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¹ date when the request for an advisory opinion or application was filed with the court Registry

[5] Permanent Court of International Justice.

<i>Before:</i>	MM. Loder,	<i>President,</i>
	Weiss,	<i>Vice-President,</i>
	Lord Finlay,	
	MM. Nyholm,	
	Moore,	
	De Bustamante,	<i>Judges</i>
	Altamira,	
	Oda,	
	Anzilotti,	
	Huber,	
	Pessôa,	
	Caloyanni,	<i>National Judge.</i>

The Government of the Greek Republic, represented by H.E. M. Kapsambelis, Greek Minister at The Hague,

Applicant,

versus

The Government of His Britannic Majesty, represented by Sir Cecil J. B. Hurst, K.C.B., K.C., Legal Adviser to the Foreign Office,

Respondent. [7]

Objection to the Jurisdiction of the Court Made by His Britannic Majesty's Government.

The Court, composed as above, having heard the observations and conclusions of the Parties, delivers the following judgment:

The facts:

The Government of the Greek Republic, by an application instituting proceedings filed with the Registry of the Court on May 13th, 1924, in conformity with Article 40 of the Statute

and Article 35 of the Rules of Court, has submitted to the Permanent Court of International Justice a suit arising out of the alleged refusal on the part of the Government of Palestine, and consequently also on the part of His Britannic Majesty's Government, since the year 1921 to recognise to their full extent the rights acquired by M. Mavrommatis, a Greek subject, under contracts and agreements concluded by him with the Ottoman authorities in regard to concessions for certain public works to be constructed in Palestine.

This application concludes with a request that the Court may be pleased to give judgment to the effect that the Government of Palestine and consequently also the Government of His Britannic Majesty, have, since 1921, wrongfully refused to recognise to their full extent the rights acquired by M. Mavrommatis under the contracts and agreements concluded by him with the Ottoman authorities in regard to the works specified above, and that the Government of His Britannic Majesty shall make reparation for the consequent loss incurred by the said Greek subject, a loss which is estimated at £234,339 together with interest at six per cent as from July 20th, 1923, the date on which this estimate was made.

The considerations leading up to these conclusions have been developed in the Case filed with the Court by the claimant on May 23rd, 1924. It is therein specified that the Greek Government, abandoning a portion of its original claim relating to the irrigation works in the Jordan Valley, asks for judgment only in respect of two groups of concessions, namely : those relating to the construction and working of an electric tramway system, the supply of electric light and power and of drinking water in [8] the city of Jerusalem, and those relating to the construction and working of an electric tramway system, the supply of electric light and power and of drinking water in the city of Jaffa and the irrigation of its gardens from the waters of El-Hodja.

On the grounds stated in the Case, the Greek Government asks the Court to give judgment as follows:

The Jerusalem Concessions:

(1) That, these concessions having begun to be put into operation, the British Government, in its capacity as Mandatory for Palestine, is bound to maintain them and to agree

to their adaptation to the new economic conditions of the country, or to redeem them by paying to the claimant reasonable compensation;

(2) that, having in fact already, made its choice, by rendering impossible, directly or indirectly, the carrying out of the works for which the claimant holds a concession, it must pay him compensation;

(3) that, taking into account all the various elements of the loss occasioned to the claimant, he shall receive fair and reasonable compensation by means of the payment to him of the sum of £121,045, together with interest at six per cent from July 20th, 1923, until the date on which judgment is given.

The Jaffa Concessions:

(1) that the fact that these were granted after October 29th, 1914, does not justify the British Government in refusing to recognise them;

(2) that the fact that they were not confirmed by Imperial iradé, which is a simple formality not to be withheld at discretion, does not deprive them of their international value;

(3) that, though the British Government, in its capacity as Mandatory for Palestine, is at liberty not to maintain them, it is nevertheless under an international obligation to compensate their holder for the loss which it has inflicted upon him by deciding - as it has done - not to allow him to proceed with them;

(4) that, taking into account all the elements of the loss thus sustained by the claimant, he shall receive fair and reasonable compensation by means of the payment to him of the sum of [9] £113,294, together with interest at six per cent from July 20th, 1923, until the date on which judgment is given.

The application instituting proceedings was, in accordance with Article 40 of the Statute, communicated to the Government of His Britannic Majesty on May 15th, 1924, and the Greek Case was transmitted to that Government on May 31st. On June 3rd, His Britannic Majesty's Government informed the Court that it found itself obliged to make a preliminary objection on the ground that the Court had no jurisdiction to entertain the proceedings in question. In agreement with His Britannic Majesty's Government, the President fixed June 16th as the date for the filing of the objection to the Court's jurisdiction.

