of the nine ships. We say, beginning with the history out of which the matters of our complaint arise, that the British Government entered into a commercial contract with Mr. Ambatielos. That contract contains certain incidents. The important incident for this purpose was that the ships were to be delivered at a certain specified time, because Mr. Ambatielos wanted to take advantage of the high freight rates which appertained when the contract was entered into. We then say as the next stage in that totality of events that that contract was broken because the ships were not delivered within the specified time. If the matter had rested there, of course Mr. Ambatielos could have gone to the British courts to get redress. He tried to do so, but then he found himself hindered and obstructed by what represents the next stage in this same totality and single sequence of events, namely the fact that the British Government in effect (if I may summarize what took place) prevented him from getting his relief, because it withheld from him and from the Court evidence which was essential to enable him to get that relief, presenting itself a case in conflict and contradiction to that evidence which it possessed. We rely on the totality of those events and also on each of them individually. Now that is the gist of it. It is commercial from beginning to end. It centres upon a commercial contract and the breach of it, and then another action withholding the evidence closely intertwined with what had gone before, and it is each of these things and the whole totality of those things which give rise to the complaint which the Greek Government brings to-day. Now are those not matters relating to commerce ? If they do not relate to commerce,

what do they relate to? Buying nine steamers, that is a commercial transaction; it is nothing else. The withholding of evidence was the withholding of evidence directly relating to that transaction. The relief that Mr. Ambatielos wanted to get, was relief from the courts for the breach of that same commercial transaction, and no other relief. The whole thing began with a commercial transaction; it continued within the ambit of a commercial transaction; and it all hinges upon matters which relate to that commercial transaction and accordingly which fall within the scope of the words "in all matters relating to commerce". Mr. Fitzmaurice, in his argument, said: what of the case of a diplomatic representative who travels by air and who is, I forget whether arrested, or searched, or something of the sort. He said that would be a case which clearly related to diplomatic privilege, and I agree, and he then said: you could not say simply because of the fact that the courier or representative or whoever he was, was travelling by air, that it was a case which related to air conventions. I also agree. But what I say about his example is this: if you want to draw a true analogy between that example and the present case, you should say: does the fact that the courier was travelling by air prevent you from saying that his complaint was a complaint relating to diplomatic privilege—and of course it does not. And so, here I say, does the fact that one of the incidents in this series of events was that my client was obstructed in obtaining the relief he asked from a court, a commercial court, prevent you from saying that his complaint is a complaint which refers to commerce, and of course it does not. In Mr. Fitzmaurice's example, travelling by air did not prevent the gist of the matter being looked at, and the gist of the matter in his example was the interference with the diplomatic privilege of the courier. Equally in my case, the fact that proceedings in a court formed part of the matters out of which the complaint arises does not prevent you from saying that what really is the matter in dispute is a commercial matter, or if I may borrow the words in Article X: "matters relating to commerce". It is "matters relating to commerce" which give rise to this dispute. I thought possibly that I might point what I was saying by making this assumption: in the actual case Mr. Ambatielos went to the ordinary courts, but supposing we had this same contract for the purchase of ships and supposing, as so many commercial contracts do and as this one did (as is in the experience of everybody), the contract for the sale of ships had contained an ordinary arbitration clause; supposing it had contained a clause which said: if there is a dispute between the Parties as to anything arising out of this contract, it shall be referred to an arbitrator, each Party shall appoint an arbitrator, and there shall be an umpire and so on—in the ordinary form in which one has seen dozens and dozens of commercial contracts; and supposing precisely the same thing had happened as did happen, but that you substitute the arbitrator for the judge, and supposing Mr. Ambatielos—going before the arbitrator to ask for damages for breach of the contract—found that he could not prove his case because some of the materials he required in order to prove his case were not available to him owing to a default on the part of the other Party to the contract. Well, now, would anybody ever for a moment say that his grievance was not a grievance in a matter relating to commerce—it would be quite unarguable; I would submit to the Court that in those assumed

circumstances you would be dealing with a matter which related to commerce, and equally here I submit that it is quite unarguable that one is not dealing with a matter relating to commerce—one obviously is; a commercial contract, a dispute arising out of it, an unsatisfactory result to that dispute because of what we complain of as wrongful action on the part of the other Contracting Party in keeping information from us. Now, therefore, I say in answer to the first point, the first argument that Mr. Fitzmaurice uses—the argument to which I have just referred—I say in answer to it, this was commerce. If Mr. Fitzmaurice says, as he rightly says, that the 1886 Treaty was a treaty which related to commerce, I say equally so does this dispute relate to commerce, and therefore they are both on the same terrain, they are both in the same sphere of human activity, both relate to the same thing, and that therefore his argument—I think it was actually the second argument in the list of four that I gave—that second argument I submit to the Court is not a well-founded argument; we are here talking about matters which relate to commerce, and nothing else.

Mr. Fitzmaurice's next argument, namely, argument 3 on the list that I read out, was that the treaties cannot incorporate the provisions of international law or indeed any other provision which would cover Mr. Ambatielos's claim (I refer to *Compte rendu* of the 26th March, page 402); he says that the Treaty could only incorporate those things which are expressly referred to in the Treaty, and he cited Judge De Visscher in support of that proposition—in other words, he was saying it could only incorporate "commercial provisions". Let it be so. I simply repeat what I have just said: it is "commercial provisions" which, in my submission, concern the matter which arises in dispute before the Court. I simply say, in other words, what I said in answer to the last argument. But I want to make a slightly more detailed reply to an argument which Mr. Fitzmaurice used on page 403. Quoting Judge De Visscher, he said that a most-favoured-nation clause only dealt in terms of privilege and that, as it is everybody's right to be treated in accordance with international law, a most-favoured-nation clause could not attract international law by implication in another treaty. I think one should be careful about that argument, for two reasons: in the first place it is very far from clear that international law coincides, for example, with a provision such as a provision in Article 16 of the Treaty of Peace and Commerce with Denmark of 1660, words like "cause justice and right to be speedily administered"—they do not necessarily exactly coincide. I would add this: nor is international law perfectly clear or always stated in the same terms. I thought it might be useful to cite as an example extracts from the *Travaux de la Conférence pour la codification du Droit international, série de Publications de la Société des Nations, Questions juridiques*, 1929, Chapter III. The Court will remember that the various countries answered questions. Great Britain stated the principles of international law in the following form:

"La responsabilité de l'État n'est pas engagée simplement du fait qu'une décision judiciaire est erronée. Toutefois, une décision judiciaire erronée peut engager la responsabilité de l'État :

a) si elle est erronée à un point tel qu'aucun tribunal convenablement constitué n'aurait pu honnêtement arriver à une décision de ce genre ;

b) si elle est due à la corruption ;

c) si elle est due à une pression exercée par les organes exécutifs du gouvernement ;

d) si elle est provoquée par une procédure assez défectueuse pour exclure tout espoir raisonnable de décision équitable."

That was the British formulation. It occurred to me, for example, to contrast the formulation by the then Czechoslovakian Government. I do not want to read it all, but simply to cite the sentence which introduces quite a new conception to the conceptions formulated by the British Government. Amongst the other principles stated by the Czechoslovakian Government, they said :

> "Il ne conviendrait pas d'exiger qu'on accordât aux étrangers l'assistance judiciaire sans se préoccuper si la réciprocité est ou non assurée."

Therefore the Czechoslovakian Government was introducing the concept of reciprocity ; that does not find its place in the formulation by the British Government. I simply mention those as examples to show that the principles of international law relating to treatment before courts is not identical as formulated by all countries. There are differences. There is a certain imprecision necessarily about it because the principles of international law are constantly being evolved, constantly re-stated and woven into a single comprehensive legal system. Therefore, first I say international law has certain elements of uncertainty about it ; secondly, it does not necessarily coincide with words such as one finds in the article which I just cited :

> "Each Party shall in all causes and controversies now pending or hereafter to commence, cause justice and right to be speedily administered to the subjects and peoples of the other Party."

Therefore I would submit to the Court that Mr. Fitzmaurice's argument is not well founded to the effect that a most-favoured-nation clause cannot incorporate provisions such as those in Article 16, because, as it were, they are already ingrafted into international law by the general principles of international law, and most-favoured-nation provisions only incorporate what can be regarded as a privilege conferred on the most-favoured-nation subjects. Therefore I would, in reply to that argument of Mr. Fitzmaurice, namely, the third in the list, say that even if he is right in saying that only those provisions in other treaties which relate to commerce are incorporated, we are here in presence of a commercial issue, and therefore the argument does not affect me. Secondly, I say in answer to his submission that most-favoured-nation treaties only incorporate what could be regarded as a privilege and therefore cannot incorporate the provisions of international law, that international law is of itself uncertain and does not necessarily coincide with the provisions contained in specific treaties between the United Kingdom and other countries which have been

entered into in the past, such as, for example, the Treaty of Peace and Commerce with Denmark of 1660.

It is getting near 6 o'clock, and I wonder whether possibly you would allow me to ask the Court this—I am not far now from the end of my argument, if the Court would be so very kind as to give me a little longer than its normal hours I think I could very comfortably finish. I would be very grateful if the Court could see its way to do that, and I hope that I am not trespassing upon the indulgence the Court gave me in sitting on Saturday afternoon, but I think half an hour would comfortably see me through the end of my argument, possibly a few more minutes after that.

Le VICE-PRÉSIDENT faisant fonction de Président : Nous vous écoutons volontiers.

Sir Frank SOSKICE : Thank you very much indeed, thank you. It is very kind of you.

Mr. President and Members of the Court, on page 405 of his argument Mr. Fitzmaurice makes an analysis of some of the treaties on which we relied, and the time has come, I think, when I should put before the Court the letter which we have produced setting out the relevant extracts of the treaties on which we rely. May I add this, that if the Court desires a convenient method of examining those treaties, they are to be found collected in a document, in a volume, called "*The Handbook of Commercial Treaties between Great Britain and Foreign Powers*", published by His Majesty's Stationery Office, 1912, official copy revised in 1922. If I may just indicate the volume, that is the blue volume, and all the treaties are there set out in convenient form, and we have, in the letter that we have prepared for the use of the Court, put in the page references in this blue book to the various treaties on which we rely for the purpose of establishing our case on Article X of the 1886 Treaty. I think the Court, I think each Member of the Court has before it a copy of this letter, I do not know whether you have, Mr. President.

Le VICE-PRÉSIDENT faisant fonction de Président : La lettre est arrivée seulement il y a une demi-heure à peu près ; on est en train de faire le nécessaire pour en faire la distribution.

Sir Frank SOSKICE : I am sorry that we caused inconvenience, Mr. President, and I should have let you have it earlier. May I just therefore make some brief comments on the letter. We set out in the letter a number of treaties, treaties with Denmark, treaties with Spain, treaties with Sweden, treaties with Peru, Costa Rica, Japan and Bolivia. I want to say this with regard to, for example, a first treaty. The first treaty to be found on page 245 is called a Treaty of Peace and Commerce with Denmark, it contains Article 16, to which your attention has been called, each Party sharing all causes and controversies now dependant or hereafter to commence cause justice and right to be speedily administered to the subjects and people of the other Party, according to the laws and statutes of each country without tedious and unnecessary delays and charges. Now, Mr. President and Members of the Court, what I want to say with regard to that is this : Article 16 finds its place in a treaty which is called a "Treaty of Peace and Commerce". Those who framed that Treaty obviously regarded it as appropriate that a treaty of peace and commerce should include an article such as Article 16 dealing with

the settlement of disputes. Article 16 in the handbook is headed "Administration of Justice", but my adversaries have been kind enough to inform me that the heading "Administration of Justice" does not appear in the original copy in the Record Office in London, but that I do not think matters in the slightest degree. Article 16 is an article which we say is incorporated into Article X of the 1886 Treaty, we say by virtue of Article X of the 1886 Treaty that we are entitled to expect that the British Government will treat subjects of the Greek Government in accordance with Article 16 of that Treaty of 1660. Now the Court may say: "Well, that is a very old treaty, must you go back so far in history as 1660 in order to find your claim for relief", and my answer to that is this: "It may well be that that Treaty is an old treaty, but it is by no means an obsolete treaty; if you will look further down on the first page you will find, on the first page of the letter, you will find that in 1814 that old Treaty of 1660 was expressly kept in being, and you will also find that even in 1912, by a Declaration that was made between Great Britain and Denmark on 9th May 1912, that Treaty was recognized as being still in existence and was in terms referred to in that Declaration." May I just read the relevant words of that Declaration in 1912: "whereas the commercial relations between the British Empire and the Kingdom of Denmark are regulated by the Treaties of February 13th, 1660 to 1661, and the 11th July 1670, and whereas it is desirable to make further provisions with regard to the application of the said Treaties to certain parts of His Britannic Majesty's Dominions, namely the Dominion of Canada, Australia, New Zealand, and so on, it is agreed that either of the contracting parties should have the right to terminate the said Treaties". Now, therefore, old as that treaty may be, it is in terms expressly recognized in 1912 as being binding upon the two Parties, and being the Treaty under which commerce between the United Kingdom and Denmark is still then recognized in 1912, and this volume, and this handbook to which I referred, has been revised to June 1922, and I am instructed that these Treaties are still in force; they are re-printed in this volume of Treaties which binds Great Britain, treaties existing between Great Britain and other countries repeated as being still in force in 1922, and I am told that they were in force, and as far as I know still are, during the relevant period when the events out of which the Greek Government's complaint arises took place. Therefore, it is no good treating these Treaties as if they were some old junk that belonged to the Limbo history and which for all purposes can be regarded as obsolete; not a bit, they are the actual Treaties in force in modern times, in 1912 and 1922. Those are the Treaties which are then recognized as governing relations between Great Britain and Denmark. Now there is nothing strained or forced at all in those circumstances about my praying in aid on behalf of the Hellenic Government that 1660 Treaty, which I say is incorporated by virtue of Article X of the Treaty of 1886 between the Hellenic Government and the British Government. That is the legal position and there in no escape from it, and the Hellenic Government are entitled to say that they rely on, for example, Article 16 of that Treaty with Denmark; and that they can require as a matter of right that the British will cause justice and right to be speedily administered to Mr. Ambatielos. Justice and right, that does not only mean justice in the courts, it means that he will be fairly dealt with, and our complaint here is that he has, owing to the series

of events which make up the matters of which we complain, been unfairly dealt with. I am simply stating the legal proposition, and I am entitled to say that Article X of the 1886 Treaty requires the British Government to do justice and right to Mr. Ambatielos, a Greek subject, in respect of the matters of which we complain. Now that is not tongue twisting, and it is not meant for gymnastics, it is a simple proposition as the argument advanced by the British Government in the Iranian Oil case was equally a simple proposition, and I respectfully submit that I am entitled to rely upon it. I just want to make this observation. It is argued by Mr. Fitzmaurice that Article X of the 1886 Treaty does not incorporate anything other than the commercial provisions of the Treaties entered into by Great Britain. Looking at this Treaty between Denmark headed as it is a "Treaty of Peace and Commerce", which provisions does Mr. Fitzmaurice say are not commercial provisions. Does he say that Article 16, on which I rely, is not a commercial provision, it is an article which those who framed that commercial treaty put into it, a commercial treaty? Quite obviously, in my submission, Article X attracts Article 16 of the Danish contract, the Danish Treaty.

