5. REJOINDER SUBMITTED BY THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

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Introduction

1. The present Rejoinder is submitted in pursuance of the Order made by the Court on the 18th July 1952. Part I analyzes the issues now before the Court : Part II examines the contentions of

the Hellenic Government, and states the contentions of the United Kingdom Government in reply.

Part I.—Analysis of the issues now before the Court in consequence of its Judgment on the question of jurisdiction

The effect of the Court's previous Judgment

2. On the 1st July 1952, the Court delivered a Judgment [1] on the issue of jurisdiction in the present case (*I.C.J. Reports 1952*, p. 28), in which it stated as its formal conclusion that it had ".... jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926 [2], the difference as to the validity of the Ambatielos claim, *in so far as this claim is based on the Treaty of* 1886" [3] (at p. 46 ; italics added).

3. A principal issue in the present proceedings is, therefore, whether the claim of the Hellenic Government is in fact based on the Treaty of 1886 ; and this in turn raises the question of what is the correct meaning to be attributed to the term "based" in the present connection.

The present proceedings involve a substantive issue, i.e. the merits of the question defined in the previous Judgment of the Court

4. In consequence of its Judgment disposing of the preliminary objection put forward by the United Kingdom Government on the issue of jurisdiction, the Court is now concerned with a substantive issue, i.e. the merits of the question defined in that Judgment. In its statement of reasons leading up to the conclusion quoted in paragraph 2 above, the Court said (Judgment, p. 44) that it was for it to decide whether "there should be a reference to a Commission of Arbitration" and "whether there is a difference between the Parties within the meaning of the Declaration of 1926". The Court then went on to say that, should it find "that there is such a difference, the Commission of Arbitration would decide on the merits of the difference".

5. It is thus clear that the present proceedings turn on the question whether there does in fact exist between the Parties "a difference .... within the meaning of the Declaration of 1926". If reference is made to the terms of that Declaration, it will be seen that it relates (and relates solely) to "claims .... based on the provisions of the Anglo-Greek Commercial Treaty of 1886", and it provides that any

[1] Hereinafter referred to as the "Judgment".

[2] I.e. the Anglo-Greek Declaration of the 16th July 1926, for the text of which see p. 36 of the Judgment.

[3] I.e. the Anglo-Greek Treaty of Commerce and Navigation of the 10th November 1886. For the text, see Annexe N of the Greek Memorial, at p. 47.

differences which may arise between the two Governments "as to the validity of such claims" (i.e. claims based on the provisions of the 1886 Treaty) "shall .... be referred to arbitration in accordance with the provisions of the Protocol .... annexed to the said Treaty".

6. Consequently, it would not be sufficient, for the purposes of the present proceedings, if the Hellenic Government merely preferred a claim against the United Kingdom Government based on the allegation of a breach of some general rule of international law, e.g. that a denial of justice to a Greek national had occurred—even if that were in fact true. The claim, in order to be arbitrable under the Declaration, must be based on an alleged breach of the provisions of the 1886 Treaty and, if the allegation of denial of justice constitutes the *ultimate* ground of the charge against the United Kingdom Government, it must be shown that such a denial of justice would also involve a violation of the terms of the Treaty —otherwise no obligation to submit the case to arbitration can arise.

7. It is evident that this issue is one of substance, so far as the Court is concerned, and that in that sense it is an issue of merits, since the remedy which the Hellenic Government is now claiming in these proceedings is that the United Kingdom Government should be declared to be under an obligation to submit the Ambatielos claim to arbitration in accordance with the Declaration of 1926. From this, two things follow :

(1) the burden of establishing that such an obligation exists lies with the Hellenic Government ;
(2) the usual rule must apply, that, in accordance with Article 53 (2) of the Court's Statute, before the Court can give judgment in favour of a claim, it must be satisfied that "the claim is well founded in fact and law".

Therefore, in order to be entitled to the remedy claimed—i.e. a declaration that the United Kingdom Government is under an obligation to refer the Ambatielos claim to arbitration—Greece, as the applicant State, must establish affirmatively before the Court such contentions as will satisfy the Court that its claim to the remedy sought is "well founded in fact and law".

8. At this point the United Kingdom Government would recall that it has from the beginning of this case maintained, not only that the Ambatielos claim is not "well founded in fact and law", but also that, every genuine aspect of it having long since been examined and explained, it does not at this point of time merit further serious consideration. It was for this reason that the United Kingdom Government felt justified in taking the preliminary objection on jurisdiction despite the fact that its normal policy is to accept the judicial settlement of disputes. All these matters were fully explained in the Counter-Memorial and in the United Kingdom's oral argument of May 1952 (Oral Arguments, pp. 279 to 284),

to which the Court is requested to refer. It is submitted that they are factors which should be taken into account in deciding whether the United Kingdom Government should now be required to submit the case to arbitration. Since, however, the other aspects of the case have been very fully argued in the Counter-Memorial, the present Rejoinder is confined to the issue whether, even assuming the Ambatielos claim to be well founded as regards its basic merits, it is a claim which can in any reasonable and legitimate sense be regarded as "based" on the Treaty of 1886, and to the questions of exhaustion of local remedies and prescription which are dealt with in paragraphs 54 to 58 below. It will, of course, be for the Hellenic Government to establish to the satisfaction of the Court that its present contention, concerning the applicability of the 1886 Treaty to the claim, is well founded.

In order to establish that its claim is well founded, the Hellenic Government must show that the Ambatielos claim is based, i.e. founded, on the provisions of the 1886 Treaty

9. Since the remedy sought is a declaration that the United Kingdom Government is under an obligation to submit the Ambatielos claim to compulsory arbitration, the Hellenic Government must demonstrate that this claim is "based on the provisions of the Anglo-Greek Commercial Treaty of 1886" (see paragraph 5 above). That it must demonstrate this is, in effect, admitted by the Hellenic Government in its Reply (see, for instance, paragraphs 6, 19, 20 and 23) ; and the main reason for the individual opinion of Judge Spiropoulos was equally that the wording of paragraph 2 of the operative conclusion of the Court appeared "to impose upon the applicant State the duty of establishing that the Ambatielos claim 'is based on a provision of the Treaty of 1886' " (Judgment, p. 55). It is indeed clear that only on this basis can any obligation to submit the dispute to arbitration arise ; and it can scarcely be doubted that it was precisely for this reason (and for little other reason) that the Hellenic Government, at a very late stage of the discussions [1], cited this Treaty, which (as the United Kingdom Government hopes to show in Part II of the present Rejoinder) has no real connection with the Ambatielos claim at all.