On that date, the Agent of His Britannic Majesty's Government filed with the Registry of the Court a preliminary objection to the Court's jurisdiction and a preliminary counter-case in the proceedings respecting the Mavrommatis Palestine Concessions.

The objection concludes with a request that the Court may be pleased to give judgment on the preliminary objection filed on behalf of His Britannic Majesty's Government and, without entering at the present stage upon the merits of the case, to dismiss the proceedings instituted by the Greek Government; whilst in conclusion of the preliminary counter-case it is submitted on behalf of His Britannic Majesty's Government that the proceedings instituted by the Government of the Greek Republic should be dismissed upon the ground that the Court has no jurisdiction to entertain them.

The Agent of the Government of the Greek Republic (having been informed of the filing of the objection made by the British Government) requested permission, on behalf of his Government, to make a written reply to this objection.

He was requested to submit his reply on June 30th. Accordingly, on the day fixed, the Greek Agent filed his Government's reply to the British preliminary counter-case concerning the Court's jurisdiction.

This reply, in conclusion, requests the Court to declare that the objection to the jurisdiction of the Court has not been established and to dismiss it ; and to reserve the suit for judgment on its merits.

In support of their conclusions, the Parties have handed in to the Court a number of documents as annexes to the case or preliminary counter-case. [10]

Furthermore, the Court has heard, in the course of public sittings held on July 15th and 16th, 1924, the statements of H.E. M. Politis, counsel for the applicant Government, and of the Agent of the respondent Government.

* * *

The Law.

Before entering on the proceedings in the case of the Mavrommatis concessions, the Permanent Court of International Justice has been made cognisant of an objection taken by His Britannic Majesty's Government to the effect that the Court cannot entertain the proceedings.

The Court has not to ascertain what are, in the various codes of procedure and in the various legal terminologies, the specific characteristics of such an objection; in particular it need not consider whether "competence" and "jurisdiction", *incompétence* and *fin de non-recevoir* should invariably and in every connection be regarded as synonymous expressions. It will suffice to observe that the extremely wide bearing of the objection upon which, before the case can be argued on its merits, the Court has to take a decision (without, however, in so doing, in any way prejudging the final outcome of such argument) has been indicated by the Parties themselves in their preliminary counter-case and reply or in the course of the oral statements made on their behalf. It appears in fact from the documents before the Court and from the speeches of Sir Cecil Hurst and of H.E. M. Politis that the preliminary question to be decided is not merely whether the nature and subject of the dispute laid before the Court are such that the Court derives from them jurisdiction to entertain it, but also whether the conditions upon which the exercise of this jurisdiction is dependent are all fulfilled in the present case.

The general basis of the jurisdiction given to the Permanent Court of International Justice is set down in Articles 34 and 36 of the Statute, according to which, in the first place, only States. or Members of the League of Nations may appear before it and, in the second place, it has jurisdiction to hear and determine "all cases which the Parties refer to it and all matters specially provided for in Treaties and Conventions in force".

In the application instituting proceedings the Greek Government relies on the following:
[12]

Article 9 of Protocol XII annexed to the Peace Treaty of Lausanne of July 24th, 1923;

Articles 11 and 26 of the Mandate for Palestine conferred on His Britannic Majesty on July 24th, 1922;

Article 36, first paragraph, and Article 40 of the Statute of the Court and Article 35, paragraph 2, of the Rules of Court.

The Parties in the present case agree that Article 26 of the Mandate falls within the category of "matters specially provided for in Treaties and Conventions in force" under the terms of Article 36 of the Statute and the British Government does not dispute the fact that proceedings have been duly initiated in accordance with Article 40 of the Statute.

Article 26 of the Mandate contains the following clause:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

The question therefore arises whether the conditions laid down by Article 26 in regard to the acceptance of the Court's jurisdiction, the absence of which would render such acceptance inoperative, are fulfilled in the case before the Court.

Before considering whether the case of the Mavrommatis concessions relates to the *interpretation of application* of the Mandate and whether consequently its nature and subject are such as to bring it within the jurisdiction of the Court as defined in the article quoted above, it is essential to ascertain whether the case fulfils all the other conditions laid down in this clause. Does the matter before the Court constitute a dispute between the Mandatory and another Member of the League of Nations ? Is it a dispute which cannot be settled by negotiation ?