Mr. President and Members of the Court, for my observations I have selected simply the first treaty in that list, because Article 16 of the Denmark Treaty is quite sufficient to my purpose. I do not think that I would be assisting the Court by going through and making similar observations with regard to the other treaties contained in the list. The argument with regard to them is the same. You get similar language, you get an undertaking to prevent wrong to the subjects of the other country—for example, in the Treaty of Peace and Friendship with Spain, dated May 23rd, 1667. Going right through the treaties, one finds a number of phrases that can be prayed in aid by my clients for the purpose of advancing their argument that a flagrant wrong done to their subject, Mr. Ambatielos, by the congeries of events to which I have drawn attention, conflicts with the wording of a number of these treaties, and any of the provisions in any of these treaties, the words of which are infringed by the treatment meted out to Mr. Ambatielos, can be prayed in aid by my clients and any single one of them is enough.

I want to make two short comments. You will see on page 2 a treaty described as the Treaty of Peace and Friendship—not commerce—with Spain, May 23rd, 1667. The industry of those advising me has unearthed, however, a very early copy of that particular treaty with Spain: the copy is dated 1686 and appears in a volume which will be made available to the Court, headed "Several treaties of Peace and Commerce concluded between the late King of blessed memory deceased and other Princes and States", and what I desired to call attention to was, for the sake of accuracy and completion, that in that volume the Treaty with Spain of 1667 is set out and in that volume it is described as "Articles of Peace, *Commerce* and Alliance"—commerce, of course, being the word on which I found.

It is quite artificial, I submit, to argue, as Mr. Fitzmaurice argues, that an article such as Article X of the Treaty of 1886, inasmuch as it only relates to commercial matters, does not include the whole of these commercial treaties, including in those commercial treaties articles like Article 16 of the Danish Treaty, which are designed

to protect the subjects of the Contracting Parties from wrongful treatment at the hands of the other Contracting Party.

I want shortly to notice two arguments of Mr. Fitzmaurice in his argument. He said:

> "You must construe these seventeenth century treaties by reference to the circumstances of the time, and although their words may at one time have conferred certain rights, it does not follow that they should always be read in the same sense."

My answer to that is that that argument might have been open to Mr. Fitzmaurice had it not been for the fact, as I have pointed out, that those same seventeenth century words have been again specifically affirmed and recognized as binding in modern times, in the 1920's, by the Declaration which in the case of the Danish Treaty I read out from page 1 of the letter which we have supplied to the Court. Therefore, I submit that Mr. Fitzmaurice's argument is ill-founded. He says that in any case the obligations imposed upon the contracting governments by those treaties to treat the subjects of the other government fairly have been swallowed up in the principles of developing modern international law. That I have already answered by pointing out that often, and in particular in the case of Article 16, the obligations on each contracting government are more specific than the somewhat imprecise obligations not always stated in identical terms which are imposed by the general principles of international law, so that I would respectfully submit that that argument of Mr. Fitzmaurice also, on examination, turns out not to be sustainable.

On page 407 of his argument, Mr. Fitzmaurice, if I may revert again to the argument of the British Government in the Anglo-Iranian case, said that after all, there, the treaty entered into in 1934 between Iran and the Danish Government did actually in terms confer the obligation upon each Contracting Party to treat the subjects of the other in accordance with the principles and practice of ordinary international law. In reply to that observation of Mr. Fitzmaurice, I call the attention of the Court to the fact that one of the treaties set out in our list, namely, the last one, a treaty of commerce between Great Britain and Bolivia, equally in terms imposes the obligation upon each of the Contracting Parties—Great Britain and Bolivia—to apply the principles of international law in the treatment of the subjects of the other.

Mr. President and Members of the Court, I hesitate to go back still once again to the Anglo-Iranian case, but I feel I should do so, because on page 406, Mr. Fitzmaurice, in my respectful submission, puts an interpretation upon words used both in the judgment of the Court and in the opinion of Judge McNair and of Judge Hackworth which upon examination those words do not bear. As I read Mr. Fitzmaurice's argument, he was saying that both learned judges in effect were dissenting from the view that the British Government, through the medium of the 1857 Treaty, was entitled to pray in aid the provisions of the 1934 Treaty with Denmark. In point of fact, I respectfully submit that if one examines the words of Judge McNair and Judge Hackworth, both learned judges say exactly the opposite. That is of some importance from the point of view of my argument for the following reason : I can, after all, pray in aid what both learned judges

have said as a judicial expression of opinion in favour of the view for which I am contending, namely, that through the medium of Article X, I can rely upon the provisions, for example, of Article 16 of the Danish Treaty of 1660. What Judge McNair said on page 122 of the record of the judgment of the Court and of the individual opinions of some of the learned judges, was this:

> "Unquestionably, if the jurisdiction of the Court in this case had already been established and if the Court was now dealing with the merits, the United Kingdom would be entitled to invoke against Iran the most-favoured-nation clause, Article 9 of the Anglo-Persian Treaty of 1857, for the purpose of claiming the benefit of the provisions of the Irano-Danish Treaty of 1934 as to the treatment of foreign nationals and their property."

Now, I submit that the learned judge is saying in terms what I am submitting to-day—saying exactly what I am submitting—and Judge Hackworth, on page 139, says, in my submission, precisely the same thing:

> "I readily agree with the majority that the most-favoured-nation provisions of the earlier treaties, and the provisions of the later treaties are inter-related and must be considered together in order that benefits under the latter may be claimed."

The Court did not decide against the British Government on the ground that you could not relate the Danish Treaty to the 1857 Treaty: on the contrary, so far as Members of the Court dealt with that particular problem, they intimated, broadly speaking, that their view was that you could, in the passages which I have just quoted, but the British Government failed, as I have said, because it was held against them that the Declaration of 1932 by the Iranian Government did not relate to treaties entered into before that time, and the 1857 Treaty was a treaty entered into before that time. That was the sole reason why the British Government failed in its argument, and if I may just say this, that was what the Court was saying on page 110, to which Mr. Fitzmaurice also calls attention. Although I will not cite the actual words, it was only *that* that the Court was saying, namely that the British Government could not pray in aid a treaty in 1934 simply and solely because, for the purpose of the Declaration of 1932, the relevant treaty was the 1857 Treaty which was entered into before the 1932 Declaration was made by the Iranian Government.

And now, Mr. President and Members of the Court, I desire to offer a few observations on Mr. Fawcett's concluding argument on what Mr. Fitzmaurice described as his fourth argument, the argument, in other words, fundamental to the British case, that the Greek Government cannot succeed in obtaining arbitration unless it can show that if the facts it alleges are true, the treaty provisions of the 1886 Treaty are broken. My observations will be brief. On page 420 of the *Compte rendu* of the 27th March, he cited an American case, *The International Textbook Company* v. *Pigg*. In the course of that case it was stated that movement was essential. But what for? What the Court was there considering was *inter-State* commerce, and I underline the words "inter-State", and the learned judge who dealt with that case said: "If you are asking whether commerce can be said to be inter-

State commerce, movement between one State and another is the distinguishing feature of it." So be it. That does not touch this case: We are dealing with commerce, not inter-State commerce, and may I venture to give this example. In London we have a very extensive market in diamonds. It is carried on by Hatton Garden diamond dealers, of whom the world has probably heard. The dealers in diamonds go to a café or Lyons' teashop, I think in Hatton Garden, somewhere off Holborn, and they sit on each side of the table and they deal in diamonds, and they hand diamonds one to the other across a narrow tea-table. Are they not engaged in commerce ? Is that not commerce ? But where is the movement there ? I suppose there is movement just of the diamonds across the tea-table from one dealer's pocket to another, but really here there was after all going to be movement of nine steamships from Hong Kong and other shipyards to Great Britain or to some other destination, so that it does not really advance the matter very much to say that movement was essential. There was movement in plenty here, if movement is what is required.

Mr. Fawcett based an argument on Article I ; Article I appears in the Hellenic Government's Memorial at page 48. May I say simply what I say with regard to Article I : there is no mystery about our argument ; it is simply this : you, the British Government, so we say (perhaps wrongly—but that is what our case is)—you, the British Government, by breaking your agreement with Mr. Ambatielos and then preventing him from obtaining access to the information he required to obtain redress from the courts, treated him badly and unfairly. That is not the treatment which you mete out to your own subjects. Now the answer that Mr. Fawcett may desire to make is : that is the treatment which we mete out to our own subjects. I hope that is not the answer that he will make, because I am sure it is not true. In any case it will be for the arbitrator to decide, but that is the case that we make : the treatment that he got was not the treatment which was meted out to British subjects—people who were resident in the United Kingdom. He was treated unfairly and shabbily by reference to the standards that they can expect and do in point of fact see observed in treatment of British subjects. That is the short case on that. It may be a case that we can establish ; it may not be a case which we can establish, but surely it is for the arbitrator to decide, and there is no mystery about what the case is, and no argument can be based upon it in my submission, upon the wording of Article I, which clearly does require that foreigners, Greeks, shall enjoy the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce as British subjects, and that is all that we say that Mr. Ambatielos should have got and that is what we say he did not get.

We found our argument also on Article XV, sub-paragraph 3, of the Treaty of 1886, and Mr. Fawcett had some observations to offer with regard to that Article. He cited from a German and a Swiss decision as to the meaning of the Free Access Clause in articles of this type. I would simply say that really his citation did not very much advance matters. One citation was, I think, to the effect that such an article has a precise meaning, and the other citation was to the effect that it should not be given an extensive meaning. Let it be so. I want to give it a precise and not an extensive meaning. And

the meaning that I want to give it is this: if, by withholding information from a litigant which in common justice and fairness you should make available to him, you hamper him in the presentation of his case with the result that he loses it, in my submission, within the meaning of Article XV, you have not allowed him free access. He has had access to the courts, but his access has been hampered and impeded by the action of the executive authorities of the British Government. Now that is the case. Mr. Fawcett cited *Maiorano's* case in the United States. That was the case, the Court will remember, in which a non-resident alien sought damages in respect of the death of her husband. She litigated the case, but it was found and it was held that she, as a non-resident alien, was not entitled to the relief for which she claimed. It was held that the statutory provision depriving her of relief did not prevent her from having free access to the courts, which she had in fact had, in that she had been able to argue her case asking for relief. That was not a case in which somebody had abstracted from her information which she would require to put before the court. That case does not, in my submission, affect this matter one way or the other. If you want to draw an analogy between that case and the present case, you must assume that the lady desired to use certain evidence, or was in ignorance of evidence, which, had she known of it, she would have wanted to use, that that evidence was evidence such that if she had it available she could have established her claim to relief, and that the Party whose conduct is complained of kept that evidence from her and advanced an argument in support of his own resistance to her claim before the court which was inconsistent with what that evidence would have demonstrated. If there had been that circumstance in the case, I venture to submit that the learned judges of the Supreme Court would have determined the *Maiorano* case in a different sense and would have said: no doubt it is true that the lady had free access to the courts in so far as she was entitled to go there and plead her cause, but she did not have free access in this respect that the authority whose conduct is complained of kept away from her evidence that she required in order satisfactorily to be able to plead her cause, and that is the gist of the complaint here.

Mr. President, those are the short observations that I would make on Mr. Fawcett's argument. That brings me very close to the end of the argument that I desire to address to you, and it brings me entirely to the end of the detailed submissions that I desire to make on the general arguments advanced which I have ventured to characterize as irrelevant to the real issue which it is before you to decide to-day. I will add just a few more words when this particular part of my address has been translated.

Mr. President and Members of the Court, it simply remains for me to thank the Court very cordially for allowing me to address it till seven o'clock on a Saturday evening, particularly in that my address has consisted very largely of argument which I myself have described as wholly irrelevant. The whole point really here is the point with which I began: what is this claim based upon? And I end with that point, and in my submission really the whole of this case could be decided in about twenty minutes' consideration. This is obviously without doubt a claim based upon the treaty provisions

of the 1886 Treaty. A difference has arisen with regard to that claim. The Declaration of 1926 beyond any shadow of doubt requires that that claim should be referred to arbitration. That is not a matter of discretion—it is a matter of right, and I would respectfully ask the Court to say that I ought to have the relief for which I ask. Certainly, at a later date, the arbitrator can, and indeed will be in duty bound to, go into all the matters that have been canvassed before you this week. Really the whole kernel and core of this case centres upon the short point : what does the Declaration mean which is appended to the Treaty of 1926 ? It requires claims based—that is to say formulated in reliance—upon articles of the 1886 Treaty, in the event of a difference arising, to be referred to arbitration. That is all I ask, and I respectfully submit that there has been no answer given to rebut my claim to have that matter disposed of by the arbitration proceedings for which I ask.