[1] The Court will no doubt recollect (see United Kingdom Counter-Memorial, paragraph 86) that it was not until 1939, nearly twenty years after the events complained of in the Ambatielos case, and fourteen after the case was first raised with the United Kingdom Government, that it occurred to the Hellenic Government to bring the 1886 Treaty into the matter. It is impossible to suppose that the Hellenic Government was unaware of this Treaty or of the 1926 Declaration during these years, or that it would have failed to cite the Treaty at once if it had regarded it as having any bearing on the matter. In the circumstances, only one deduction is possible, namely, that the Treaty was eventually cited for the purpose of seeking to found a claim to compulsory arbitration which would not otherwise have had any basis, rather than on account of any *substantive* relevance the Treaty might have had to the issue.

10. In order to show that a given claim is "based on" the provisions of a certain treaty, it is clearly not sufficient simply to cite the provisions of the treaty and to allege that they are relevant and that a breach of them has occurred. Nor, so the United Kingdom Government wishes to suggest, is it enough to cite a number of provisions, and then, by the use of unnatural, forced and artificial constructions, seek to show that they might remotely have some possible bearing on the issue.

11. The United Kingdom Government in fact submits that, for an obligation for recourse to compulsory arbitration to exist *on the score that the issue involves a claim "based on" the provisions of a given treaty* (and this is what the 1926 Declaration provides), the claim must be one which finds its substantive foundation in the treaty and not outside it. If this is correct, such an obligation can only arise if the alleged breach of treaty is the principal issue involved, and forms the actual foundation of the claim—for otherwise the claim is not based on the treaty in any real or genuine sense, and the treaty aspect, in so far as it exists at all, is merely auxiliary to a claim based on something else. The alleged breach of treaty being the sole issue which, in the present case, is susceptible of obligatory reference to arbitration, the necessary condition, i.e. that the claim should be *based on* the treaty, cannot be regarded as fulfilled, if the alleged breach of treaty is not the actual or substantial basis and foundation of the claim.

12. For these reasons, the United Kingdom Government cannot agree with the thesis advanced at the end of paragraph 20 of the Greek Reply, to the effect that an obligation to submit the dispute to arbitration exists so long as its "lack of a basis" in the 1886 Treaty is not "apparent". Merely to show (if indeed this could be shown) that there is not a *manifest absence* of such a basis, is very far indeed from establishing that such a basis in fact exists—that the claim is actually, as the Declaration of 1926 requires, *based on* the provisions of the Treaty.

13.—(1) The Hellenic Government must, in the submission of the United Kingdom Government, establish two distinct propositions :

First, that the Ambatielos claim comes within the scope of the Treaty of 1886. Here the Hellenic Government must show that, upon the proper construction of certain specified provisions of the Treaty of 1886, one or more of the items of claim (the treatment of the Claimant by the Ministry of Shipping in respect of the sale, delivery and mortgage of the ships ; the alleged denial of justice in the English courts ; and the alleged unjust enrichment of the Crown) are in the *class* of subject-matter intended to be covered by those provisions.

Second, that, upon the assumption that the allegations of fact by the Hellenic Government, made in support of the claim, are

substantially true, those alleged facts constitute a breach of certain specified provisions of the Treaty of 1886.

(2) If the Hellenic Government fails to establish the first proposition, then it has no cause of action, since the claim is not based upon the Treaty of 1886, because the Treaty has no relevance or application to it at all. If, however, the Hellenic Government succeeds on the first proposition in respect of any item of its claim, it must still establish the second proposition in respect of that item. The question then is whether, if the allegations of fact made by the Hellenic Government relative to that particular item were *assumed to be true, they would constitute a breach of those provisions which*, if it had established the first proposition, the Hellenic Government would have shown to relate to that item. If the Hellenic Government fails to establish this second proposition, then the claim is not based on the Treaty of 1886 in the sense that there is nothing for the United Kingdom to answer, and, therefore, an order for arbitration is not necessary or justified.

14. In Part II of the present Rejoinder, which is now to follow, the United Kingdom Government will endeavour to show that the Hellenic Government has not established either of these two propositions. The United Kingdom Government will also endeavour to show that, even if the test suggested by the Hellenic Government in paragraph 20 of its Reply is adopted, i.e. that it is only necessary to establish that the contention involved is a "serious" one "deserving of examination", it fails by that test also. The United Kingdom Government will submit in fact that, to use a term employed in the third sub-paragraph of paragraph 20 of the Greek Reply, the contention that the claim is based on the 1886 Treaty is essentially factitious [1]; and that, as the whole history of the case shows, this contention is put forward, not on its merits as a substantive contention, but as a procedural device, in order to found jurisdiction for a compulsory reference to arbitration. It cannot be regarded as amounting to a serious contention that a breach of the 1886 Treaty has occurred on which the claim in the Ambatielos case is in any real sense "based".

Part II.—Detailed statement of the United Kingdom Government's Contentions and examination of the Hellenic Government's Contentions

15. The principal contentions which the United Kingdom will now put forward are :

[1] The French term used in the original is "*factice*". All citations from the Hellenic Government's Reply are taken from the translation prepared by the Registry of the Court.

A. That there is in the present case no claim based on the 1886 Treaty, and that the claim put forward on behalf of Mr. Ambatielos is not so based in the sense in which the phrase "based on the provisions of the Anglo-Greek Commercial Treaty of 1886" in the 1926 Declaration ought properly to be understood.

B. That this case has certain aspects which would make it inequitable to compel the United Kingdom Government to accept arbitration in respect of it, and which should lead the Court to find (in the terms used on p. 44 of its previous Judgment) that the case is not "a proper case" *(un cas approprié)* in which "to adjudge that there should be a reference to a Commission of Arbitration" *(pour dire qu'il devrait y avoir soumission à une commission arbitrale)*.