I.

A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons. The present suit between Great Britain and Greece certainly possesses these characteristics. The latter Power is asserting its own rights by [12] claiming from His Britannic Majesty's Government an indemnity on the ground that M. Mavrommatis, one of its subjects, has been treated by the Palestine or British authorities in a manner incompatible with certain international obligations which they were bound to observe.

In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State - i.e. between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States. Henceforward therefore it is a dispute which may or may not fall under the jurisdiction of the Permanent Court of International Justice.

Article 26 of the Mandate, in giving jurisdiction to the Permanent Court of International Justice does not, in fact, merely lay down that there must be a dispute which requires to be settled. It goes on to say that the dispute must be between the Mandatory and another Member of the League of Nations. This is undoubtedly the case in the present suit, since the claimant State Greece, like Great Britain, has from the outset belonged to the League of Nations. It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law.

The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant. The fact that Great Britain and Greece are the opposing Parties to the dispute arising out of the Mavrommatis concessions is sufficient to make it a dispute between two States within the meaning of Article 26 of the Palestine Mandate. [13]

II.

The second condition by which this article defines and limits the jurisdiction of the Permanent Court in questions arising out of the interpretation and application of the Mandate, *is that the dispute cannot be settled by negotiation*. It has been contended that this condition is not fulfilled in the present case ; and leaving out of account the correspondence previous to 1924 between Mavrommatis or his solicitors and the British Government, emphasis has been laid on the very small number and brevity of the subsequent communications exchanged between the two Governments, which communications appear to be irreconcilable with the idea of negotiations properly so-called. The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a

more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*. This will also be the case, in certain circumstances, if the conversations between the Governments are only the continuation of previous negotiations between a private individual and a government.

It is true that the State does not substitute itself for its subject ; it is asserting its own rights and, consequently, factors foreign to the previous discussions between the individual and the competent authorities may enter into the diplomatic negotiations. But it is equally true that if the diplomatic negotiations between the Governments commence at the point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case. In the case now before the Court, the negotiations between M. Mavrommatis or his representatives and the Palestine or British authorities had covered precisely the points on which the Greek Government decided to rely, and did in fact rely as against [14] the British Government with regard to the recognition of the Mavrommatis concessions. And the negotiations between the concessions holder and the authorities were throughout conducted on the basis of international instruments subsequently relied on by the Greek Government - when it approached His Britannic Majesty's Government. That this is the case appears from the whole of the correspondence placed before the Court and more especially from the letter sent by the Foreign Office on April 1st, 1924 to the Greek Legation in London, in which all the questions which had previously been discussed between the interested person and the Colonial Office were recapitulated. One proof that the Greek Government took this view is the fact that it had associated itself with the steps taken by its subject by transmitting to the Foreign Office the letter sent to the Greek Legation by M. Mavrommatis on December 18th, 1922. The Greek Government moreover had already realized from two letters, dated January 22nd and February 2nd, 1923, sent by Mr. G. Agar Robartes of the Foreign Office to M. Melas, Secretary of the Greek Legation in London, that the British Government was indisposed to enter into direct negotiation with it regarding the claim of its subject. A year later, on January 26th, 1924, the

Greek Legation in London wrote to the Foreign Office in order to ascertain whether in the opinion of the British Government, "M. Mavrommatis' claims could not be satisfactorily met" or submitted to arbitration either by a member of the High Court of Justice or by a tribunal of which the president, failing agreement between the Parties, should be appointed by the British Government itself; and the note of His Britannic Majesty's Secretary of State for Foreign Affairs, dated April 1st, 1924, was regarded by Greece as a definitely negative reply.

This note moreover is also of great importance from another point of view. For it tends to show the official character of the correspondence which had taken place regarding the Mavrommatis concessions between the Greek Legation in London and the Foreign Office or certain of their officials. Thus the note of the Secretary of State refers expressly to the note - above mentioned - signed by M. Collas on January 26th, 1924; and the latter in its turn refers to the letter sent by Mr. Robartes to M. Melas on February 2nd, 1923. It should also be observed that all this correspondence bears the registration numbers of the Legation and of the Foreign Office. [15]

The matter had reached this stage when the Greek Government, considering that there was no hope of effecting a settlement by further negotiation and acting upon a suggestion made by M. Mavrommatis' solicitors in their letter of April 1st, 1924, to the Greek Legation in London, sent to the Foreign Office a dispatch dated May 12th, 1924, informing His Britannic Majesty's Government of its decision to refer the dispute to the Court, a decision which - doubtless in view of the approaching opening of the Court's ordinary Session - it proceeded to carry out on the following day, when it filed the application instituting proceedings with the Registry.