Le VICE-PRÉSIDENT, faisant fonction de Président : Je voudrais vous demander si vous confirmez les conclusions que vous avez présentées dans votre réplique — parce que je voudrais vous demander de présenter les conclusions finales ou bien de confirmer celles que vous avez présentées au moment de la procédure écrite.

Sir Frank SOSKICE : Mr. President, the answer is that I desire to confirm the conclusions that we filed.

5. REJOINDER OF Mr. FITZMAURICE

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTING OF MARCH 30th, 1953

Mr. President and Members of the Court :

We do not propose to keep the Court very long to-day : this morning and a short time this afternoon will suffice for our final statement, which we shall sub-divide as follows :

I propose to deal with and reply to some of Sir Frank Soskice's arguments on the more general aspects of the case, including the important question of the interpretation of the word "based", the question of the true character of Mr. Ambatielos's claim, the most-favoured-nation question and the older treaties. My colleague, Mr. Fawcett, will follow me on the subject of the exhaustion of legal remedies and certain special points, and then my colleague Mr. Evans, our Agent in this case, will finish with some remarks on the question of delay and with a summary of our argument and statement of our formal conclusions.

Mr. President and Members of the Court, we heard Sir Frank Soskice on Saturday tell the Court that the cardinal point—and, indeed, according to him, the only point—in the present case, is the interpretation of the term "based" as it occurs in the Declaration of 1926. And while we should contend, as we have, that put in this narrow way—that is to say, as being the only question in this case—the argument does not take sufficient account, or anything like sufficient account, of what is the proper function of the Court in the present proceedings, we would nevertheless agree with him that the interpretation of this term is one of the most important issues involved. But, of course, we place a totally different interpretation on the term.

I will not recapitulate all the argument of Sir Frank Soskice, which was most ably and clearly presented. It can be sufficiently summed up by saying that, in his view, it was enough if the claimant simply invoked the Treaty of 1886, if he simply—and here, I think, I more or less quote what Sir Frank Soskice said—if he simply "formulated his claim on the basis of the Treaty".

I propose to consider the matter for the moment from the point of view presented by Sir Frank Soskice as being the correct one. Now, I believe there are two things which must inevitably strike anyone who has followed these proceedings, and in particular the argument which Sir Frank Soskice put forward, together with that advanced earlier by Me. Rolin. The first of these things is that those who put forward this point of view, namely, that it is in effect sufficient to invoke the Treaty for the claim to be based on it within the meaning of the Declaration, those who put forward this point of view very quickly come up against the difficulty of just how far that argument can be pushed. Inevitably the question comes up : is it really sufficient simply to invoke the

Treaty—that is, for a claimant simply to say that his claim is based on the Treaty and that therefore the arbitral commission must be set up. Well, of course, invariably, when faced with that proposition, the answer has to be that this process of invocation must be subject to some limitation; and the limitation admitted, and indeed suggested, by our adversaries is that the Court is entitled to prevent an abuse of its own process and, therefore, if a claimant puts forward as being based on a certain treaty a claim which obviously is wholly unrelated to it, a claim which involves a fraud upon the Court or some ulterior motive, such as blackmail (I think this was the example which Sir Frank Soskice gave), then clearly the Court must reject the plea that the claim is based in the way that the claimant says it is.

The first observation I would make about this is that it places on a subjective footing and turns into a matter of appreciation and degree what ought really to be capable of objective determination on a scientific legal basis. At exactly what point, for instance, does the plea that a claim has a certain basis become so preposterous that a Court must reject it? What is meant by the word "obvious"? When does a claim have an obviously improper motive? And what are the tests to be applied? Everything would seem to depend very much on general inpression and, so we suggest, a quite impossible degree of uncertainty would be introduced into the whole matter.

However, adopting for present purposes the tests and suggestions put forward by Sir Frank Soskice, I was particularly struck by the fact that, after admitting that the Court had the right to prevent an abuse of its process and that it must reject anything vexatious in the nature of a fiction, or a claim which only involved a pretension of being based in the manner alleged, Sir Frank Soskice added, as if it were self-evident, "but, of course, this case is 100 miles from that". Mr. President, we maintain that this case is not only not 100 miles, it is not even 100 cms. from the criterion which Sir Frank Soskice put forward. In fact, we maintain that the description which Sir Frank Soskice gave of the type of case that ought to be rejected, even on the view which he himself put forward, exactly fits the present case and could scarcely have been more apt. In our earlier statement, we gave the Court in some detail our reasons for putting forward this view, and I will not repeat them now. But I will say that there could hardly be a clearer case of a claim originally put forward on the basis of the general principles of international law being subsequently placed deliberately on a completely artificial treaty basis, in order to found an obligation to submit to compulsory jurisdiction, and thus to circumvent or obscure the very evident fact that if the claim is put on its proper basis, no such obligation exists, or ever did exist.

I do not believe, Mr. President, that anyone who dispassionately considers this case, whatever his view as to the merits may be, can doubt that we are here confronted with what is essentially a fictitious and, so to speak, manufactured, basis of claim. This, we think, is brought out even more clearly—and here is the second point I wanted to mention in the present immediate connection—by the fact which has struck me, at any rate, all through these proceedings as I have listened to Me. Rolin and Sir Frank Soskice, that whenever they touched upon the merits of the case (and they did touch upon the merits quite considerably), virtually all mention of the Treaty of 1886 vanished from their argu-

ments ; and also the further fact that when they did try and argue their complaint on the basis of it being a breach of the Treaty, an extraordinary element of artificiality and unnaturalness was at once apparent, whereas on the footing of the general principles of international law, there is no difficulty about at least stating Mr. Ambatielos's claim and the nature of his complaint.

We heard, for instance, the other day from Sir Frank Soskice what was the real kernel of the Greek complaint. It was the alleged action of certain British Government officials in, as it was said, withholding certain vital evidence in the case when Mr. Ambatielos was before the English courts. We say that that has obviously, and on the face of it, no more to do with the 1886 Treaty than if that Treaty were in fact the famous Whaling Convention which we have heard so much about. Indeed, if it had only happened that one of the ships sold to Mr. Ambatielos had happened to be a whaling vessel, I do not doubt that our adversaries would have managed to cite this Whaling Convention in support of that claim and that citation would have had very little, if any, more relevance to the matter than the 1886 Treaty has.

If the complaint stated by Sir Frank Soskice constitutes, in fact, the essence of the Ambatielos claim—and that is what he says—then the question it obviously raises, apart from a number of matters of internal English law and procedure, is the applicability of certain principles of international law concerning the treatment of foreigners before the courts. Well, now, we shall deal later with the way in which the history of the case shows its present basis to be fictitious and, we think, abusive, but at any rate, these are the reasons why we maintain that, even if the criterion put forward by the Hellenic Government in this case and so ably argued by their advocates, Me. Rolin and Sir Frank Soskice, is the correct one—even on that basis their contention should fail, because we have here what, according to the principle which they themselves admit, of not allowing a basis of claim which would in the circumstances be an abuse of the process of the tribunal concerned, we say that we have here just such a basis of claim.

Now, of course, Mr. President and Members of the Court, we do not in fact agree with the view put forward by our adversaries as to what is the true meaning of the term "based" in the Declaration of 1926, and as to what is the function of the Court in the present proceedings. The Court's function, according to Sir Frank Soskice, is merely to verify, by what would apparently be a sort of process of superficial inspection of the claim, that the claimant does in fact purport to base his claim on the 1886 Treaty, and that this basis of claim is not obviously ridiculous ; and if the Court does so verify, then the matter becomes almost automatically and as of course a matter for the arbitration commission, which must thereupon be set up.

The effect of this view, we think, would be to deprive the Court of any real judicial task in these proceedings, whereas in fact the Court derives its authority in the present proceedings from Article XXIX of the Treaty of 1926, and under that Article it is the function of the Court to interpret the Declaration of 1926 and to say how it should be applied. In so far as the interpretation and application of the 1926 Declaration involves determining whether a claim is based on the 1886 Treaty, the Court has the function of interpreting the latter Treaty, and should do so, because it is necessary in order to interpret and

apply the Declaration. And the function of the Court in interpreting and applying the Declaration is essentially a judicial one. It constitutes for the Court a substantive task which, in our submission, must go beyond mere verification and control.

The United Kingdom Government contends that, since the sole legitimate purpose of any commission set up under the Protocol attached to the 1886 Treaty, and its sole sphere of competence, would be to hear and determine disputes or claims concerning the interpretation or execution of that Treaty, the commission should not, in all the circumstances of this case, be set up unless it is affirmatively clear that the claim which is being set up to consider is a claim genuinely based on the Treaty and not one which really relates to something else. A finding in this sense should really be, we think, a condition precedent of the commission being set up at all.

In short, in our submission, the Court should satisfy itself that the commission, if it were set up, would not be called upon to go into a claim, the real basis of which lies outside the Treaty and whose connection with the Treaty, if it exists at all, is at the most formal and superficial, not substantial.

If the Court did not do this, it seems to us that it would really be giving the 1926 Declaration a lower status than the other provisions of the 1926 Treaty, of which it has found the Declaration to be a part. It would be distinguishing the Declaration from the other provisions of the Treaty as one which the Court is not obliged fully to interpret in order to apply it, but can apply in a certain manner (that is by setting up the commission or deciding that the parties should do so) after what I have termed a merely administrative inspection and not an examination or judicial investigation of the claimant Government's allegation that this claim is based on the Treaty—because in fact nothing more than an inspection is necessary in order to verify what everyone connected with these proceedings has always known, that the claimant, although he was certainly not doing so in the 1920's or even in the 1930's, is now invoking the 1886 Treaty. The whole question is, is it enough merely to invoke ? We hope the Court will feel that at this stage of the case, and especially in view of its history, and of the tremendous contrast between the basis of claim put forward in the 1930's and that now put forward, we hope the Court will feel that this is a case amongst all other cases in which mere invocation and formulation is not enough ; that the claimant should be required to establish affirmatively that his pretension of having a treaty basis is justified ; and that otherwise it would not be right to require the United Kingdom to submit to arbitration on what might be, and in our view is, a purely fictitious basis of claim.

Mr. President, before I go on to the next part of my argument, might I make some observations of a general character which closely concern many of the aspects of this case ? Our adversaries have accused us of seeking to evade arbitration on a technicality. I would first point out that this constitutes in some sense an admission on their part that they are themselves seeking to take us to arbitration on a technicality. Certainly a technicality is involved in this case, but that technicality is the supposed application of the 1886 Treaty to this claim.

However, we say that the whole statement that we are evading our obligation to arbitrate on a technicality begs the question, since the very point at issue is whether we are under such an obligation at all. By "obligation" we of course mean, in this Court, a legal obligation. It has first to be established that we have such an obligation, and these proceedings show that that is at least very far from being self-evident. We are obviously fully entitled to maintain that there is no such obligation and that the only basis of it which our adversaries can put forward involves a complete misrepresentation and misapplication of a Treaty, the real nature and purpose of which has no substantial connection of any kind with the present claim.

Now, I have made these remarks, Mr. President, because really the underlying issue is the principle of consent which is always involved in contentious cases between States. In the advisory opinion which the Court gave on the *Peace Treaties* some three or four years ago, the Court carefully distinguished the case of an advisory opinion from contentious proceedings, and emphasized the principle of consent as being the sole foundation for the jurisdiction of an international tribunal in contentious cases, such consent naturally being capable of being given either *ad hoc* in the particular case or by means of some antecedent and general consent, as, for instance, when a country has, by signing the optional clause, become a party to, has consented to the compulsory jurisdiction of the Court, or where, by participation in a treaty containing an arbitral clause, it has consented to arbitrate matters arising *out of that treaty.* In the *Anglo-Iranian Oil* case, the Court gave effect to this principle of consent in a striking manner, and laid it down very clearly that consent cannot be presumed and must result clearly from the terms of the clauses, declarations or provisions by which the State concerned is said to have given its consent.

Now the United Kingdom contention in the present case is that it never gave any true consent to such a claim as that of Mr. Ambatielos going to arbitration by virtue of the Treaty of 1886. The consent given under the arbitration protocol of that Treaty and by means of the Declaration of 1926 was only intended to relate to matters of the kind which normally and naturally arise under that Treaty, and have a true and substantial relationship to it. It was never intended to relate, and certainly would never have been entered into by any United Kingdom Government, if that Government had had reason to suppose that claims of a general international law character would be argued to come under the Treaty and to be subject to the obligation to arbitrate. I venture to say, Mr. President, that no government would enter in this off-hand way into a compulsory arbitration obligation of so wide a character.

That the United Kingdom is in no way unwilling to submit general international law claims to compulsory international adjudication when proper means to that end are employed, is conclusively shown we think by its signature of the Optional Clause in 1930 and the maintenance of that obligation from then onwards, whereas, according to my information, the Hellenic Government had neither then, nor has it even now, signed this clause.

It scarcely lies, therefore, with the Hellenic Government to reproach the United Kingdom for unwillingness to arbitrate the present claim voluntarily.

Mr. President, I now pass to the next stage of my argument, and here I shall deal with Sir Frank Soskice's argument about the allegedly commercial character of Mr. Ambatielos's claim.