United Kingdom Contention A : There is in the present case no claim based on the 1886 Treaty

16. The principal arguments which will be advanced in support of this contention are :

(1) that an obligation to submit a dispute to compulsory arbitration must be clearly established, and the case must be shown to come fairly within the terms and language of the relevant arbitration clause according to its natural and ordinary meaning ;

(2) that the arbitration clause in the present case was intended, as is shown by its language and the surrounding circumstances, to relate to cases involving an alleged breach of the Treaty of 1886 ; and

(3) that the Ambatielos claim does not have this character because

(i) the provisions invoked by the Hellenic Government, namely Articles I, X, XII and XV of the Treaty, are each concerned with a subject-matter quite distinct from the items of the Ambatielos claim ;

(ii) even if it is held that certain provisions of these specified articles are concerned with the same subject-matter as certain items of the claim, *and* it is assumed that the allegations of fact by the Hellenic Government supporting these items are true, these allegations do not meet the conditions necessary to establish a breach of those provisions ;

(iii) in fact the Ambatielos claim, as formulated by the Hellenic Government, cannot be based upon any provisions of the Treaty considered in their natural and ordinary

meaning, and it is only by an unnatural, forced and artificial construction of terms and concepts that these provisions can be given a meaning that might even remotely relate them to the issue involved in the claim ;

(iv) the Ambatielos claim is essentially based on alleged breaches of the general rules of international law governing the treatment of foreigners, and the attempt to base it upon the provisions of the Treaty of 1886 is motivated by the desire to found obligatory jurisdiction for an arbitral commission over a claim which has always been manifestly so weak as not to deserve serious consideration between governments.

Argument (1) in paragraph 16

17. There is no need to labour this point. The principle is well established, and has been recognized and applied by the Court, that the jurisdiction of international tribunals in contested cases depends on the consent of the parties, given either *ad hoc*, or generally in respect of a class of cases. In the latter event, it must be established affirmatively that, on a reasonable and natural interpretation of the relevant clause, the case does come within the specified class, and this must be established by the applicant or plaintiff State. This principle is *per se* sufficient to dispose of the view, put forward by the Hellenic Government, that the requirement that the claim should be based on the provisions of the 1886 Treaty is satisfied if it can merely be shown that it is not manifest or apparent that a basis in the Treaty is lacking. Such a thesis would give arbitral clauses in treaties a scope and extension which in most cases their authors could certainly never have contemplated.

Argument (2) in paragraph 16

18.—(1) In the present case, such obligation as may exist to submit to arbitration arises from the Declaration of 1926, which the Court in its previous Judgment found to be applicable to the Ambatielos claim "in so far" (but only in so far) "as this claim is based on the Treaty of 1886". It is, however, abundantly clear that, in drawing up the 1926 Declaration, the Parties had a specific, and limited object in view. This point was fully discussed in the previous proceedings, and the Court then in effect found that the object in question was to ensure that claims arising under the 1886 Treaty should not, by reason of the lapse of that Treaty or its replacement by the later 1926 Treaty, be left without means of settlement. It is, therefore, clear that the class of claims which the Parties had in mind was that of claims arising naturally and directly from the provisions of the 1886 Treaty, and that they can have had no intention of including claims, the substantive basis of which lay outside

the Treaty, or to open the door to the obligatory arbitration of such claims.

(2) If the Court will at this point turn to paragraphs 7 to 15 of the Greek Reply, it will see that, on the view of the Treaty there advanced, and on the interpretation of its provisions there suggested, there would in fact be scarcely any claim on behalf of an individual that could not be founded upon one of the provisions of the four articles invoked by the Hellenic Government. The line of possible claims could be extended almost indefinitely.

Argument (3) in paragraph 16

19. The point at issue here is whether the Hellenic Government has established the two propositions referred to in paragraph 13 above. The question is not whether the allegations made by the Hellenic Government and the substance of the Ambatielos claim are well founded, though the United Kingdom Government, of course, contends that they are not. The point at issue is whether the 1886 Treaty is *applicable* to these allegations, even if true. The United Kingdom Government will now give the detailed reasons why, in its view, these provisions, and, in particular, Articles I, X, XII and XV (3) cited by the Hellenic Government, are not so applicable, and why, in consequence, the Ambatielos case does not involve a claim "based on" the provisions of the Treaty.

20. It is, however, necessary to deal first with a preliminary point; namely, the suggestions made from several quarters that the United Kingdom Government has already admitted that the claim is based on the 1886 Treaty.

The United Kingdom Government has never admitted, and does not now admit, that the Ambatielos claim is or can be based on the provisions of the 1886 Treaty

21. Certain suggestions have been made that the United Kingdom Government has already admitted that the Ambatielos claim is *prima facie* to be held as based on the Treaty of 1886. Thus, Judge Levi Carneiro, in his individual opinion (Judgment, p. 49), cited a passage from the United Kingdom Counter-Memorial and said:

> "The British Government did not reject the reasoning on the ground that the claim was not based on the Treaty of 1886, although it disputed the denial of justice and the inequality of treatment. On the contrary, it admitted that the claim was, *prima facie*, based on the Treaty of 1886.
>
> Its first submission was that the Court
>
> 'has no jurisdiction to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government based on Article XV or any other article of the Treaty of 1886'."

And, in referring to a passage in the Oral Arguments, he said (Judgment, p. 50) that Counsel for the United Kingdom "did not attempt to show that the claim was not based on the Treaty of 1886". Again, the Hellenic Government in its Reply (paragraph 9) remarks of Article XV of the Treaty of 1886 that "an admission made by the respondent Party as to the apparent connection between that provision and the claim of the Hellenic Government (p. 289 of the Oral Arguments) is to be noted....". Professor Rolin made a similar point during the oral hearing (Oral Arguments, p. 333).

22. An examination of the United Kingdom's oral and written pleadings will show that no such admission was in fact made. On the contrary, the United Kingdom Government consistently maintained, in so far as it was necessary to do so at the stage reached, that the Ambatielos claim was not, and could not, be "based" on the Treaty of 1886. First, in paragraph I (i) *(a)* of its Conclusions (Counter-Memorial, p. 179) to which Judge Levi Carneiro referred, the United Kingdom Government was concerned only with the issue of jurisdiction. The effect of the sentence is made clear by the use of the words "or any other article of the Treaty of 1886". What the United Kingdom Government was here asking the Court to find was that, *even if the claim could be shown to be based on one or more provisions of the Treaty, the Court had no jurisdiction in respect of it.* The words cannot, therefore, in any sense be taken as an admission that the claim was in fact based upon the Treaty.