The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations. Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation. When negotiations between the private person and the authorities have already - as in the present case - defined all the points at issue between the two Governments, it would be incompatible with the flexibility which should characterise

international relations to require the two Governments to reopen a discussion which has in fact already taken place and on which they rely. It should be observed in this connection that the Foreign Office, in its reply of April 1st, states that the competent department to which the negotiations had been entrusted had fully and carefully examined the question.

III.

The Court has now to consider the condition which Article 26 of the Mandate imposes upon its jurisdiction when laying down that the dispute must relate "to the interpretation or the application of the provisions of the Mandate". The dispute may be of any nature; the language of the article in this respect is as comprehensive as possible (*any dispute whatever - tout différend, quel qu'il* [16] *soit*); but in every case it must relate to the interpretation or the application of the provisions of the Mandate.

In the first place, the exact scope must be ascertained of the investigations which the Court must, under Article 36, last paragraph, of the Statute, pursue in order to arrive at the conclusion that the dispute before it does or does not relate to the interpretation or the application of the Mandate, and, consequently, is or is not within its jurisdiction under the terms of Article 26. Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court's jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.

For this reason the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes.

It is true that in Advisory Opinion No. 4 regarding the Nationality Decrees in Tunis and Morocco (French Zone), the Court, which had to take a decision upon a plea to the jurisdiction,

declared that the jurisdiction of the Council of the League of Nations must be considered to exist provided that the legal grounds (*titres*) of an international character advanced by the Parties are such as to justify the provisional conclusion that they are of juridical importance for the dispute.

In that case, the plea was made under paragraph 8 of Article 15 of the Covenant and was directed against the very general jurisdiction given by the first paragraph to the Council of the League of Nations covering all disputes likely to lead to a rupture. Whereas in the present case, the objection to the Court's jurisdiction taken by the British Government relates to a jurisdiction limited to [17] certain categories of disputes, which are determined according to a legal criterion (the interpretation and application of the terms of the Mandate), and tends therefore to assert the general rule that States may or may not submit their disputes to the Court at their discretion.

The dispute brought before the Court by the Greek Government's application relates to the question whether the Government of Palestine and consequently also the British Government have, since 1921, wrongfully refused to recognise to their full extent the rights acquired by M. Mavrommatis under the contracts and agreements concluded by him with the Ottoman authorities in regard to certain public works.

In support of its application, the Greek Government cites Article 11 of the Mandate, which runs as follows:

"The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard among other things to the desirability of promoting the close settlement and intensive cultivation of the land.

"The Administration may arrange with the Jewish Agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a

reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration."

The question to be solved is whether the dispute above mentioned should be dealt with on the basis of this clause. Taken as a whole, Article 11 purports to regulate the powers of the Palestine Administration as regards: *a)* public ownership or control of the natural [18] resources of the country or of the public works, services and utilities; *b)* the introduction of a land system appropriate to the needs of the country and, *c)* arrangements with the Jewish agency to construct or operate, upon fair and equitable terms, any public works, services and utilities and to develop any of the natural resources of the country.

The Court feels that the present judgment should be based principally on the first part of paragraph 1 of Article 11.

After an introductory phrase laying down in general terms the fundamental duty of the Administration, namely to "take all necessary measures to safeguard the interests of the community in connection with the development of the country", Article II continues to the effect that the Administration of Palestine "shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein"- *aura pleins pouvoirs pour décider quant à la propriété ou au contrôle public de toutes les ressources naturelles du pays, ou des travaux et services d'utilité publique déjà établis ou à y établir.*

The Court considers that, according to the French version, the powers thus attributed to the Palestine Administration may cover every kind of decision regarding public ownership and every form of "controle" which the Administration may exercise either as regards the development of the natural resources of the country or over public works, services and utilities. An interpretation restricting these powers to certain only of the measures which the Administration may take in regard to public ownership or to certain only of the ways in which public "controle" may be exercised over the activities in question, though not completely excluded by the very general wording of the French text, is not the natural interpretation of its terms : that is to say that the right to grant concessions with a view to the development of the natural resources of the country or of public works, services and utilities, as also the right to

annul or cancel existing concessions, might fall within the terms of the French version of the clause under consideration.