The United Kingdom Government contends that, in order to discharge its burden of proof in this case, which the claimants have admitted to exist, and to show that the claim is based on the 1886 Treaty, the claimant Government must at least establish that the Treaty deals with the same class or order of subject-matter to which the claim relates. The general view put forward by the claimants, that such a relationship exists because the Treaty is a commercial treaty and the claim of Mr. Ambatielos had its origin in a commercial contract and in a breach of that contract, involves in our view a gross error of classification as I explained in my previous statement, and a noticeable confusion of terms and legal concepts, including a confusion between the factual origin of the claim and its legal foundation. The facts out of which the claim has arisen may have started with an alleged breach of contract, but what the claim actually relates to is the treatment supposed to have been received by Mr. Ambatielos in proceedings before the English courts and, so far as concerns the legal issues which a claim of this character raises, it is irrelevant whether the proceedings concern a breach of contract, or an action for negligence or any other form of legal proceeding.

In order to demonstrate the true character of the Hellenic Government's claim out of their own mouths as it were, the United Kingdom Government would particularly ask Members of the Court to re-read *in extenso* the Hellenic Government's note of January 2nd, 1935, which is Annex R 5 to the Greek Memorial. This is a particularly able statement of the Greek case, exclusively from the point of view of general international law, and Members of the Court will find in it a very skilful exposition of the principles of international law involved. Every one of the allegations of fact made by Mr. Ambatielos in the course of the present proceedings are contained in that note, but instead of being related to the Treaty of 1886 and instead of invoking clauses of that Treaty, they are related wholly and exclusively and in detail to general principles of international law about the administration of justice which are alone involved. It is difficult to believe that anyone can read this particular note and still entertain any doubt as to the true foundation of the Ambatielos claim from a legal point of view, or as to the artificial and spurious nature of its supposed connection with the 1886 Treaty.

The United Kingdom Government contends that the claimant's arguments confuse both the existence of certain rights and the process by which those rights are carried out, and also confuses the rights which the claimant may have had under the Treaty and the rights which may arise in consequence of his exercise of his treaty rights. That sounds rather complicated, but I shall return to it in connection with some of Sir Frank Soskice's remarks, and I think it will then become entirely clear.

In any case, if the contentions of the claimant Government were correct, if a right to engage in commercial activity (which is what the Treaty essentially gives) of itself entailed the wide and almost unlimited consequences which they contend for, and covered the range of subject-matter suggested, then why did it not suffice to have a treaty simply

conferring on the subjects and citizens of the High Contracting Parties the right to engage in commercial activities in each other's territories? According to Sir Frank Soskice's interpretation of Article I, for instance, according to his view of the meaning, and still more of the implications, of the phrase "matters relating to commerce and navigation", almost everything would be included, and one could think of the most ludicrous examples that might be covered by such means. Perhaps I might attempt to give the Court my idea of the kind of case that might be covered on that interpretation of Article I. Well, suppose for instance that there is a Greek lady who is an inhabitant of the United Kingdom, and she goes out one morning to do her morning shopping, and while she is in her greengrocers, and is engaged in buying something, which, may I ask Members of the Court to note, would be a commercial transaction, through the negligence of the shopkeeper she is in some way injured, and in consequence of that she brings legal proceedings, and in the course of those legal proceedings she says that important evidence is withheld. Well, I do not know if it would seem to Members of the Court that a claim about that could by any possibility or stretch of imagination be regarded as a claim based on the 1886 Treaty, yet I would ask the Court to note that although the facts are trivial and ludicrous, in essence they are precisely parallel to the facts of the present case—with one exception—and I want to draw attention to that exception. The exception is that in the present case the commercial transaction was not between two private individuals, as it was in the example that I gave, but between a private Greek national and a government, and I venture to suggest that it is *that* fact, that is the point, that is the real essence in many ways of the contention which is being put before the Court in this case, that because the other party to a commercial transaction is the Government, because of that, then a breach of the contract is in itself a breach of the Treaty.

Now, Mr. President, we entirely reject that point of view. I went into the matter very fully in my previous statement, and I pointed out that a government as a party to a contract cannot be in a worse position than a private person, and just as, in a contract between private persons, if there is a breach of that contract, what happens next is that the parties have their remedies in the courts, and only if there is a denial of justice in consequence of the attempt to prosecute those remedies, does an international claim arise, so equally is it where the other party to the contract is the government. The government has every bit as great a right as a private citizen to require that when a dispute arises between itself and a private party, under its own internal law, the merits of that dispute shall first of all be tested in its own courts (and that is a fundamental principle which is applied throughout the world), and that only if the proceedings in its own courts result in a denial of justice is there an international claim, and therefore we maintain that the fact that the government is a party to the contract cannot entail that the breach of contract, if it occurred, was itself a breach of a treaty, any more than in the example which I gave. And of course the subsequent proceedings are before the courts, and the basis of a claim then is that something has happened in the courts which ought not to have happened, but that is not a matter on the basis of the treaty at all; it then becomes a matter for the application of the principles of international law about the

treatment of foreigners in the courts, and that is a matter of pure international law which has no treaty basis.

Well now, Mr. President, if the sort of interpretation of Article I of the Treaty, put forward by Sir Frank Soskice, the sort of interpretation which involves saying that because Article I speaks of matters relating to commerce and navigation, therefore anything in which a commercial transaction is involved comes under the Treaty, why was it then necessary to specify in detail, as is done in the various articles of the Treaty, just what the activities covered by the Treaty could consist of and what rights and facilities they entailed ? The United Kingdom Government contends that the very fact that the Treaty of 1886, like all commercial treaties, particularized and specified such things as the right to enter, travel and reside, own factories, not to be subjected to domiciliary visits and so on, must be taken as a conclusive indication of the fact that the Treaty is not to be regarded as covering everything that could conceivably have a commercial flavour, but only rights and facilities which are specified in the Treaty, or which are clearly to be implied from its language. The United Kingdom does not contend that the claimant may not have had additional rights outside the Treaty (though it does deny that he was refused those rights) : it simply contends that these additional rights, relating to the processes of justice, did not arise from the Treaty and that a claim which involves them cannot therefore be based on the Treaty.

Now, Sir Frank Soskice said that we were in error in thinking that this case only involved a complaint about the process of the courts. He said the claim was a claim which centered on a series of transactions forming one coherent whole, which began with the alleged breaking of a commercial contract and which was followed, when Mr. Ambatielos took the matter to the courts, by a process of alleged suppression or withholding of evidence which caused Mr. Ambatielos, so it is said, to lose his case. And on this basis Sir Frank said that the matter was (I quote from his speech) "commercial from beginning to end. It centres upon a commercial contract and the breach of it, and then another action withholding the evidence closely intertwined with what had gone before, and it is the whole totality of these things which gives rise to the complaint which the Greek Government brings to-day. Now are not those matters relating to commerce ? If they do not relate to commerce, what do they relate to ?" And he ended up with the phrase : "We are here talking about matters which relate to commerce and nothing else."

Mr. President, we suggest that this statement exhibits very well the fallacy which has vitiated the arguments of our adversaries all through these proceedings, and to which I have already drawn attention. There is first of all the fallacy that centres around the alleged breach of contract. The obvious implication of Sir Frank Soskice's remarks was that this alleged breach constituted a breach of the Treaty, or at any rate raised some question of the interpretation and execution of the Treaty, and as I was saying just now, a breach of an ordinary commercial contract—even if the Government is a party—could not possibly in itself be a breach of the Treaty, which in no way guarantees the fulfilment of such contracts. I pointed out what I think must be unquestionably the case, that the effect of a breach of contract is to leave the complainant party with his remedy in the ordinary courts of

law, and that, provided he has access to these on the same terms as nationals, he receives the only rights which the Treaty gives him in the matter. What takes place thereafter is a matter entirely of the process of the courts. It has no specifically commercial implications and the Treaty has nothing whatever to do with it. Now, it is this question of what took place after Mr. Ambatielos's case was before the courts which forms the real basis of his complaint. This was admitted by Sir Frank Soskice in another passage in which he said (I take this from page 466 of the transcript) that the proceedings in the English courts threw into relief and made clear and high-lighted what was the (I quote) "substantial ground of complaint that the Greek Government in these proceedings has against the United Kingdom, and that is : having broken this contract, it is not content to let the matter rest there, but, by failing to produce vital evidence, it prevented my client from getting the relief to which he was plainly entitled before the courts of the United Kingdom, who, had they had that further evidence before them, would undoubtedly have afforded him the relief for which he counter-claimed".

Now, I suggest that a clearer case of an allegation of denial of justice pure and simple than that could hardly be found—not, it is true, a denial of justice on the part of the courts as such, but on the part of the executive in relation—*in relation*—to the administration of justice. And we maintain that that is a pure question of general international law with which the Treaty, on its actual language, does not deal at all. And if, as Sir Frank Soskice says—and may I observe that he went out of his way to emphasize the point—if it is true, as he says, that the whole kernel and essence of the Hellenic Government's complaint is what Sir Frank Soskice says it is in the passage I have just read, then it follows, we think, as inevitably as night follows day, that this claim is a claim based on the general principles of international law relating to the administration of justice, and the treatment of foreigners before the courts, and not based on the Treaty of 1886 in any other sense than that the claimant says it is.

Sir Frank Soskice, of course, endeavoured to get round these obvious difficulties in his case by arguing that conceptions of general justice and equity were imported into the 1886 Treaty by means of the attraction exerted by its most-favoured-nation clause on the provisions of other and older treaties. I shall have something to say about these older treaties presently. For the moment I would only refer to a passage in which Sir Frank Soskice said something like this (I am not sure whether I have the words quite accurately, but this is certainly the gist of them, which I took down) : "You, the British Government, by breaking the contract and preventing him"—that is, Mr. Ambatielos —"from having access to vital evidence, treated him unfairly and in a way you would not have treated British subjects." Mr. President, this is the kind of tendentious statement to which we have had to become accustomed in these proceedings. Leaving aside the merits of the implication that a government invariably treats its own subjects fairly, a proposition with which I think not everyone would agree, the position is that the plaintiffs, if the basis of their claim is that Mr. Ambatielos was not treated in the way that a British subject would have been, have not produced one scintilla of evidence to show that Mr. Ambatielos was in fact treated in any different way from what a British subject would have been in similar circumstances ;

and, of course, it is quite illegitimate to presume—to draw an inference—from the mere fact that Mr. Ambatielos was treated in a certain way, if he was, that the reason for that treatment was the fact that he was a foreigner. Such a presumption is wholly and absolutely unwarranted, and if that is the basis of the Hellenic Government's claim, it is essential for them to produce some concrete evidence beyond mere presumption and inference that there was some form of definite differential treatment. Well, now, not a shadow of evidence to that effect has been produced. Not a shadow of evidence has been produced that he was subjected to any conditions, restrictions or regulations of any kind not equally applicable to British subjects, or that his alleged unfair treatment was in any way attributable to his not being a British subject, or that any element of discrimination on grounds of nationality came into the matter at all. This is most material, because three of the articles of the Treaty on which our adversaries have principally relied in the present connection, namely, Articles I, XII and XV, give national treatment and not one whit more. Well, now, what, for instance, were the taxes, imposts, obligations, and so under Article XII which were imposed on the claimant but not on British subjects? There simply were not any.

Again, as regards Article XV, paragraph 3, we find this statement on page 466 of the transcript of Sir Frank Soskice's speech. After saying that he wanted to give this provision a precise and not an extensive meaning, he said that the meaning he wanted to give it was this (I quote):

> "If, by withholding information from a litigant which in common justice and fairness you should make available to him, you hamper him in the presentation of his case, with the result that he loses it, in my submission, within the meaning of Article XV, you have not allowed him free access. He has had access to the courts but his access has been hampered and impeded by the action of the executive authorities of the British Government. Now that is the case."

Well, if that is not an extensive meaning of the notion of free access, I would like to ask what is. Moreover, these observations of Sir Frank Soskice's exhibit all the usual fallacies, and are a good example of the tendency of our adversaries to quote provisions in part without giving the full text. Sir Frank Soskice says that by reason of the alleged withholding of evidence, Mr. Ambatielos was not given free access, in the sense of completely free access, but Article XV, paragraph 3, does not speak of free access in the sense of "free without limit". It speaks of free access not subject to any conditions or restrictions not equally imposed on native subjects. In order to make good his point, Sir Frank Soskice would have had to show that the alleged withholding of evidence was something which was done to Mr. Ambatielos but which would not have been done in like circumstances to a British subject. Only on that basis, if at all, could he bring himself within the terms of Article XV, paragraph 3, and of that there is not one scintilla of evidence. Furthermore, the withholding of evidence could not constitute in itself a condition or restriction on access. It might be a wrongful act if the withholding was improper, but not one which the Treaty renders wrongful; and in any case, a wrongful

act *ad hoc* is a wholly different conception from what is obviously meant by a condition or restriction under Article XV, paragraph 3. Finally, the whole idea that failure to produce certain evidence in the course of proceedings before the courts constitutes a restriction on access is a misconception of the idea of access, and contrary to the whole trend of the authorities on the subject of what is involved by free access. The effect of this conception is to extend a simple and well-understood notion, the notion of access, into something the exact limits and bearing of which would be quite indeterminate and certainly very wide.

Mr. President, might I make clear one point which did not come out quite clearly in the most excellent translation which has just been given ? What I said in the previous section of my statement was that, if it was possible to bring the case of Mr. Ambatielos within the free access clause at all, it could only be done if it could be shown that he had not received the same treatment as a British national would have done, and if evidence to that effect was produced. Of course, as I went on to say, it is not our view that the case can be brought within the free access clause, because in our view the free access clause means simply access to the courts, and cannot possibly be read as covering all the various things that may happen in the course of litigation after the individual concerned has had his free access.