23. Secondly, at page 292 of the Oral Arguments, to which Judge Levi Carneiro referred, Counsel for the United Kingdom was immediately concerned with the question whether, even assuming that the Ambatielos claim was covered by the Treaty of 1886 (which was never admitted), it was also covered by the Declaration of 1926. For this purpose, it was not material to consider whether the claim could in fact be based on the Treaty of 1886, for the United Kingdom argument was that, even if it was so based, the Declaration did not operate to confer any jurisdiction upon the Court in respect of the claim. Finally, on page 289 of the Oral Arguments, Counsel for the United Kingdom referred to the Treaty of 1886 as follows:

> ".... in view of the provisions of the 1886 Treaty, the only treaty provisions which can be relied upon, the claim can really only be put on the basis of the principles of general international law".

He went on to observe that the Hellenic Government "find a certain difficulty in bringing the actual claim they do make under the wording of Article 15 (3) or of any other article of the 1886 Treaty". Far from admitting that the claim was in fact based on the Treaty of 1886, the United Kingdom Government was here showing that, the Treaty of 1886 being the *only* treaty to which the Declaration of 1926 referred, it was precisely because any attempt to base the

claim directly upon that Treaty failed and must fail, that the Hellenic Government must have recourse to the general rules of international law, and that it was on these rules and not on the Treaty that the claim was really based. That is the view which the United Kingdom Government has taken throughout, and the view which it takes now.

The Ambatielos claim does not come within the scope of Articles I, X, XII or XV or any other provision of the Treaty of 1886, in that none of the items of the claim are in the class of subject-matter intended to be covered by those Articles or provisions

24. Before proceeding to consider in detail the relevance of the provisions of the 1886 Treaty to the claim, the United Kingdom Government wishes to make one submission of a more general character. At the root of the claim there is a complaint of a breach of contract by the Crown. The Claimant alleges that late delivery of six of the nine ships, and non-delivery of two of the ships, was a breach of the contract of sale of July 1919, whereby he suffered loss and damage. He further alleges that the Crown failed to comply with the terms of the subsequent mortgage of the ships. It cannot be argued that the alleged breach of the contract of sale or mortgage was, by and in itself, a breach of any provision of the Treaty of 1886, for this would, in effect, be to say that a treaty of commerce and navigation between two countries guarantees the observance of every commercial contract concluded under municipal law by traders between the two countries—a proposition which cannot seriously be maintained. Nor does the fact that the Crown was a party to the contract of sale of the ships alter the case ; for, as the Hellenic Government itself insists (Memorial, paragraph 12), the Ministry of Shipping was, for the purposes of this contract, acting as a private trader. The obligations of the Crown under a private law contract are wholly distinct from its treaty obligations, although as a private trader it is entitled to the same benefits under the Treaty as anyone else.

25. The detailed reasons will now be given why, according to the view taken by the United Kingdom Government, the provisions of the 1886 Treaty have no application to the Ambatielos claim.

26.—(1) This contention will be supported by a review of the four Articles of the Treaty (paragraphs 27 to 32 below) and by certain general considerations concerning the national and most-favoured-nation treatment referred to in them (paragraphs 33 to 39 below).

(2) The provisions of the 1886 Treaty said to be applicable are Articles I, X, XII and XV (3). In order to determine the true scope and meaning of these Articles, it is necessary to consider the Treaty as a whole. Its operative provisions fall into two parts : Articles I

to X, which are concerned with commerce (trade) and navigation ; and Articles XI to XVI, which contain establishment provisions. Therefore, the Hellenic Government, in citing Articles I and X, and Articles XII and XV (3), relies on two articles relating to commerce and navigation, and on two articles containing establishment provisions.

Articles I and X

27. Articles I and X will be seen upon closer examination to be concerned solely with the movement of trade between the two countries. They are in general terms, and together confer upon the nationals of each country the right to national and most-favoured-nation treatment in matters of commerce and navigation in relation to the other country. Articles II to IX explain and develop the terms of the general Articles I and X, and it is only by reading all these Articles together, and as a whole, that it is possible to arrive at the true meaning of the words "commerce and navigation".

28. Article I provides for "reciprocal freedom of commerce and navigation" and permits the nationals of each country "freely to *come, with their ships and cargoes, to all places, ports and rivers*" in the territories of the other "to which native subjects generally are or may be permitted to come". Article II deals with duties and prohibitions upon the import of goods, and Article III with duties and prohibitions upon the export of goods into and from the two countries. Article IV provides for exemption from transit dues and national treatment in all that relates to warehousing, bounties, facilities and drawbacks. Article V permits the import and export of goods between the two countries in British and Greek vessels respectively. Article VI forbids the imposition of any port dues upon incoming vessels of the two countries higher than those imposed upon national vessels ; and Article VII calls for national treatment of the vessels of each country in regard to the coasting trade, and to the use of port and dock facilities. Article VIII establishes rules for warships and merchant vessels driven into port by stress of weather or accident, and for defraying the expenses of their stay and refit. Article IX defines British and Greek vessels for the purposes of the Treaty. Article X provides that "in all matters relating to commerce and navigation" each country shall unconditionally place the trade and navigation of the other on the footing of the most-favoured-nation.

29.—(1) Articles I to X establish in some detail the régime in the framework of which the words "commerce and navigation" in Articles I and X are to be understood. As a matter of construction, the special provisions of Articles I to IX limit the meaning of these words and make it impermissible to abstract them from their context and give them a general meaning. It is also beyond dispute that

the subject-matter of the Ambatielos claim is not a matter of "navigation" within any meaning that can be given to it in Articles I and X.

(2) The régime established by Articles I to X relates solely to the import and export of goods between the two countries and the movement of ships carrying goods and passengers between them. These Articles in fact regulate the entry of ships into ports and rivers and their departure therefrom, the use of port, dock and warehouse facilities, and the imposition of duties and dues upon ships and goods entering and leaving.