The English version, however, seems to have a more restricted meaning. It contemplates the acquisition of "public ownership" or "public control" over any of the natural resources of the country [19] or over the public works, services and utilities established or to be established therein.

Since no question of "public ownership" is raised in the present case, the Court has devoted its whole attention to the meaning of the expression "public control". It has ascertained that the word "control" may have a very wide sense but that, used in conjunction with the expression "public ownership", it would appear rather to mean the various methods whereby the public administration may take over, or dictate the policy of, undertakings not publicly owned.

The Court is of opinion that, where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English.

The Mavrommatis concessions in themselves are outside the scope of Article 11, but the question before the Court is whether, by granting the Rutenburg concessions - which cover at least a part of the same ground - the Palestine and British authorities have disregarded international obligations assumed by the Mandatory, by which obligations Greece is entitled to benefit.

The connection between the Rutenberg and Mavrommatis concessions arising out of the fact that they partially overlap, may be considered as admitted because the Palestine and British authorities, when the question of the validity of the latter concessions was brought up, invited the interested party to come to an understanding with the Zionist organisation and with Mr. Rutenberg.

If the Rutenberg concessions fall within the scope of Article 11, the dispute undoubtedly relates to that article.

In this connection, the Court has to decide whether the grant of the Rutenberg concessions has given rise to the acquisition or exercise of "public control" in the sense contemplated above.

If the expression "public control" is contrasted with "private control" in the very restricted sense of a public undertaking as opposed to a private undertaking controlled by the public [20] authorities, the Rutenberg concessions cannot be considered as having conferred upon the Palestine Administration "public control" over the services under concession.

But it does not appear to be correct to maintain that the English expression "public control" only covers cases where the Government takes over and itself directs undertakings of one kind or another. The expression is also used to indicate certain forms of action taken by the State with regard to otherwise private undertakings. Even in such cases, the word "control", in the sense in which it is generally used, cannot be employed to describe practically all acts of public authority; "control" always means measures of a special character in connection with an economic policy consisting in subordinating, in one way or another, private enterprise to public authority. This wider meaning of the English expression appears to be the only one which does not nullify the expression *contrôle public* in the French version : it seems hardly possible to read the latter as referring exclusively to cases where a public administration itself takes in hand an undertaking. It is in this sense that even the grant of a concession of public utility to an individual or to a company may be accompanied by measures which amount to an exercise of "public control".

In this respect it should be observed that Article 28 of the Rutenberg concessions expressly lays down that "the undertaking of the company under this concession shall be recognised as a public utility Body under Government control" : it would not be correct to interpret this clause as reserving to the Government the right, should it see fit, to assume control of the undertaking. This "Government control" appears rather to be connected with the recognition of the undertaking as a public utility body. Moreover, it is clearly of a different nature to the supervision which the Palestine Administration may exercise over the financial operations of the company under Article 36 of the concessions.

Again it may be remarked that the concessions in question have been granted to a company which Mr. Rutenberg undertakes to form and the statutes of which, according to

Article 2 of the agreement concerning the grant of the concession for the Jordan and Article 34 of the Jaffa concession, were to be approved by the High Commissioner for Palestine in agreement with the Jewish agency mentioned in the Mandate. [21]

In order to form an idea of the significance of this clause, it must be remembered that this Jewish agency is described as follows in Article 4 of the Mandate:

"An appropriate Jewish agency shall be recognised as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters as may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine, and, subject always to the control of the Administration, to assist and take part in the development of the country.

"The Zionist organisation... shall be recognised as such agency."

« Un organisme juif convenable sera officiellement reconnu et aura le droit de donner des avis à l'Administration de la Palestine et de coopérer avec elle dans toutes questions économiques, sociales et autres, susceptibles d'affecter l'établissement du foyer national juif et les intérêts de la population juive en Palestine, et, toujours sous réserve du contrôle de l'Administration, d'aider et de participer au développement du pays. « L'organisation sioniste sera reconnue comme étant l'organisme visé ci-dessus »

This clause shows that the Jewish agency is in reality a public body, closely connected with the Palestine Administration and that its task is to co-operate, with that Administration and under its " control, in the development of the country. The words used in paragraph 2 of Article n to indicate the action of the Jewish agency are the same as those used in the first paragraph to indicate the use to be made of the powers granted to the Palestine Administration. It is obviously a program of economic policy which the Administration may carry out, either directly, or through a public body acting under its control.