Well now Mr. President, it appears to us that on analysis Mr. Ambatielos's claim really is that, although he had access, he did have access on the same terms as nationals, yet the subsequent treatment he received was unfair, unjust and inequitable. But, of course, we say that that is a matter which does not raise any issue on the Treaty but does raise issues under well-known principles of general international law, and it is the same with the older treaties. Even assuming for the moment that the provisions of these treaties cited by our adversaries can be attracted by a most-favoured-nation clause on commerce and navigation, a study of them will show that they really confer either no more than the free access to the courts which the 1886 Treaty confers, or, alternatively, that they only confer a right to the benefit of the ordinary processes of justice on the same terms as nationals. They confer no special rights on foreigners but merely place them on the same footing as nationals. Since Mr. Ambatielos has, beyond vague statements and allegations, produced no evidence of discrimination against him as a foreigner, it all necessarily comes back to the same point. His claim is in fact that the treatment he received was so inequitable as to amount to a denial of justice under international law. Alternatively, it may be a plea that the procedure of the English courts is so defective as not to measure up to the minimum standard of law and justice required by international law. Those may well be his contentions, but, if they are, they are pure general international law contentions, and the basis of the claim is that of a pure general international law claim, and the supposed basis in the Treaty of 1886 is really non-existent and patently fictitious.

In order to illustrate that, I come to a point to which I attach great importance. I mentioned it in my previous speech, and I did so in order to draw attention to some of the absurd results which the Hellenic contention, if it was valid, would lead to. I gave an example a short time ago, but now may I give another, which I did refer to in my earlier statement. One result which the Hellenic contention would

lead to, for instance, would be that Greek nationals in litigation about commercial transactions would, on account of the supposed application of the Treaty, have superior rights and be in a better position as regards their position before the courts than they would be in other and non-commercial types of litigation. That must be the result, it seems to us, of the Hellenic contention, because they contend that the 1886 Treaty gives them rights in respect of litigation about commercial matters, and if that is so they are in a special and more favourable position in regard to that type of litigation than in regard to litigation in non-commercial matters. Now that obviously cannot be so—and why not? Because the rights of foreigners before the courts are the same in all cases and are governed by rules of general international law applicable to all types of litigation, not only commercial. That Greek litigants in commercial cases have in fact no special or superior rights, shows conclusively that the Treaty gives them none, and that it has nothing to do with the processes of the courts or of the administration of justice as such.

Sir Frank Soskice told us again and again that the alleged withholding of evidence was the essence of the Greek complaint. Now if he were here I would ask him, would he or the Hellenic Government seriously maintain that if evidence is improperly withheld by a government official in a commercial case it is an international wrong, based on the 1886 Treaty, and that there is a breach of the 1886 Treaty; but if the same thing is done by a government official in a divorce case involving a Greek national it is not? Or would they pretend that the Treaty also applies to divorce cases? Obviously, such a thesis would be untenable. It is untenable because if the withholding of evidence, which is the ground of the complaint, if the withholding of evidence in a case involving a foreigner is an international wrong, it is so by the operation of general principles of international law applicable in all types of litigation. The position is the same in all cases, and therefore the Treaty can have nothing to do with nor confer any rights in respect of treatment of foreigners before the courts. As I said, if it did, it would confer superior rights in the cases it is alleged to apply to, namely commercial cases, and since litigants in such cases have, in fact, no other, different or superior rights, either as regards evidence or anything else, from what they have in any other kind of case, it follows, we think, that a claim in respect of their rights before the courts, and this is a claim in respect of Mr. Ambatielos's rights and treatment before the courts, it follows, we think, that such a claim cannot be based on the Treaty of 1886.

Mr. President and Members of the Court, I now propose to answer some of Sir Frank Soskice's remarks on the most-favoured-nation aspect of the matter and on the older treaties. The claimant Government contends that, if the claim does not fall within the direct language of the Treaty, it falls indirectly under the Treaty by reason of the operation of a most-favoured-nation clause (Article X) which is said to attract either relevant general principles of international law or the provisions of other treaties said to be relevant.

The United Kingdom relies on the principle that a most-favoured-nation clause can only apply to and operate in respect of the matters expressly covered by the clause. In the present case, the relevant clause confers most-favoured-nation rights only in respect of "commerce and

navigation" and, in another part of the Article, "trade and navigation". If such a provision could attract the general principles or rules of international law at all (which the United Kingdom Government contends is not the case), it could only attract such general rules and principles as relate specifically to trade, commerce and navigation, and not to the different subject of the administration of justice.

The same applies to the provisions of the older treaties. Article X of the 1886 Treaty could only attract provisions of other treaties relating to trade, commerce and navigation and conferring rights coming specifically under those heads.

As regards our proposition that most-favoured-nation clauses such as Article X of the 1886 Treaty cannot ordinarily attract the general principles of international law at all, we maintain our position. Sir Frank Soskice suggested we were wrong because he said that in many fields, international law was uncertain, or there was not agreement as to what its rules were. We concede that there may be cases where, for special reasons and owing to particular circumstances, the specific grant by treaty of what might seem to be a right already existing under general international law, would in the circumstances in question constitute a benefit or favour capable of being attracted by a most-favoured-nation clause in another treaty. We placed in this class some of the treaties concluded by Iran with other countries after the termination of the capitulatory régime, and we distinguished our own argument in the *Anglo-Iranian* case on that basis, that is we distinguished it from our present argument, and also on the basis of the radically different wording of the treaty clauses involved. We nevertheless maintain, and we think it obvious—at least so it seems to us—that in *principle* most-favoured-nation clauses cannot relate to things which are not matters of favour but of inherent right. It must, we think, be correct to say, in principle, that the whole idea of most-favoured-nation treatment involves, must involve the possibility that, in relation to the subject-matter of the most-favoured-nation clause concerned, some countries receive or may receive better treatment than others, and such treatment alone is what the most-favoured-nation provision is intended to catch. Treatment according to the general rules of international law is not a favour but a right. Not a right possessed only by some countries or by countries more favourably treated than others, but a right possessed by all—and the question of favours does not arise, and unless special circumstances can be shown, rights conferred by general international law are not attracted by most-favoured-nation clauses. In the present case there obviously are no special circumstances which would take the matter out of the ordinary rule.

Now the provisions of other treaties conferring specific benefits in the nature of grants or favours are, of course, in a different position, but we are still left with two objections, in our view fatal, to the theory advanced by our adversaries in regard to the older treaties that they quote. If the provisions quoted are provisions about commerce and navigation, then they have no higher or better status than the provisions of the 1886 Treaty itself—in other words, Mr. Ambatielos's claim not being a claim about commerce and navigation but about the processes of the courts, the commercial provisions of the older treaties can have no more bearing on the matter than the provisions of the 1886 Treaty itself.

In so far, on the other hand, as these provisions in the older treaties are not commercial in character and are alleged by our adversaries to involve treatment in accordance with general international law principles, they cannot in principle be attracted by a most-favoured-nation clause, and in any case could not be attracted by a most-favoured-nation clause such as Article X of the Treaty of 1886, which deals solely with commerce and navigation.

We therefore say that, even if it be held that the treaties cited in the present case guarantee, as our adversaries have suggested, treatment "in accordance with the principles and practice of ordinary international law" and even if it be held that such treatment could be attracted by a most-favoured-nation clause, if drafted in sufficiently wide terms, such as Article IX of the Anglo-Iranian Treaty of 1857 which I cited the other day, yet it still does not follow that all the rights granted under the treaties between the United Kingdom and the other countries in the present case can be attracted by a most-favoured-nation clause drafted in the much more limited manner of Article X of the Treaty of 1886 ; and we say that these rights in the other treaties could in fact only be attracted by Article X in so far as they relate to matters of commerce, and that in so far as they relate to matters of commerce, they do not relate to the claim of Mr. Ambatielos, to its real essence. Now on this point, although Sir Frank Soskice, I think, misinterpreted our position entirely, we have, or we think we have, the clearest authority of the Court itself in the *Anglo-Iranian* case. We there, if I might venture to remind the Court, advanced the proposition that since it might be the case that countries which had treaties with Iran subsequent to 1932 could invoke the Iranian Declaration accepting the Optional Clause, and since it might also be the case that countries which had treaties with Iran prior to 1932 could not invoke this Declaration, the former countries might be considered to be in a privileged position as compared with the latter countries ; and on that basis, we argued that Denmark's position from the jurisdictional point of view—she being one of the countries that had the later treaties (and I emphasize her position from the jurisdictional point of view)—might be in a privileged position as compared with the United Kingdom, which only had a treaty anterior to 1932, so that the United Kingdom would not be in the position of the most favoured nation, despite its most-favoured-nation clause with Iran in the Treaty of 1857 ; and as part of this proposition, we did rely on Article IX of the 1857 Treaty, under which Iran grants most-favoured-nation treatment to the subjects and commerce—but the subjects generally as well as the commerce—of the United Kingdom. But now the Court rejected our argument, precisely on the ground that a most-favoured-nation clause concerning the treatment of subjects and commerce did not cover jurisdictional matters (that is to say such matters were not matters not relating to the treatment of subjects and commerce), and therefore it is quite plain, so it seems to us, on the authority of the Court itself, and this is our present proposition in which we think we are following the Court, that a most-favoured-nation clause on one subject cannot attract the benefits of other treaties relating to other subjects, for in the *Anglo-Iranian* case the Court found that most-favoured-nation clauses relating to subjects and commerce could not attract rights of a jurisdictional character under other treaties. In so far, therefore, as the treaties between the United Kingdom and

the other countries cited in this case relate to matters other than commerce, we submit that they cannot be attracted by Article X of the Treaty of 1886, which grants most-favoured-nation treatment only in matters relating to trade, commerce and navigation.

Before I come to the final conclusion of my statement which I want to put before the Court, may I say a word about the actual provisions of some of these older treaties.

A new batch of them has been cited at a very late stage of this case, when it is difficult for us to comment on them in detail without unduly prolonging the proceedings, but I will say a little, though only a very little.

First, as Sir Frank Soskice was good enough to tell the Court on Saturday, we have been in communication with London and have had the originals of these treaties in the Public Record Office inspected. We shall in due course furnish the Court with photostats of these originals. In no case, so we are told, do the headings of the different articles, which apparently appear in the British Handbook of Commercial Treaties in the 1912 edition, figure in the originals. Nor do they figure in subsequent editions of the Handbook of Commercial Treaties, such as the 1924 and 1930 editions which we have here. Similarly, we are unaware at present whether the titles of these treaties, as cited in the paper which was drawn up on behalf of the claimant Government, appear in the originals or not, but that, of course, we shall verify, and it will appear from the photostatic copies which we shall submit to the Court. In any case we submit to the Court that headings of an editorial character introduced into a particular edition, it may be by someone really with no higher status or legal knowledge than a printer's assistant, can have no significance. Now, the point is that some of these headings are definitely misleading in regard to some of the provisions quoted. For instance, Article 1, paragraph 6, of the Treaty of Japan of 1911, which is headed "Administration of Justice", is simply an ordinary clause for free access on the same conditions as nationals in terms very like, and almost identical with, Article XV, paragraph 3, of the 1886 Treaty. The same applies to Article 7 of the Treaty of Peru of 1930.

The Bolivian Treaty of 1911, we suggest, is completely irrelevant. It merely defines the circumstances in which diplomatic intervention can take place. If the individuals concerned have legal remedies in the courts, diplomatic intervention is prohibited, in effect, until such remedies have been exhausted. But if there is evidence of a denial of justice, or other violation of international law, then intervention is permissible. But this provision in no way creates any rights as to denial of justice or as to international law : it merely refers to them. It simply regulates the process by which certain existing international law rights can be protected. It does not create those rights as such and therefore no such rights could be, by virtue of a treaty like the Bolivian Treaty, attracted under a most-favoured-nation clause in another treaty.

Generally, the provisions of the other treaties quoted, such as Article 16 of the Danish Treaty of 1660, Article 24 of the Danish Treaty of 1670, Article 8 of the Swedish Treaty of 1654, Article 6 of the Swedish Treaty of 1661, confer no more than a right to the benefit of the ordinary processes of justice according to the laws and usages of the country, i.e. national treatment. I find here a volume conveniently left for me

by Sir Frank Soskice in which the Treaty with Denmark of 1670 figures, and Article 24 says:

> "Both Parties shall cause justice and equity to be administered to the subjects and people of each other according to the laws and statutes of either country."

And that, in our view, taken in the context and in relation to the period in which this provision was drawn up, simply means the benefit of the ordinary processes of the laws and procedure of the country on the same terms as nationals. And on that basis, even if these provisions could be regarded as incorporated by reference into the Treaty of 1886, under the most-favoured-nation provision dealing with commerce and navigation, they would still not touch the real essence of Mr. Ambatielos's complaint, as it was expressed by Sir Frank Soskice in the passages I quoted. Mr. Ambatielos's complaint, as I have said so frequently (I am sure the Court must be almost tired of hearing it), is that the processes of the Court were inherently defective or, alternatively, that they were so employed and administered as to result in a denial of justice. It cannot be maintained that he was denied access or not allowed to use these processes, and in this connection, although we have refrained far more studiously than our adversaries have from going into the merits, we have ventured to point out that Mr. Ambatielos did fail to avail himself of the various processes afforded by English procedure for compelling the production of documents or the calling of witnesses, which might have procured him the evidence he says was improperly withheld. On the basis of the real essence of his complaint, it is apparent that he in fact received all that the older treaties might specifically have conferred upon him, even if they were relevant, and were to be regarded as incorporated in the 1886 Treaty. His complaint relates to something which is not covered by those treaties, nor by the 1886 Treaty, but which is covered by the general principles of international law on which his claim is really based.

And in conclusion, before I come to the final remarks I want to make, I would venture to remind the Court of my argument that the provisions of these older treaties must, in any case, be read in the light of the circumstances which existed when they were entered into and of the developments in general international law which have taken place since. I do not think the Declarations cited by our adversaries in some sense re-affirming these treaties as such, affect my argument, for we have never suggested that the treaties as such are not still in force. We have only said that certain particular provisions of them are, by reason of the considerations I have mentioned, spent or obsolescent or, in practice, inoperative.