(3) But, even if "commerce" in Articles I and X means "commercial activity" in the broader sense of the purchase and sale of goods, it does not, and cannot, include the incidents of the administration of justice.

(4) The conclusion is that the concepts of commerce and navigation on the one hand, and of the administration of justice on the other, are quite separate concepts involving different orders of legal ideas.

30. The above construction, which, it is submitted, is that yielded by the plain and natural meaning of the language of Articles I to X, is confirmed by the character of Articles XI to XVI, which contain establishment provisions, and so complete the framework within which the nationals of the two countries are entitled to carry on their trade and business. Article XI permits the mutual appointment of consuls and consular agents. Articles XII, XIII, XIV and XV guarantee certain privileges for the nationals of each country who reside, acquire property or carry on trade or business in the other country; and it will be necessary to examine two of these Articles (XII and XV) more closely below. Article XVI gives certain rights to consuls in the recovery of deserters from vessels of their respective countries. The remaining articles of the Treaty are formal.

Article XII

31. By no stretch of the imagination can this Article be regarded as having anything to do with the allegations of denial of justice put forward in the Ambatielos case. As in the case of Articles I and X, it is only necessary to read Article XII for this fact to be immediately apparent, and the United Kingdom Government is reluctant to spend time in trying to prove—where there is no burden upon it to do so—that provisions about liberty to enter and reside, to possess houses and businesses, and to carry on commerce, and the right not to be subject to imposts and obligations that are greater than those imposed upon nationals, have no bearing whatever on the issues involved in the Ambatielos claim. Again, quite different orders of ideas are involved. Nevertheless, the point is

examined in the light of the Greek contentions in paragraphs 42 to 43 below.

Article XV (3)

32. This is the only provision of the 1886 Treaty which *could*, conceivably, be regarded as having any relevance to the Ambatielos claim. In fact it has none, because the essence of that claim is not that the Claimant did not have *access* to the courts (which he clearly did or these issues could never have arisen), or even that he did not have access on the same terms as nationals ; but that, *upon* having such access, he was not properly treated in the courts, which is a wholly different question, and one not covered by this or any other provision of the Treaty. Only if he had been discriminated against as a foreigner could it be said that Mr. Ambatielos did not have access to the courts on the same terms as nationals ; but this allegation has not been made, or else has now been withdrawn.

Some general considerations

33. The truth is that the entire case of the Hellenic Government is an attempt to argue that the 1886 Treaty incorporates the general provisions of international law relating to the administration of justice. How such a result can be derived from the provisions which have been analyzed above is, however, not made in any way clear.

34. The essence of the argument appears to be contained in paragraphs 12 and 13 of the Hellenic Government's Reply. It is there apparently contended that the conclusion of a contract is a matter of commerce, and that, therefore, all subsequent "difficulties .... such as litigation resulting from commercial contracts" are matters covered by the Treaty. Even if this decidedly specious and sweeping argument were admitted, what does being covered by the Treaty involve ? The argument put forward in these paragraphs (12 and 13) of the Greek Reply is that it involves a right to most-favoured-nation treatment, and (apparently) that most-favoured-nation treatment involves *per se* a right to the benefit of the general rules of international law governing the administration of justice (denial of justice, minimum standard, etc.).

35. The United Kingdom Government submits that most-favoured-nation treatment involves and can involve no such thing. In the first place, the very fact that these rights *are* general international law rights, means that States and individuals are entitled to them in any event, irrespective of treaty. In the absence of express words, therefore, no treaty is to be read as purporting to *confer* such a right, since it already exists ; and this will be by virtue of general international law and not by virtue of the treaty. The right will not therefore be "based" on the treaty concerned.

36. Secondly, and even more important, there is the question of what is involved in the conception of most-favoured-nation treatment. Most-favoured-nation treatment denotes (as its name implies) the treatment accorded to the *most-favoured*-nation by virtue of a specific undertaking towards it individually—not the treatment accorded as a matter of *general* obligation to *all* nations by virtue of universally binding, and already existing, rules of basic international law. If the latter treatment is owed to a given country, it is not so owed by virtue of any most-favoured-nation obligation, but by reason of the inherent obligations of general international law. Most-favoured-nation treatment is essentially treatment that would not be owed but for a specific undertaking to grant it. This is not the case with treatment owed by virtue of general rules of international law.

37. It follows that a right to most-favoured-nation treatment is quite outside, and has nothing to do with, a right to treatment according to the general rules of international law. Indeed, it could more properly be maintained that the latter treatment, so far from being implied by most-favoured-nation treatment, constituted *least*-favoured-nation treatment, since it is owed automatically to all countries, even the least specially privileged. The Hellenic Government is perfectly correct in contending that the United Kingdom owed (as it maintains it accorded) such treatment to the Claimant. But it was not on the basis of the 1886 Treaty that this treatment was owed—but on the basis of the general rules of international law ; and the most-favoured-nation (and indeed the national) treatment clauses of the Treaty dealing with such matters as commerce, navigation, residence, taxes, etc., had no effect on or relevance to this obligation.

38. If, of course, parties like, by the use of express words, to incorporate in their treaties the general rules of international law on any matter, that is their affair. But they must do so expressly, and, in the absence of express words, no presumption can arise that they intended it—rather is the presumption in the reverse sense.