The conclusion which appears to follow from the preceding argument is that the Rutenberg concessions constitute an application by the Administration of Palestine of the system of, "public

control" with the object of developing the natural resources of the country and of operating public works, services and utilities. Thus envisaged, these concessions may fall within the scope of Article II of the Mandate.

But even if any doubt on this point remained, the Court believes [22] that it should disregard it in view of a passage in the Preliminary Counter-case filed by His Britannic Majesty's Government on June 16th, 1924, containing a declaration which, no matter in what connection it was made, refers directly to the relations between the Rutenber.g concessions and Article 11 of the Mandate. This passage runs as follows:

"The concessions granted to Mr. Rutenberg in September, 1921, for the development of electrical energy and water power in Palestine (Annex to the Greek Case, pp. 21 -52 } were obliged to conform to this Article 11, and it would have been open to any Member of the League to question provisions in those concessions which infringed the international obligations which His Britannic Majesty as Mandatory for Palestine had accepted."

«Les concessions accordées en septembre 1921 à M. Rutenberg pour le développement de l'énergie électrique et de la force hydraulique en Palestine (Annexe au Mémoire grec, pages 21 à 52) ont obligatoirement dû être faites en conformité de l'article 11 et il eût été loisible à tout Membre de la Société de mettre en question toute stipulation de ces concessions qui eût porté atteinte aux obligations internationales assumées par Sa Majesté britannique en qualité de Mandataire pour la Palestine. »

The express reference to the "international obligations accepted by the Mandatory" makes it clear that this statement refers to paragraph 1 of Article 11.

Again the British Agent's oral pleading contains the following:

"Article 11 provides in the first part which I have read, that the Government of Palestine may itself develop these natural resources. It shall have full power to provide for public ownership or control of any of the natural resources of the country, subject to the international obligations accepted by the Mandatory. Then comes a second paragraph which enables the Administration to "arrange with the Jewish agency" - that is the Zionist

Organisation which had been mentioned in an earlier portion - "to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country", in so far as these [23] matters are not directly undertaken by the Administration. It will be noticed that there is no repetition in that second paragraph of those words "subject to any international obligations accepted by the Mandatory", but I think it is a limitation upon the powers of the Mandatory which is so obvious that it is implied in the second paragraph just as much as in the first. The Mandatory cannot, in making his arrangements for the development of the natural resources of the country, ignore the international obligations which he has accepted."

* * *

The powers accorded under Article 11 to the Administration of Palestine must, as has been seen, be exercised "subject to any international obligations accepted by the Mandatory". This qualification was a necessary one, for the international obligations of the Mandatory are not, *ipso facto*, international obligations of Palestine. Since Article 11 of the Mandate gives the Palestine Administration a wide measure of autonomy, it was necessary to make absolutely certain that the powers granted could not be exercised in a manner incompatible with certain international engagements of the Mandatory. The obligations resulting from these engagements are therefore obligations which the Administration of Palestine must respect ; the Mandatory is internationally responsible for any breach of them since, under Article 12 of the Mandate, the external relations of Palestine are handled by it. It has been contended on behalf of the Greek Government that the Administration of Palestine, by arranging with the Jewish agency for the construction or operation of the works or of a portion of the works for which M. Mavrommatis already held concessions and not paying the latter compensation, had disregarded the international obligations of the Mandatory. At the present stage of the proceedings the question whether there really has been a breach of these obligations can clearly not be gone into; to do so would involve a decision as to the responsibility of the respondent, a thing which the two Governments concerned do not at the moment ask the Court to do. But, in accordance with the principles set out above, the Court is constrained at once to ascertain whether the international

obligations mentioned in Article 11 affect the merits of the case and whether any breach of them would involve a breach of the provisions of this article. [24]

There has been much discussion as to what international obligations of the Mandatory's must be respected by the Administration of Palestine. The Greek Government appears to hold that these are all international obligations in general; on the other hand the submission of the British Government in its preliminary Counter-case is that only various beneficent principles are intended, to the maintenance of which the League of Nations, on whose behalf His Britannic Majesty exercises the mandate over Palestine, is pledged, such as freedom of transit and communications, equality of commercial opportunity for all Members of the League, suppression of the arms traffic, etc. It is not however certain whether this submission was maintained in the oral proceedings.