Mr. President and Members of the Court, before I step down from the rostrum and give place, either this morning or this afternoon, to my colleague Mr. Fawcett, I would like to make one or two off-the-record remarks to the Court—although, of course, I fully realize that in this Court no remarks are off the record.

I would like just to try and pinpoint for the Court what it is that the United Kingdom is really trying to say to the Court in this case. What we are trying to say is that the Court has before it on the present occasion an essentially fictitious basis of claim, and that, in the view of the United Kingdom—or rather, if I may so put it, the

United Kingdom requests the Court, in those circumstances, not to find that the United Kingdom is under an obligation to submit that claim on that basis to arbitration. And I venture to think that the basis of claim put forward is not only fictitious, but a peculiarly vexatious and dangerous one, because the effect of it would be to expose countries to attack in respect of the processes of their courts and of the general administration of justice in their countries through the medium of ordinary commercial treaties. Now, all countries have a natural reluctance to have discussed in an international court, and to have ventilated there, what goes on in their courts, and as to the result and outcome of particular cases. That reluctance is not in any way discreditable—it is natural—and it applies equally whether the country concerned has a highly developed system of law of procedure or whether it has a less highly developed system. The reluctance in question is *quasi* universal.

Now, as regards the present claim, we have studiously avoided going into the merits on the present occasion, except to the extent that we were literally compelled to do so by certain observations of our adversaries, but if the Court will—as I hope it will—look again at paragraphs 17-76 of our original Counter-Memorial, I believe that they will see that the United Kingdom Government, not being, as it conceived, under any obligation to arbitrate this claim—they will see why the United Kingdom Government was unwilling to do so, because it seemed clear that the case was one which was fundamentally devoid of merits. And I think the Court will also understand the reason why the United Kingdom Government, not being under an obligation to arbitrate, as it thought, and no such obligation being at the time suggested, either on the basis of the 1886 Treaty or on any other basis, felt justified in refusing to submit the claim voluntarily to arbitration when, after the lapse of a very considerable number of years, that request was made.

But, Mr. President, however reluctant we might have been, we should naturally have gone to arbitration if we had been under an obligation to do so. We did not think we were and we do not think we are now. We hope that the Court will find that the present basis of claim is inadequate and in all the circumstances of this case, having regard to its history, suspect as to its genuineness. And we hope the Court will find that the United Kingdom should not be asked to arbitrate the claim on that basis.

And, now, may I state in one sentence what seems to us to be the fallacy, the fiction involved in the whole basis of claim put forward by the Hellenic Government in this case. The fallacy is simply this: that the administration of justice is a matter of commerce and navigation; we say it is not, and that it never can be, and we hope the Court in its judgment will give effect to that principle.

I thank the Court very much for the patience with which they have listened to us.

6. REJOINDER OF Mr. FAWCETT

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)
AT THE PUBLIC SITTING OF MARCH 30th, 1953, AFTERNOON

Mr. President and Members of the Court:

Before I come to the question of local remedies, there are two points in Sir Frank Soskice's speech which I would like to refer to. On page 445 he said that he did not associate himself at all with any suggestion that there had been partiality on the part of the English judges, and we welcome that repetition of the attitude of the Hellenic Government, and we do hope that that is the last that will be heard of any suggestion of partiality or obstruction by the English judges. I only called attention to it because Me. Rolin did, on page 371 of his speech, make a suggestion, which I will not repeat, but it was possible to interpret it as reviving something of the original statement on that point, and I merely say I hope it is now all forgotten.

My other point is to refer to what Sir Frank Soskice said about the two Supreme Court cases to which I referred. The first is the *International Textbook Company* v. *Pigg*; Sir Frank Soskice's point on that was that it was dealing with inter-State commerce within the United States, and he said: "we are dealing with commerce, not with inter-State commerce". He said that on page 465 of his speech. But of course the point of my reference was that we are dealing in the 1886 Treaty with commerce between two different territories—two different national territories; we are not dealing solely with commerce, and so that is the point of my citing the definition of the Supreme Court in that case.

Now, as to *Maiorano's* case, Sir Frank Soskice distinguished that—or sought to distinguish it—on the ground that it did not deal with the production of evidence. That, I would suggest, is quite immaterial, and for two reasons: that case was in fact a great deal stronger than the present case, in that the widow, who was the Plaintiff there, was told that under the local law she could bring no action at all. That is an absolute prohibition, which seems to me on the face of it to be much nearer a denial of access than any possible withholding of evidence, because such evidence may well be irrelevant, or it may be not admissible to the Court at all on quite other grounds that have nothing to do with the withholding. Therefore, on the facts it was a much stronger case from the point of view from which I am asking the Court to consider it. But the second and more important point is that I did cite it, of course, for its statement of principle, and I only ran quickly through the facts in order that the statement of principle could be seen in its true perspective, I would say, finally, of those two cases I cited, not, of course, that they are in any sense binding on this Court, but that they are, I would suggest, of high persuasive authority. They are decisions of a great national Court, which in its long history has had issues before it very often of a *quasi* international character, and I believe its decisions on questions of

this kind are of a persuasive authority and very worthy of the Court's consideration.

Now I will turn to the question of the exhaustion of local remedies. The Court will remember that Me. Rolin gave it as his opinion that this is a matter for consideration by the Court at this stage, and with this view the United Kingdom Government entirely agrees, and I shall, if I may, come back to that point later on. If this was not so, it would mean that the United Kingdom might be subjected to an order for arbitration even before the claimant had begun to seek a remedy, through the processes available to him in the English courts, and this could not reasonably be said to have been the intention of the Treaty. I hope to deal with this quite shortly, and I shall try to show the Court that there is no question of English law that they have to decide here. The parties, as I think I can show, are really agreed about what the position is under English law on the material part of the case, and I shall try to say what that position is. I shall also show that there is, as a fact before this Court, the non-exhaustion of local remedies by Mr. Ambatielos. I say "as a fact" because the legal consequences are, of course, a separate question, and I shall ask the Court to consider what the effect of that fact is on the present claim as a question of international law.

I do not think it is in dispute that Mr. Ambatielos did not appeal to the House of Lords against the decision of the Court of Appeal refusing his application to call additional evidence and that he lodged, but did not pursue, an appeal from the Admiralty Court to the Court of Appeal. I have now to deal with Sir Frank Soskice's arguments on these points, and put forward our own in answer.

Let me start, then, with the question of Mr. Ambatielos's right of appeal from the decision of the Court of Appeal to the House of Lords. Sir Frank Soskice pointed out that in deciding whether to admit new evidence the Court of Appeal was exercising a discretion. He then went on—I am referring to pages 445 to 447 of his speech—:

> "an appellate court is very slow indeed—and reluctant—to interfere with the decision on a matter of discretion of the court below".

With that we agree.

Sir Frank Soskice continues:

> "I am not arguing before you that an appellate court will *never* interfere on a matter of discretion upon which the judge below has decided, but broadly speaking an appellate court will not interfere unless it is perfectly clear that the judge in the court below, in exercising his discretion, proceeded to exercise his discretion upon some mistaken principle of law",

and he goes on:

> "It is perfectly true that in *Evans* v. *Bartlam*, the House of Lords did say that there is an overriding discretion in an appellate court, even on a matter of discretion on which the judge below decided to interfere, if the general requirements of justice so require. It is in practice—and I do not know whether this submission would commend itself to Judge McNair and whether it would coincide with his experience—very difficult, if the court below has proceeded

upon principles of law as to which criticism can not be directed, to satisfy a court of appeal or the House of Lords that they ought to interfere."

Now, I will, if I may, read the two passages from the decision in the House of Lords in *Evans* v. *Bartlam* to which Sir Frank Soskice, I think, is referring. Lord Atkin said:

> "While the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judges' discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done, it has both the power and the duty to remedy it." Lord Wright said: "It is clear that the Court of Appeal should not interfere with the discretion of the judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong, but the Court is not entitled simply to say that, if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong one. The Court must, if necessary, examine anew the relevant facts and circumstances in order to exercise by way of review a discretion which may reverse or vary the order."

Now, that is what the House of Lords said, and I think Sir Frank Soskice was very accurately summarizing it on Saturday, and I think the rule can be shortly stated in this way, where the lower court is exercising a discretion in coming to its decision, and it exercises this discretion on a mistaken principle of law, then that exercise of discretion is wrong, and the appellate courts will intervene.

I think it is quite clear from *Evans* v. *Bartlam* that all this applies to appeals from the Court of Appeal to the House of Lords, and I think Sir Frank Soskice was so reading it.

That is the principle of the English law applicable to the case before us. The appellate courts, including the House of Lords, are slow and reluctant to interfere with a discretionary decision of the lower court, unless it was exercised upon a mistaken principle of law. I think I can say that both Parties here are agreed that that is the correct principle of English law.

Mr. President, coming to the case before us, what Sir Frank Soskice said, if I understood him rightly, and what, indeed, Sir Hartley Shawcross was saying at page 303 of his speech last year—though, of course, he of necessity was dealing with this point very briefly—was not that the House of Lords could *not* have overruled the decision of the Court of Appeal in this case, but only that it would have been very difficult to persuade the House of Lords to interfere. I think, to be quite fair to Sir Frank Soskice, that he did say that there would have been no chance of the House of Lords interfering. In other words, both Sir Frank Soskice and Sir Hartley Shawcross, and there can be few higher authorities to address the Court on this point, are both agreed that the House of Lords was competent to hear an appeal from the Court of Appeal's decision in this case. But they say, in effect, that the House of Lords would not have upset the Court of Appeal's decision, or, in Sir Frank Soskice's language, there would have been no chance of the House of Lords interfering.

Now, let us see what the complaint by the Hellenic Government against the Court of Appeal's decision is. I have already suggested to the Court that this claim is an essential part of the Hellenic Government's three allegations (in my summary), which amount to a denial of access or a denial of justice. The complaint is stated in paragraphs 19 and 12 of the Greek Memorial. In paragraph 19 it is said that the decision of the Court of Appeal was contrary to the jurisprudence of that court. It was wrong that in the Ambatielos case it insisted and in that case alone upon the duty of diligence.

In paragraph 12, it says that when Mr. Ambatielos had obtained, after the judgment in the Admiralty Court, the Laing-Maclay letters, the Court of Appeal refused to admit these new pieces of evidence; and that this decision violated an essential rule of British procedure, which authorizes in principle the production of fresh evidence at the second instance.

Now if this description of the Court of Appeal's decision is a true and fair one, and we must, of course, assume that this is so for the purposes of the argument here, it comes exactly within the class of decision by the Court of Appeal upon a mistaken principle of law, on which the House of Lords would intervene on appeal. The conclusion cannot, I think, be avoided, that on the Hellenic Government's own showing and in face of the admitted principle of English law which I have just set out, that not only did appeal lie to the House of Lords, but this was the very class of case in which the House of Lords would have had the power and the duty to intervene and bring about, ultimately, the reversal of the Admiralty Court's decision. What then did our distinguished adversaries mean when they said that the House of Lords would not have upset the decision, or that there was no chance of the House of Lords interfering? Let us see what Sir Frank Soskice himself says about the Court of Appeal's decision. He asked the Court to read it, and with your permission, Mr. President, I will read to the Court a short part of the decision of Lord Justice Bankes and also Lord Justice Scrutton. Lord Justice Bankes (this is on page 205 of the Annexes to the United Kingdom Counter-Memorial) said:

> "I do not think this application ought to be granted. The rule upon which this kind of application is granted is well established and I need not repeat it; it is referred to in a case to which Sir Ernest Pollock"—who was counsel for the Crown—"referred of *Nash* v. *Rochford Rural District Council* (1917, 1 King's Bench) and summarized, it may be stated thus I think: That a person who has lost his action in the court below will not be allowed to come to this court and ask to make a new case in the Appeal Court by calling fresh evidence which was or might have been obtained by the use of reasonable diligence by him in time for the first trial."

And he refers to Mr. Ambatielos's affidavit, which is on page 207 of our Annexes, and I would draw the Court's attention to the last sentence of that affidavit:

> ".... In particular, I did not understand"—Mr. Ambatielos says—"that they (the letters) confirmed my case as to the delivery of the vessels on dates certain."

I call attention to that simply to show, as I showed from the note on page 76 of the Greek Memorial, that the whole case turns on the Laing-Maclay letters and the testimony of their writers. The claimant was then saying—and the Hellenic Government have said, I think, consistently since—that it was those letters which proved their case and it was the exclusion of those letters by the Court of Appeal that made appeal from the Admiralty Court impossible. Those are the vital letters—that is the vital information—which proves their case : that is what they are saying.

Now I will just add this short passage from Lord Justice Scrutton, who says :

> "I agree that to grant this application would be to depart from the settled principle upon which the Court deals with the admission of further evidence after a case has once been tried. One of the principal rules which this Court adopts is that it will not give leave to adduce further evidence which might have been adduced with reasonable care at the trial...."

Mr. President, I do not want to go into the merits at all : I merely want to try to show that the Court of Appeal there believed that it was applying a well-established principle of law. Now what does Sir Frank Soskice say about this ? If I may quote from his speech on page 447, he says, speaking of the judgment, and this is just after he invited the Court to study it :

> "The Court will there see that the Court of Appeal do deal with the matter as a matter of discretion. They give their consideration to it and in the exercise of their discretion they form the view that they ought not to allow the further evidence to be adduced.
>
> In the light of the principle which I have cited from our English jurisprudence, what real chance must there have seemed to be to the advisors of Mr. Ambatielos of successfully appealing to the House of Lords from that judgment of the Court of Appeal ? It was a matter of discretion. Lord Justice Bankes cites a well-known passage from the case of *Nash* v. *Rochford Rural District Council* in terms very similar to the citation that I made from the opinion of the Privy Council in the case of *Leeder* v. *Ellis*, and I put it to the Court that it must have seemed to those who were advising Mr. Ambatielos when the Court of Appeal rejected his application for permission to introduce further evidence that an appeal against that decision in a matter of discretion to the House of Lords would have been virtually hopeless."