39. In any case, provisions for national or most-favoured-nation treatment cannot *per se* have such an effect. In this connection the Hellenic Government, in paragraph 8 of its Reply, coupled with the observations contained in the two middle paragraphs of page 223 of its written Observations and Submissions on the preliminary question of jurisdiction, apparently attempts to argue (though very briefly and without developing the point) that the general rules of international law respecting the administration of justice must be regarded as incorporated in the 1886 Treaty because of the provisions of some old treaties concluded by the United Kingdom between 1654 and 1670 with certain other countries, and which contain provisions for the treatment of the respective nationals of the

country in accordance with "common right", "justice and equity", and "love and friendship". Even if these very general provisions were apt to relate to and cover the specific rules of general international law concerning the administration of justice (and it is submitted that they are not), they could still not be regarded as being incorporated in an ordinary treaty of commerce and navigation, such as the 1886 Treaty, merely by reason of most-favoured-nation clauses which, as has already been shown, deal solely with commerce and navigation in the strict sense, a sense which, according to the normal use of language, cannot include the administration of justice. This point was made by Counsel for the United Kingdom (Oral Arguments, p. 290) when he said that, in order for the Greek contention to be correct, "you would have to find a provision in the Treaty which incorporates general international law as part of the Treaty". He then went on :

> ".... there is no such provision in the 1886 Treaty .... and I have not found in our opponents' observations any statement that there is such a provision, though it appears that they are searching for a provision of the kind through the most-favoured-nation clause. But the United Kingdom contend that the most-favoured-nation clause in the 1886 Treaty would not attract a provision of that kind in another treaty even if it could be found, because the most-favoured-nation clause in the 1886 Treaty is limited to matters of trade and commerce."

Even if the Ambatielos claim comes within the general scope of any of the provisions of the Treaty of 1886 and the allegations of fact, made by the Hellenic Government in support of the claim, are assumed to be true, none of the facts alleged would constitute a breach of any provision of the Treaty and, in particular, of Articles I, X, XII or XV (3)

40. The foregoing general considerations tend, it is submitted, to rule out *a priori* the Greek contention respecting the effect of the 1886 Treaty. It is nevertheless desirable to examine more closely how the Hellenic Government puts its case.

41. Of Article I the Hellenic Government, after a passing reference in paragraph 8 of the Reply, merely says in paragraph 14 :

> ".... the Greek claim may be based too on two other articles, Article I and Article XII, which guarantee to Greek nationals the treatment of British nationals. The first of those provisions is, it is true, limited in its terms to commerce and navigation, but, as has been seen in connection with Article X, it in no way follows that it is not applicable in the present case—on the contrary."

In connection with Article X, the Hellenic Government had said (Reply, paragraph 12) :

"One must, indeed, take as being covered by the provisions of the Treaty of 1886, 'all difficulties arising from commercial transactions, such as litigation resulting from commercial contracts'."

42. In paragraphs 15 to 17 of the Reply, the Hellenic Government sets out the grounds for its complaint that the Claimant was not accorded national treatment, namely, (i) alleged failure of the Crown to meet the delivery dates but retention by it of the agreed purchase price ; (ii) alleged non-compliance by the Crown with the mortgage deeds of the 4th November 1920 ; (iii) alleged failure of the Crown to produce documents and call witnesses at the trial in 1922, whereby the trial judge was prevented from deciding the case in the light of all material evidence ; and (iv) alleged departure of the English Court of Appeal from its own practice by refusing the Claimant's application for leave to produce new evidence.

43. The United Kingdom Government contends that Article I is inapplicable to all these complaints and in fact wholly irrelevant for two reasons.

Firstly, on the proper construction of Article I, which, it is submitted, is that set out in paragraphs 27 to 30 above, particularly as to the true meaning of the phrase "freedom of commerce and navigation", the alleged facts of which the Hellenic Government complains in (i) and (ii) above could not possibly, even if proved, constitute a breach of Article I. Similarly, the conduct alleged in (iii) and (iv) above could not, upon any reasonable construction of the phrase, constitute an interference with the "freedom of commerce and navigation", or be regarded as having to do with the movement of ships and goods into or out of the ports and rivers of the Parties to the Treaty.

Secondly—and this reason is decisive even if the first reason were held to be inadequate—the Hellenic Government has not shown, or even attempted to show, that the Claimant was accorded treatment other or more unfavourable than that which a British national would have received in similar circumstances.

44. It will be convenient to deal next with Article XII, since it is upon the undertaking to grant national treatment, contained in that Article, that the Hellenic Government appears to rely. Of article XII the Hellenic Government says (Reply; paragraph 8) :

"Article XII likewise provides for national treatment for the persons and property of nationals of each Contracting Party in fiscal matters and generally exempts them from obligations of any kind which are different from or greater than those which are or may be imposed upon nationals."

Again, in paragraph 14 of the Reply, the Hellenic Government states that Article XII guarantees national treatment.

45. The United Kingdom Government submits that the second of the objections to the Greek argument, which are set out in paragraph 43 above in relation to Article I, is equally decisive for Article XII ; but it has two further observations to make, one upon the interpretation of Article XII, and the other upon the issue of national treatment, under Articles I and XII, as a whole.

Firstly, the Hellenic Government, while apparently relying on the fourth paragraph of Article XII, attempts to give the term "obligations" in that paragraph a meaning of almost unlimited breadth, whereas it must surely be read as *ejusdem generis* with "imposts", that is to say, as meaning obligations arising from the general provisions of the local law and not from an individual contract.

Secondly, the Hellenic Government is in substance alleging inequality of treatment of the Claimant, contrary to Articles I and XII. But the Hellenic Government has adduced no facts tending to show that the Claimant was discriminated against on the basis of nationality, and the suggestion that the courts were guilty of bias against him as a foreigner has been withdrawn (see Reply, paragraph 4). While it is appreciated that the Hellenic Government has not thereby withdrawn its complaints in respect of "the regularity of the procedure followed in the English courts, nor to the conduct of the British executive authorities", the Hellenic Government does not allege that this procedure was vitiated, or that this conduct was caused by anti-foreign bias, or that the Claimant was treated under either head otherwise than a British national would have been.

46. Article X of the Treaty of 1886 places the trade and navigation of the two countries on the footing of the most favoured nation. The Hellenic Government invoked this Article in paragraph 22 of its Memorial, where it stated that the alleged failure of the United Kingdom Government to fulfil its obligation under the contract of sale of July 1919 was especially grave since "the Treaty of 1886 guarantees the treatment of the most favoured nation to the nationals of the two nations". In paragraph 3 of its Observations and Submissions concerning the preliminary objection raised by the United Kingdom Government, the Hellenic Government said :

> "The time has not yet come for an exhaustive consideration of the various treaties concluded by the United Kingdom of which Greece, by applying the provisions relating to the most-favoured-nation clause, is entitled to claim the benefit. We shall confine ourselves to pointing out that a treaty with Spain of 1667, still in force, provides for the application to nationals of the parties, of the 'common right' whereas others bind the governments to conform to equity and justice and to treat and use each other with all real friendship and affection (Treaties of 1660 and 1670 with Denmark, and of 1654 and 1661 with Sweden)."