The Court, whilst abstaining from giving an opinion on these opposing contentions, feels constrained at once to make certain reservations in regard to them. The former does not appear to take sufficient account of the peculiar importance attaching to the words "accepted by the Mandatory", which obviously contemplate obligations contracted, even though, in a sense, it may be said that the whole body of international law has been accepted by States. Moreover, there would appear to be no reason for such a clause in this connection. The second interpretation is also unsupported by any argument and it is not easy to see any connection between it and the subject matter of the clause of which it forms part. In the opinion of the Court, the international obligations mentioned in Article 11 are obligations contracted having some relation to the powers granted to the Palestine Administration under the same article.

The Court has been informed that in the draft of the Mandate, prepared when it was thought that the Treaty of Sévres would shortly be ratified, the clause under discussion was worded as follows : "subject to Article 311 of the Treaty of Peace with Turkey", the article of the Mandate being in other respects identical with the final text. Later, when it became clear that the Treaty of Sévres would never come into force, whilst the new Peace Treaty with Turkey had not yet been drafted, in order to avoid delay in the adoption of the Mandate, the reference to the Treaty of Sévres was replaced by the words "international obligations accepted by the Mandatory". This phrase therefore - whatever its scope may be in other directions - includes at

all events [25] the provisions which, in the future Peace Treaty with Turkey, were to take the place of the provisions of Article 311 of the Treaty of Sévres.

This article which is the second of Section VI (*Companies and Concessions*) of Part IX (*Economic Clauses*) of that Treaty, is worded as follows:

"In territories detached from Turkey to be placed under the authority or tutelage of one of the Principal Allied Powers, Allied nationals and companies controlled by Allied groups or nationals holding concessions granted before October 29th, 1914, by the Turkish Government or by any Turkish local authority shall continue in complete enjoyment of their duly acquired rights, and the Power concerned shall maintain the guarantee granted or shall assign equivalent ones.

"Nevertheless, any such Power, if it considers that the maintenance of any of these concessions should be contrary to the public interest, shall be entitled, within a period of six months from the date on which the territory is placed under its authority or tutelage, to buy out such concession or to propose modifications therein ; in that event it shall be bound to pay to the concessionnaire equitable compensation in accordance with the following provisions.

"If the Parties cannot agree on the amount of such compensation, it will be determined by Arbitral Tribunals composed of three members, one designated by the State of which the concessionnaire or the holders of the majority of the capital in the case of a company is or are nationals, one by the Government exercising authority in the territory in question, and the third designated, failing agreement between the Parties, by the Council of the League of Nations.

"The Tribunal shall take into account, from both the legal and equitable standpoints, all relevant matters, on the basis of the maintenance of the contract adapted as indicated in the following paragraph.

"The holder of a concession which is maintained in force [26]shall have the right, within a period of six months after the expiration of the period specified in the second paragraph of this article, to demand the adaptation of his contract to the new economic

conditions, and in the absence of agreement direct with the Government concerned, the decision shall be referred to the Arbitral Commission provided for above."

As Article 311 of the Treaty of Sévres dealt with concessions in territories detached from Turkey and as that article is now replaced by Protocol XII of the Treaty of Lausanne, it follows that "the international obligations accepted by the Mandatory", referred to in Article 11 of the Mandate, certainly include the obligations arising out of Protocol XII of the Lausanne Treaty.

These obligations limit the powers of the Palestine Administration to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. Since - as has been already stated - the Rutenberg concessions fall within the scope of Article 11 of the Mandate, it is obvious that the Palestine Administration is, as regards these concessions, bound to respect obligations which Great Britain has accepted under Protocol XII. If the Administration has, by granting the Rutenberg concessions, committed a breach of these obligations, there has been an infringement of the terms of Article 11 of the Mandate which may be made the subject of an action before the Court under Article 26.

The Court considers that the reservation made in Article 11 regarding international obligations is not a mere statement of fact devoid of immediate legal value, but that, on the contrary, it is intended to afford these obligations within the limits fixed in the article, the same measure of protection as all other provisions of the Mandate.

It now only remains to consider whether there are any international obligations arising out of Protocol XII of Lausanne - hereinafter called "Protocol XII" - which affect the Mavrommatis concessions.