In other words, Sir Frank Soskice is saying—and I hope I am construing his argument clearly and fairly, for he, if I may say so, was scrupulously fair throughout his argument—that the Court of Appeal was here relying on an earlier decision of its own, a decision which was in fact well known as having laid down what the proper principle of law is which must be applied upon applications for the admission of new evidence. In short, Sir Frank Soskice is saying that the Court of Appeal, having exercised its discretion on the basis of an acknowledged principle laid down in earlier decisions, including one of its own, this was a situation in which there was no real prospect of successful appeal to the House of Lords. Now we have discussed some of those earlier cases, particularly

those cited in the Greek Memorial, in paragraphs 73 and 74 of the Counter-Memorial, and I do not wish to weary the Court with them now. But I think the Court will see immediately that it is faced here with a complete contradiction in the Hellenic Government's position. The Hellenic Government, in its Memorial, is saying that the Court of Appeal's decision was contrary to the precedents and usual practice of the Court: by its Counsel it is saying here that appeal to the House of Lords would have failed for precisely the opposite reason—that the Court of Appeal had exercised its discretion in accordance with principle.

Now what is the consequence of this? I would put it this way: The Court must resolve that contradiction in one of two ways—either it must hold, on the assumption that the plea in the Greek Memorial (and that is the fourth allegation in my summary) is true and justified—that is, that the Court of Appeal did act on a mistaken principle of law; then it is plain, on the principle of English law on which we are all agreed as regards appeal to the House of Lords, that Mr. Ambatielos could, and should, have appealed. Or, the Court must, in my submission, hold that that plea and the fourth allegation have been in effect withdrawn by Sir Frank Soskice, who has come to tell the Court that the Court of Appeal followed precedent, and it is for that reason that appeal to the House of Lords would have had no chance of success, and it is for that reason that this remedy which we say he had was ineffective.

Mr. President, if I may I will refer briefly here to the question of Mr. Ambatielos's appeal to the Court of Appeal against the decision of the Admiralty Court; and Sir Frank Soskice said of that on page 445 of his speech:

> "Without the evidence which we say the British executive, not judicial, authorities wrongfully withheld from the Court and from us, there would have been *very little chance* indeed of inducing the Court of Appeal to take a different view on the facts from that reached by Mr. Justice Hill after a prolonged enquiry lasting for the period that I indicated",

and again on page 448, he says:

> "Without the further evidence which we say was wrongfully withheld, there would have been very little, if any, chance of successfully appealing from Mr. Justice Hill's judgment."

Now this is an assessment of the Claimant's chance of successful appeal without the additional evidence which he sought the right to produce on the hearing of his appeal, which has I think three consequences. It is, so it seems to us, an admission that Mr. Justice Hill's judgment on the evidence before him was unexceptionable, and I have already, I hope, convinced the Court that the second allegation, that he decided against the weight of the evidence before him, cannot really stand now in the Hellenic Government's claim in face of the failure to appeal against it.

The second consequence is that, if Mr. Ambatielos had been able to produce the additional evidence, Sir Frank Soskice gave it as his opinion that the Court of Appeal (I quote):

> ".... would undoubtedly have afforded him the relief for which he counter-claimed in the action before Mr. Justice Hill".

Now that, I think, is a plain statement that the *Laing-Maclay letters*—the testimony of the writers—was the vital point and really the whole point in the case, I submit to the Court the only point, on the question of local remedies. *A fortiori*, and this is my third point, he would have obtained that relief, that is to say a reversal of the Court's decision, if he had appealed successfully to the House of Lords. That, I think, is the significance of his failure to appeal from the Admiralty Court.

Now if I may return to the main question, that is the appeal or failure to appeal to the House of Lords, I think that what our adversaries are saying, as I understand it, is that the process of appeal to the House of Lords was not an effective remedy within the meaning of the rule as to the exhaustion of local remedies. As I have tried to show, it is not the case that on the Hellenic Government's view of the facts, that appeal was useless; appeal was not futile if the Hellenic Government's case is a correct one. But the issue before the Court is solely one of international law, and Sir Frank Soskice cited the *Finnish Ships* case. Now I think it is quite clear that that case must be distinguished as there was there no appeal from the British tribunal on questions of fact, as Sir Frank Soskice, with his usual candour, has admitted. The question is, how is the principle in the *Finnish Ships* case to be applied here? Sir Frank Soskice says: "this is the general principle", and he has quoted Judge De Visscher, and he is also relying on some words of Judge Bagge in the *Finnish Ships* case itself: "If you can say that an Appeal Court, looking at the case you would present, is, I do not say certain, but from a common sense point of view almost certain to reject your appeal, it cannot be said against you that you should have appealed in spite of that advice which was given to you by your legal advisors, and in spite of that opinion which you yourself formed." That is on page 22, and on page 23 he puts it another way: "You cannot be obliged to have recourse to a Court of Appeal, if, taking a fair view of the law and the circumstances, it is virtually a foregone conclusion that the Court of Appeal would be bound to reject your appeal."

Now, Mr. President and Members of the Court, I would suggest with great respect that that is not a correct formulation of the rule as to the exhaustion of local remedies, and I would also say that it is not at all a correct formulation of what the *Finnish Ships* case decided and what Judge Bagge said. I think it is quite clear that it is an inadequate formulation because it would exclude any appeal that was ill-founded in itself—it would enable a litigant or his advisors to decide, possibly correctly, that on the law or the facts, i.e. on the merits, the appeal could not succeed and then launch an international claim, or decline to appeal on the grounds of expense, or for some quite irrelevant reason. I submit that such a formulation cannot be correct. I would also suggest that it is not a correct formulation of what Judge Bagge said, and I will now quote his words, in which Judge Bagge approved a passage in the British Government's Memorial. He said:

> "The Parties in the present case" (this is Judge Bagge) "agree that the local remedies rule does not apply where there is no effective remedy. The British Government, as previously mentioned, submit that this is the case where a recourse is obviously futile. It is evident that the British Government there include not only

cases where recourse is futile because on formal grounds there is no remedy or no further remedy, for example where there is no appealable point of law in the judgment, but also in cases where on the merits of the claim recourse is obviously futile, for example where there may be appealable points of law, but they are obviously insufficient to reverse the decision of the Court at first instance."

And I think, Mr. President, that the words "merits of the claim" there quite clearly mean the merits of the appeal. I would respectfully submit that Judge Bagge is there saying two things as far as concerns the present case, and I submit that he is laying down the true test: If there is an appealable point of law, which we have here, and if appeal, if successful, would bring about a reversal of the decision of the lower court, then the rule as to the exhaustion of local remedies applies, and until that appeal has been exhausted no international claim can be brought. In the case before us, I think it is not disputed that the House of Lords was competent to hear the appeal, and Mr. Ambatielos did not bring the appeal, and our adversaries have not contested our statement that had appeal been brought to the House of Lords and been successful, a reversal of the Admiralty Court's decision would have been brought about, and I think the passage I quoted from Sir Frank Soskice's speech, in relation to appeal to the Admiralty Court, confirms it. Now, on the Hellenic Government's view, the Court of Appeal had excluded evidence vital to their case in circumstances which showed clearly that they have either violated some rule of procedure or had gone against the precedence, in other words they had acted on a mistaken principle of law. There is plainly, on any natural meaning of words, an appealable point of law.

As to the second point, the appeal, if successful, must bring about a reversal of the decision of the lower court, and I will not weary the Court with repetition, but I think it plain that the whole case is confined solely to the *Laing-Maclay letters*, which were not produced. That was the allegedly vital evidence which the Court of Appeal refused to admit, and I think I can fairly say that it must follow, on the Hellenic Government's case, that, had the letters been admitted, a reversal of the Admiralty's Court's decision would have been the result.

And now, Mr. President and Members of the Court, before I finish, I will first give a very short summary of what I regard as the position under English law, and then I will state four short propositions showing the way in which we believe the Court should apply the accepted rules as to exhaustion of local remedies to this case. We say that, having regard to the position in English law, and to the facts of the case, there are really only two alternatives: either the Greek Memorial must be accepted, and it must follow that the appeal would have had a chance of success, and in that event the claimant cannot be held to have exhausted his local remedies, or it must be held with regard to Sir Frank Soskice's statement of the position, that there *was* an effective remedy, that is to say, there was an effective remedy within the meaning of Judge Bagge's rule which I quoted. There was an effective remedy for the further reason that, the essence of the case on the exhaustion of local remedies being the refusal of the Court of Appeal to admit the Laing-Maclay letters and testimony, at that stage the alleged withholding of evidence by the Crown was no longer oper-

ative, for the Laing-Maclay letters and testimony were, of course, at that stage in the control of Mr. Ambatielos. Now, Mr. President, I ask the Court to find that Mr. Ambatielos did not exhaust the local remedies available, and I go on to state the four propositions. We state first, and in general, that the Hellenic Government is not entitled to have its claim on behalf of Mr. Ambatielos referred to international arbitration under the 1926 Declaration in view of the fact that Mr. Ambatielos did not exhaust his local remedies. Second, if there was a breach of the Treaty in respect of the Hellenic Government's first allegation, that is, breaches of English law obligations by the Crown, then in so far as the claim is being brought in the terms of the 1926 Declaration, on behalf of a private person, Mr. Ambatielos, it is not arbitrable at this time in view of the fact that he did not exhaust his local remedies. Third, there can be no breach of the Treaty at all, and therefore no claim based on the Treaty, within the meaning of the Declaration, in respect of allegations amounting either to a denial of access or a denial of justice until local remedies have been exhausted such as a right of appeal. They have not been exhausted and there is therefore no claim.

Fourth, if it is said that the Hellenic Government is entitled to rely on an earlier treaty, and the Court so holds, by operation of Article X, and that earlier treaty is held to embody either the general rules of international law or provisions relating to the administration of justice, or to the grant of justice and right, or similar provisions, then there can equally be no breach of those rules or provisions and therefore no claim based on the Treaty, since Mr. Ambatielos has not exhausted the remedies available to him, remedies which, as I should point out to the Court, are in certain cases expressly provided for by the treaties as requiring exhaustion before the treaty applies. The United Kingdom Government therefore asks the Court to hold that the non-exhaustion of local remedies by Mr. Ambatielos is a substantive ground for refusing an order for arbitration in this case.

I have sought to avoid going into the merits throughout this argument. I have tried to put it entirely on the basis of the Hellenic Government's case as we find it in the pleadings, but there is no effective remedy within the meaning of the rule upon their case, and that in our view is sufficient at this stage to bar an order for arbitration. But, of course, there is a sense in which there may have been no effective remedy on the merits, that is, the ultimate merits of the case, because, as we say, Mr. Ambatielos had no case at all. It may well be that the remedy we describe was not effective, but of course that is not relevant at this stage. That is my argument Mr. President, and I thank the Court for the patient hearing it has given me.

7. REJOINDER OF Mr. EVANS

(AGENT OF THE GOVERNMENT OF THE UNITED KINGDOM)

AT THE PUBLIC SITTING OF MARCH 30th, 1953, AFTERNOON

Mr. President, Members of the Court:

I wish first to say something in reply to the remarks made the other day by Sir Frank Soskice on the question of the delay in bringing the present proceedings. Then I shall give the Court a very brief summary of the United Kingdom's arguments in the case and, lastly, I shall present the Court with our final conclusions.

Now, Sir Frank Soskice submitted that the question of delay was not relevant to the present proceedings. As to this, let me say that, in our submission, it is a question which the Court should consider in these proceedings because it goes directly to the question whether the United Kingdom should submit the Ambatielos claim to arbitration, and we believe that when the Court, in its judgment on the Preliminary Objection, said that the question of delay was a point to be considered with the merits, they referred to the merits of the Hellenic Government's application, which gives rise to the present proceedings, and that therefore they consider that the point should be taken into account now.

Mr. President, we think that Sir Frank Soskice misunderstood our argument and our attitude on this question of delay. We admit that there has not yet been established any absolute rule of prescription under which, after a fixed period of time, the right to commence proceedings before this Court is barred. What we have contended—and it is, we think, a legitimate contention—is that delay, unless it can be fully justified (and after all it does take something to account satisfactorily for a delay of nearly thirty years), that delay is a factor which the Court is entitled to take into account in deciding whether the claim is one in respect of which the United Kingdom Government should be required to submit to arbitration. It is a matter of equity. May I refer the Court to paragraph 108 of the United Kingdom Counter-Memorial and to the two statements there of the principles which we submit to be applicable.

The Umpire in the *Gentini* case which is reported in Ralston's reports on the Venezuelan arbitrations, 1903, said:

> "The principle of prescription finds its foundation in the highest equity. The avoidance of possible injustice to the defendant, the claimant having had ample time to bring his action, and therefore if he has lost having only his own negligence to accuse."

Again, the Commissioner in the *Williams* case, which is reported in Moore's *Historical Digest of International Arbitrations*, to which the United States has been a Party, said:

> "The causeless withholding of a claim against a State until, in the natural order of things, the witnesses to the transaction are dead, vouchers lost, and thereby the means of defense essentially

curtailed, is in effect an impairment of the right to defend. The public law in such cases where the facts constituting the claim are disputed and disputable, presumes a defense."

Now, it is our submission that the Court should take these principles into consideration in deciding whether the United Kingdom ought to submit to arbitration in the present case.