Again, in paragraph 10 of its Reply, the Hellenic Government maintains that :

> "its invocation of the general principles of international law finds a wholly sufficient legal basis in the most-favoured-nation clause in Article X of the Treaty of 1886 and in the undertakings subscribed to by the United Kingdom in relation to other States, to treat their nationals in conformity with equity and justice".

In paragraphs 12 and 14 of its Reply, the Hellenic Government goes on to say that :

> "One must, indeed, take as being covered by the provisions of the Treaty of 1886, all 'difficulties arising from commercial transactions, such as litigation resulting from commercial contracts' ",

and that Article X

> ".... indirectly, by the effect of the most-favoured-nation clause, confers upon Greek business men the benefit of treatment in conformity with the general principles of international law....".

47. It has, however, clearly been shown in paragraphs 33 to 39 above that the existence of a most-favoured-nation clause has, and can have, no such effect as the Hellenic Government maintains in these paragraphs of its pleadings. For instance, how could a most-favoured-nation clause confer "upon Greek business men the benefit of treatment in conformity with the general principles of international law" when Greek business men are already entitled in any event to such treatment precisely because of such general rules ?

48. The real truth, surely, is that, since it is plainly not possible to argue that the alleged breach of the contract of sale was in itself a breach of any provision of the Treaty of 1886 (see paragraph 24 above), and since the Hellenic Government has not attempted to bring, and cannot bring, any evidence that the Claimant was denied access to the courts or discriminated against by reason of his nationality, it is obliged to resort to a plea of denial of justice, and to attempt to bring this under the Treaty of 1886 as being contrary to certain rules of general international law said to be imported into the Treaty by the operation of Article X upon certain other treaties to which the United Kingdom is a party. But, since the rules of general international law *ex hypothesi* exist in any case and independently of any treaty, this argument is necessarily misconceived, as has already been shown. Furthermore, as has been shown in paragraph 39 above, the 1886 Treaty does not in fact incorporate or purport to incorporate these rules either in itself or by the operation of the older treaties cited.

49. The United Kingdom Government further contends that, upon a correct interpretation of Article X, the expression "all matters relating to commerce and navigation" contained in it is to be construed by reference to the preceding articles. The common

factor of these articles is the movement of ships and goods, and to read the expression in Article X as extending beyond this is incorrect, since the establishment provisions of the Treaty cover those aspects of commerce, such as the purchase and sale of goods within the country, which are outside the scope of Articles I to X.

50. Finally, the Hellenic Government, in paragraph 8 of its Reply, states that the third paragraph of Article XV of the Treaty of 1886 "deals with access to the Courts of Justice and guarantees for the nationals of each Party, in an entirely general way, national treatment in the territory of the other Party". The interpretation which the Hellenic Government seeks to put upon this provision of the Treaty of 1886 and its alleged application to the Ambatielos claim is fully examined in paragraphs 90 to 96 of the United Kingdom Counter-Memorial. Since the Greek Reply adds nothing in this connection to what was said in the Memorial, it is not necessary to repeat what has been stated in the Counter-Memorial beyond saying that, for the reasons there given, the treatment alleged by the Hellenic Government could not constitute a breach of the third paragraph of Article XV. It is manifest that the Claimant had access to the Courts of Justice and that he employed agents and counsel of his own choice. Further, it was open to him at the trial before the English Admiralty Court to call such witnesses and produce such documents as he or his legal advisers deemed fit. It is clear from the Claimant's own affidavit (Annex III to the Counter-Memorial), which is before the Court as part of the report of the hearing before the English Court of Appeal referred to in paragraph 10 of the Greek Memorial, that the Claimant was aware of the existence of the letters in Major Laing's hands. He took no steps to obtain those letters by the Court process which was available, or to subpœna Major Laing or Sir Joseph Maclay. His legal advisers had no doubt good reason for refraining from taking these steps at the appropriate time before the Admiralty Court ; but it cannot be said that his freedom of access to the courts in the presentation of his case was infringed either by the United Kingdom Government, or by the Admiralty Court, or by the rules of procedure applicable. He chose not to call this evidence at the proper stage in the proceedings ; if that was a denial of freedom of access, he denied himself that freedom.

Conclusions on United Kingdom Contention A

51. The United Kingdom Government submits that, in the light of the foregoing analysis of the Greek contentions,

(1) As to three out of the four provisions of the 1886 Treaty on which the Ambatielos claim is alleged to be based (namely, Articles I, X and XII), it is only by a radical misapplication of their terms and natural purposes that they can be regarded as having any

connection with the matter. According to any normal and ordinary meaning that can be attributed to them, they have no sort of relevance.

(2) As regards the fourth provision, namely, Article XV (3), this provides for a specific right, namely, access to the courts on national terms, and the Claimant was in fact granted that right. For all practical purposes the exercise of this right by the Claimant stands admitted by the Hellenic Government in its various pleadings and arguments, and no genuine dispute exists about it which could or should be submitted to arbitration.

(3) The attempt to extend the scope of Article XV (3) to cover matters other than access to the courts is plainly illegitimate. The distinction between access to the courts and the conduct of cases in the courts in regard to such matters as the standards of law and procedure applied, is a perfectly familiar one in international law, recognized by every authority on the topic of denial of justice and the treatment of foreigners.

(4) The attempt to argue that the Ambatielos claim is covered by the most-favoured-nation clause of the Treaty is equally illegitimate, for reasons which have been fully set out: (i) the most-favoured-nation treatment contemplated by the relevant Article related to matters quite different from those involved by the Ambatielos claim; (ii) in the absence of express language, most-favoured-nation clauses cannot be regarded as importing the general rules of international law, for the whole notion of *most-favoured*-nation treatment involves a radically different legal concept from that of treatment according to the general rules of international law, which is automatically owed to all nations (even the least favoured) irrespective of treaty; and (iii) there is no clause in the 1886 Treaty expressly, or even by implication, incorporating the general rules of international law respecting the administration of justice, and, even if the older treaties cited by the Hellenic Government were apt for the purpose (and they are not), a reference to any provisions about justice which they may contain cannot be regarded as implied by most-favoured-nation clauses about trade, commerce, navigation, residence, taxes, etc.

(5) The whole Greek contention is essentially a contention that the Claimant was the victim of a denial of justice. But the rules relating to denial of justice are part of the general body of international law, and a claim of denial of justice is necessarily and primarily based on those rules and not on the 1886 Treaty.

(6) For these reasons, the provisions of the 1886 Treaty have no application to the Ambatielos claim, and that claim is not based on the Treaty but on something quite outside it.

52. In putting forward these conclusions, the United Kingdom Government does not, of course, contend that the Claimant was not

entitled to justice and to the benefit of certain standards of law and procedure, though it does contend that this is what he in fact received. But it was not by virtue of the 1886 Treaty that he was entitled to these things, and since the obligation to submit to arbitration exists only in respect of matters arising under the Treaty, it follows that no such obligation exists in the present case. The United Kingdom Government has explained elsewhere (see pp. 279 to 284 of the oral arguments of May 1952) the reasons why, in the absence of any positive obligation to submit to arbitration, it feels morally justified in refusing to do so voluntarily ; but certain of these reasons must now be referred to specifically.

United Kingdom Contention B : The case has certain aspects which would make it inequitable to compel the United Kingdom Government to accept arbitration in respect of it

53. The United Kingdom Government submits that there are certain elements in this case which, even if they are not directly relevant to the question of the applicability of the 1886 Treaty, nevertheless constitute contributory factors which the Court can properly take into account in deciding whether the United Kingdom Government ought to be compelled to submit this matter to arbitration. The two principal points involved are : (1) the Claimant did not exhaust his legal remedies in the English courts ; and (2) there has been undue delay on the part of the Hellenic Government in prosecuting the claim.

(1) The Claimant did not exhaust his remedies in the English courts

54. The issue of the exhaustion of local remedies was not decided by the Court in its Judgment of the 1st July 1952, as it did not relate to the question of jurisdiction. But, as was recognized on an earlier occasion (*The Panevezys-Saldutiskis Railway case*, Series A/B, No. 76, at p. 22), this issue, though not one of jurisdiction, raises "an objection of a preliminary character". It would, therefore, be in order for the Court to deal with it in the present proceedings.

55. In the *Finnish Ships Arbitration* (*Annual Digest of Public International Law Cases*, 1933-34, case No. 91), the Arbitrator declared that :

> ".... all the contentions of fact and propositions of law which are brought forward by the claimant Government in the international procedure as relevant to their contention that the respondent Government have committed a breach of international law by the act complained of, must have been investigated and adjudicated upon by the municipal courts up to the last competent instance, thereby also giving the respondent Government a possibility of doing justice in their own, ordinary way" (at p. 235).

56. That the Claimant had effective rights of appeal which he failed to exhaust is shown in paragraphs 77 to 79 of the United Kingdom Counter-Memorial. The Hellenic Government does not deny that the Claimant failed to prosecute his appeal from the decision in the Admiralty Court and to appeal from the Court of Appeal's decision on the question of evidence. It is suggested, however, that these remedies were ineffective. But they were not ineffective by reason of any defect of law or procedure[1], or by reason of any interference by the United Kingdom Government with the process of the courts, or by reason of any existing precedents which would have required the appellate courts to decide against the Claimant. Whether the appeal would have succeeded was, of course, a matter depending entirely on the merits of the Claimant's case. The point is that there were substantial rights of appeal available, and the Claimant's failure to prosecute them should operate as a bar to relief by the International Court of Justice.

(2) There has been undue delay on the part of the Hellenic Government in pursuing its claim under the Declaration of 1926

57. The Court held (Judgment, p. 39) that the question whether the Hellenic Government is precluded by lapse of time from submitting the claim was "a point to be considered with the merits". It is not clear whether, by "the merits", the Court meant the merits of the case so far as the Court is now concerned—i.e. of the present proceedings, namely, the question whether the Ambatielos claim should be submitted to arbitration—or of the basic merits of the case so far as the Arbitration Commission would be concerned, if the matter were to reach that stage. It is believed that what the Court essentially meant was that the question of prescription was separate from the question of jurisdiction, which was the only question in issue in connection with the preliminary objection. The United Kingdom Government submits, therefore, that the Court can and should deal with the question of prescription at this stage.

58. The Court will find the arguments of the United Kingdom Government, in support of the view that the claim should now be regarded as time-barred, in paragraphs 104 to 108 of the Counter-Memorial.

[1] To what is stated in paragraph 78 of the Counter-Memorial it may be added that it is well established that the appellate courts in England will, if necessary, interfere with the discretion exercised by the Court below, if it is plain that the discretion was wrongly exercised. So, in *Evans* v. *Bartlam [1937] A.C. 473*, Lord Wright said (at p. 486): "The (appellate) Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order" (of the Court below); and in *Leeder* v. *Ellis [1952] 2 All E.R. 814*, the Judicial Committee of the Privy Council considered and reversed on appeal a decision of the High Court of Australia on the question of the admission of "new evidence" not brought before the Court at trial.

CONCLUSIONS ON PART II

59. The conclusions, therefore, which the United Kingdom Government submits to the Court on this Part of the Rejoinder are as follows :

First, even if the facts alleged by the Hellenic Government were true (which is, of course, denied), they would not constitute a violation by the United Kingdom of the Treaty of 1886, which has no application to the matter, and, therefore, the Ambatielos claim cannot be held to be based on that Treaty as the 1926 Declaration requires.

Second, the Claimant did not exhaust his rights of appeal before the English courts and, therefore, is not entitled to the further investigation of his complaint by international procedure.

Third, the Hellenic Government is responsible for such delays in pursuing the Ambatielos claim, prejudicial to the conduct of the case, that the United Kingdom should not at this stage be required to submit it to arbitration.

Final Submission of the United Kingdom Government

60. The United Kingdom Government accordingly submits that the Court should hold and declare that the United Kingdom is not under any obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference between the Parties as to the validity of the Ambatielos claim.

(Signed) VINCENT EVANS,
Agent for the Government of the
United Kingdom.

3rd January 1953.