Now Sir Frank Soskice had a good deal to say about the respective moral positions of the two Governments, and he was quite indignant about this, and he suggested that if the positions of the two Governments were compared it was not the Hellenic Government which came badly out of the matter. Mr. President and Members of the Court, we contest this view. Our adversaries habitually speak of a delay of some ten years, such as that which occurred between the finding of the courts in England and the first occasion in 1933 on which the Hellenic Government proposed arbitration as if it were nothing at all, but in fact it was a very considerable period, and the lapse of time was already then in 1933 such as to prejudice the United Kingdom's position. This fact was pointed out in paragraph 5 of the United Kingdom note of November 7th, 1934, which is to be found as Annex S 4 to the Greek Memorial. I want to read that paragraph, but before I do so I should like to remind the Court that the representations made by the Hellenic Government in 1925 did not amount to a legal claim against the United Kingdom Government, but were only a request to the United Kingdom Government, as Sir Frank Soskice put it, to consider the matter on a purely friendly basis. Indeed, it was said in the memorandum which was annexed to the note which the Greek Government presented to the United Kingdom Government on that occasion, that the final judgment of a British court unappealed against closes the transaction from a legal point of view. That was the attitude which the Hellenic Government took in 1925, and their representations to the United Kingdom Government on that occasion were much more in the nature of a request for an *ex gratia* payment than a legal claim. Now, these were the considerations which the United Kingdom Government brought to the attention of the Hellenic Government in 1933 on this question of delay. I read paragraph 5 of the United Kingdom's note :

"Although the events in this case took place between the years 1919 and 1922, it was not until more than ten years later that the Greek Government took any steps resembling the presentation of a claim against His Majesty's Government. While the material now at the disposal of His Majesty's Government is sufficient to enable them to deal with the contentions raised in your note so far as they contain nothing new, two results of this delay are that the records in their possession are less complete than they would have been if the matter had been raised within a reasonable time after the events in question, and that some of the persons possessing first hand knowledge of the facts are no longer alive. Such results are in such circumstances inevitable, and it is because this is so that international law and practice regard avoidable delay in presenting claims as constituting a bar to their successful presentation."

Now we maintain, Mr. President, that these were in themselves reasons which justified the United Kingdom in 1933 and 1934 in their

refusal of which the claimants have so much complained to arbitrate the case voluntarily. The lapse of another seventeen or eighteen years before the Hellenic Government took any active steps to bring the matter before this Court has not made the position any better, and it is already clear that, if the case were to go eventually to an arbitral tribunal, it would have to be argued and decided almost entirely on the basis of historical matter and paper evidence, since hardly any persons who were concerned with the transactions in 1921 would still be available to give actual testimony, though some of that testimony would be very important, particularly for the United Kingdom.

Surely, Mr. President and Members of the Court, if we are talking of moral obligations, there is an obligation in equity on a country whose position is that it has a claim in respect of which it alleges a serious violation of a Treaty (this is now the Greek position), and particularly a Treaty which contains a clause for compulsory arbitration—surely there is an obligation on a country in this position to make mention of the Treaty at some date earlier than fifteen years from the time when the claim first arose, and equally to mention the supposed obligation to arbitrate at least when, or soon after, a request for voluntary arbitration is definitely refused.

Furthermore, we maintain that the conduct of the Hellenic Government in bringing this case to the Court on a wholly artificial construction of a Treaty twenty-five years after this could first have been done, amounts to an abuse of the process of this Court. When my colleague, Mr. Fawcett, suggested that the Court should so find, *primæ impressionis*, he was not, as Sir Frank Soskice argued, asking the Court to fly in the face of precedent and of the law, but to take account of the comparatively new situation which has been created in the field of international law by the establishment of an International Court of Justice in permanent session, and he was suggesting that the Court as a permanent institution might establish a practice and jurisprudence of its own in the matter of delay as an abuse of the Court's process.

However, this matter of delay has another and equally important aspect which I might call the evidential aspect, of which Sir Frank Soskice took little account. We noticed that Sir Frank Soskice tried to explain away all the delays involved in this case on the basis that the Hellenic Government, actuated by feelings of friendliness towards the United Kingdom Government, was anxious to give the United Kingdom Government every possibility of arbitrating on a voluntary basis. We are naturally glad, Mr. President, to think that this was so. At the same time, it is difficult to avoid the feeling that there was another and simpler explanation of this attitude of the Hellenic Government, namely, that no genuine treaty basis existed and the Hellenic Government knew it. Of course, we do not suggest that a government is not entitled to seek compulsory arbitration by such legal methods as may be open to it. The whole question here is: are the methods legal, that is to say, is there anything else but a pretence of a treaty basis? And we suggest that the history of this matter and the remarkable delay by the Hellenic Government in invoking the Treaty affords the strongest possible evidence that there is not.

In brief, our argument in this respect is one which goes directly to the question whether the contention that the claim is in fact based on the Treaty can be regarded as a serious one. I can perhaps best

illustrate what we mean by referring to the *Anglo-Iranian* case, on which Sir Frank Soskice had so much to say. Whatever the merits of the argument which the United Kingdom put forward in that case alleging that certain treaties were relevant to the issue and afforded a foundation for the compulsory jurisdiction of the Court, it was an argument which they put forward *at once*, as a view genuinely held by them. In short, they did not, as the claimants have done in the present case, wait for a period of fifteen or twenty years before doing this, in the meantime putting forward and arguing their case in a series of notes on a totally different basis. As we said in our earlier statement, it is quite impossible to suppose that the claimants would not have cited the Treaty of 1886 and its compulsory arbitration provisions at a comparatively early stage of this case if they had supposed it to have any relevance. The fact that they did not do so until much later, indeed, for all practical purposes until comparatively recently, cannot but throw the greatest doubt, in our submission, on the seriousness and merits of their whole contention that the claim is in fact based on the Treaty as they now allege, and we submit that this should be taken into account by the Court in determining whether a real or a fictitious basis of claim is before it.

Mr. President, that completes what I have to say on the question of delay, and I now come to our brief summary of the United Kingdom arguments. I am afraid, Mr. President, that this part of my speech may sound more like the reading of a page from a statute book than an oration, but I think I can assure the Court that it will read very much better than it sounds, and we very much hope that the Court will find it useful in their further studies of the case. This, then, is our summary of the arguments:

1.—By reason of the second *dispositif* of its Judgment of July 1st, 1952, the Court has now to decide whether the Ambatielos claim is a claim which should be arbitrated in virtue of the Declaration of 1926.

2.—In order to determine whether the Ambatielos claim is a claim which should be arbitrated in virtue of the Declaration of 1926, the Court must interpret the Declaration.

3.—By virtue of Article 29 of the Treaty of 1926, the interpretation of any provision of that Treaty (including the Declaration of 1926) is a matter *solely* for this Court.

4.—The Ambatielos claim is not a claim which should be arbitrated in virtue of the Declaration of 1926 unless it is a claim "based on the Treaty of 1886".

5.—The decision on the question whether the Ambatielos claim is "based on the Treaty of 1886" is a condition precedent to an order for arbitration since:

(a) the United Kingdom Government, in the Declaration of 1926, consented to arbitration only in respect of claims "based on the Treaty of 1886";

(b) to order arbitration and leave the question whether the Ambatielos claim is based on the Treaty of 1886 to be decided by the arbitrator would be to beg the question, for the making of an order for arbitration implies that an affirmative answer has been given to the question.

6.—In maintaining that the Ambatielos claim is "based on the Treaty of 1886", the Hellenic Government agrees that this expression means more than "*said* to be based on the Treaty of 1886", but contends that the claim is "based on the Treaty of 1886" if certain provisions of that Treaty (namely, Articles I, X, XII and XV) are invoked in support of the claim *and* those provisions are not obviously unrelated to the claim.

7.—This contention is wrong in principle, in the submission of the United Kingdom Government, since it would allow a claimant government to allege that a treaty had been broken without being obliged to state facts tending to establish the breach. It is in effect an unjustifiable attempt to shift the burden of proof.

8.—The Hellenic contention is also wrong in relation to the present case since—so the United Kingdom Government contends—the Ambatielos claim could only be "based on the Treaty of 1886" if it is a claim the substantive foundation of which lies in the Treaty, that is to say:

(a) if the claim came within the scope of the Treaty;
(b) assuming the facts alleged by the Hellenic Government to be true, a violation of the Treaty would have occurred;
(c) local remedies had been exhausted.

9.—The Hellenic Government has failed to discharge the burden of proof accepted by it since:

(a) even if the Hellenic Government's interpretation of the expression "based on the Treaty of 1886", as stated in point 6, is correct, there is an obvious lack of connexity between the Treaty provisions invoked by them and the Ambatielos claim, in that:

(i) rights are claimed as treaty rights which are on the face of them either rights under the general principles of international law or rights arising under English law;

(ii) no fact is alleged by the Hellenic Government which, even if true, would establish that Mr. Ambatielos did not receive national treatment within the meaning of Articles I, XII and XV of the Treaty of 1886;

(iii) the articles of other treaties or the general principles of international law, invoked by the Hellenic Government through Article X of the Treaty of 1886 either

1. cannot properly be regarded as incorporated in the Treaty because

Article X refers only to commerce and navigation, and a most-favoured-nation clause cannot ordinarily attract general principles of international law; or

2. if they, that is, the articles of the other treaties or the general principles of international law invoked by the Hellenic Government, can properly be regarded as incorporated in the Treaty, they do not cover this claim; or

3. if they can properly be regarded as incorporated in the Treaty and do cover the claim, they cannot properly be invoked because of the fact that Mr. Ambatielos did not exhaust his local remedies.

(b) if the United Kingdom Government's interpretation of the expression "based on the Treaty of 1886" be correct, the Hellenic Government has not shown that the Ambatielos case is based on that Treaty because

(i) the claim does not come within the scope of the Treaty;

(ii) even if the facts alleged by the Hellenic Government were true, no violation of the Treaty would have occurred;

(iii) local remedies have not been exhausted.

10.—As regards the question of local remedies,

(i) the position under English law is clear and does not have to be decided by the Court. The Parties are agreed that the House of Lords *was* competent to hear and determine an appeal by Mr. Ambatielos from the Court of Appeal's decision, and the Court of Appeal was competent to hear an appeal from the decision of the Admiralty Court;

(ii) it is admitted, and a fact before the Court, that Mr. Ambatielos did not exhaust his local remedies;

(iii) the Ambatielos case cannot be taken out of the rule of exhaustion of local remedies since

(a) there was an appealable point of law from the Court of Appeal to the House of Lords;

(b) the appeal from the Court of Appeal to the House of Lords, if successful, would, according to the Hellenic Government's own contention, have led to a reversal of the Admiralty Court's decision;

(c) there was, in any event, the possibility of an appeal to the Court of Appeal against the Admiralty Court's decision, which was not in fact pursued.

11.—The Ambatielos claim is therefore not "based on the Treaty of 1886". Alternatively, even if the Court should find that the Ambatielos claim is "based on the Treaty of 1886", the Court should not order the United Kingdom Government to submit to arbitration since

(a) local remedies have not been exhausted; and

(b) the present proceedings are an abuse of the process of the Court because the Hellenic Government

has slept on its right to refer the claim to this Court under the 1926 Treaty; and

has shown a lack of seriousness in

(A) the delays from 1925 to 1933 and from 1936 to 1939, and in the fact that the present basis of claim was not put forward until 1939, involving a complete abandonment of the international law basis of the claim put forward up till then; and

(B) the artificiality of its own construction of the Treaty.

That, Mr. President, completes my summary of the United Kingdom's arguments. Before I proceed to state the final conclusions of the United Kingdom Government, I wish to draw the attention of the Court to the reservation, which Mr. Fitzmaurice made at the end of his statement last

Thursday, to the effect that, if the principles of general international law are held to be incorporated in the Treaty of 1886, the question whether, even if all the facts alleged by the Hellenic Government were true, a violation of any general principle of international law would have occurred, would not have been argued, and the Court should give directions on the matter.

This reservation was fully explained to the Court by Mr. Fitzmaurice. That part of his speech is set out in pages 30-34 of the Verbatim Record[1], C. R. 53/4.

The following, Mr. President and Members of the Court, are the final conclusions which I wish to present to the Court on behalf of the United Kingdom Government:

1. That the United Kingdom Government is under no obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, *unless* this claim is based on the Treaty of 1886.
2. That the Hellenic Government's contention that the Ambatielos claim is based on the Treaty of 1886, within the meaning of the Declaration of 1926, because it is a claim formulated on the basis of the Treaty of 1886 and not obviously unrelated to that Treaty, is ill-founded.
3. That, even if the above Hellenic contention be correct in law, the Court should still not order arbitration in respect of the Ambatielos claim, because the Ambatielos claim is in fact obviously unrelated to the Treaty of 1886.
4. That the Ambatielos claim is not a claim based on the Treaty of 1886, unless it is a claim the substantive foundation of which lies in the Treaty of 1886.
5. That, having regard to (4) above, the Ambatielos claim is not a claim the substantive foundation of which lies in the Treaty of 1886, for one or other or all of the following reasons:
   (a) the Ambatielos claim does not come within the scope of the Treaty;
   (b) even if all the facts alleged by the Hellenic Government were true, no violation of the Treaty would have occurred;
   (c) local remedies were not exhausted;
   (d) the Ambatielos claim—in so far as it has any validity at all, which the United Kingdom Government denies—is based on the general principles of international law, and these principles are not incorporated in the Treaty of 1886.
6. That if, contrary to (4) and (5) above, the Ambatielos claim be held to be based on the Treaty of 1886, the United Kingdom Government is not obliged to submit to arbitration the difference as to the validity of the claim for one or other or all of the following reasons:
   (a) non-exhaustion of local remedies;
   (b) undue delay in preferring the claim on its present alleged basis;

[1] See pp. 415-417.

(c) undue delay and abuse of the process of the Court in that, although reference of the dispute to the compulsory jurisdiction of the Court has been continuously possible since the 10th December 1926, no such reference took place until the 9th April 1951.

Accordingly, the United Kingdom Government prays the Court

To adjudge and declare

That the United Kingdom Government is not obliged to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim.

Thank you, Mr. President.