The instrument in question which is entitled "Protocol relating to certain Concessions granted in the Ottoman Empire", concerns [27] concessionary contracts duly entered into before October 29th, 1914, between the Ottoman Government or any local authority, on the one hand, and nationals (including Companies) of the Contracting Powers, other than Turkey, on the other. Greece is one of these Powers. The Protocol includes two sections, the first of which (Articles 1 to 8) concerns concessions in territories which continue to form part of the Ottoman Empire, whereas the second (Articles 9 to 13) concerns concessions in territories which have

been detached. The fundamental principle of the Protocol is the maintenance of concessionary contracts concluded before October 29th, 1914. In territories detached from Turkey, the State which acquires the territory is subrogated as regards the rights and the obligations of Turkey; the greater part of the provisions of Section I also apply to the contracts dealt with in Section II. Beneficiaries under concessionary contracts entered into before October 29th, 1914, which, at the time of the coming into force of the Treaty of Peace, have begun to be put into operation, are entitled to have their contracts readapted to the new economic conditions; other beneficiaries are not entitled to such readaptation, but their contracts may be dissolved at their request and in this case they are entitled, if there is ground for it, to an equitable indemnity in respect of survey and investigation work.

It is not disputed that the Jerusalem concessions dated from before October 29th, 1914, and must therefore be dealt with in accordance with the terms of Protocol XII. On the other hand, the Parties do not agree on the question whether the holder of these concessions is entitled to benefit by the provisions of Article 4 of the Protocol and consequently to claim that they should be readapted to the new economic conditions ; or whether, in accordance with Article 6, he is only entitled, to request that the contract may be dissolved with reasonable compensation for survey and investigation work. In accordance with the principles enunciated above, the question whether the Administration of Palestine can withhold from M. Mavrommatis the readaptation of his Jerusalem concessions, is a question concerning the interpretation of Article 11 of the Mandate, and consequently the provisions of Article 26 are applicable to it.

With regard to the Jaffa concessions, the position is as follows: The preliminary agreements are dated January 27th, 1914, and [28] on March 6th of the same year, the Ministry of Public Works at Constantinople authorised the District of Palestine to grant the proposed concessions. They were not however converted into concessions duly signed by the Ottoman authorities until January 28th, 1916. According to an Ottoman law promulgated in the meantime, they had to be confirmed by Imperial *Firman*; but this condition was never fulfilled.

It appears from the documents placed before the Court by the Greek Government and dealing with the negotiations which had taken place between those interested, that the Parties do not agree on the question whether Protocol XII has the effect of depriving concessions obtained in Turkey after October 29th, 1914, of any value as against States acquiring former Ottoman

territory, or whether, on the contrary, "concessions granted between October 29th, 1914, and the restoration of peace in countries where Turkey continued to exercise sovereign power, hold good, in principle, as against the successor States, though the latter cannot be compelled to maintain them."

The Court has not to give an opinion on the merits of this contention. It will suffice to observe that if on the one hand, Protocol XII being silent regarding concessions subsequent to October 29th, 1914, leaves intact the general principle of subrogation, it is, on the other hand, impossible to maintain that this principle falls within the international obligations contemplated in Article 11 of the Mandate as interpreted in this judgment. The Administration of Palestine would be bound to recognise the Jaffa concessions, not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory created no exception.

Though it is true that for the purpose of the settlement of a dispute of this kind the extent and effect of the international obligations arising out of Protocol XII must be ascertained, it is equally the fact that the Court is not competent to interpret and apply, upon a unilateral application, that Protocol as such, for it contains no clause submitting to the Court disputes on this subject.

On the other hand, the Court has jurisdiction to apply the Protocol of Lausanne in so far as this is made necessary by Article 11 of the Mandate. [29]

The foregoing reasoning leads to the following conclusions:

(a) That the dispute between the British and Greek Governments concerning M. Mavrommatis' claim in respect of the Jerusalem concessions must be decided on the basis of the provisions of Article 11 of the Mandate and that consequently it is within the category of disputes for which the Mandatory has accepted the jurisdiction of the Court ;

(b) that, on the other hand, the dispute between these Governments concerning M. Mavrommatis' claims in respect of the Jaffa concessions has no connection with Article 11 of the Mandate and consequently does not fall within the category of disputes for which the Mandatory has accepted the jurisdiction of the Court.

Although a single application has been filed with the Court for the payment by Great Britain of a lump sum ; and although the case of the Mavrommatis concessions, throughout the

negotiations preceding the present action, has, all things considered, been dealt with as one single question, the fact remains that, in its Case, the Greek Government submitted its claim under three different headings. One of these - that relating to the Jordan works - has been abandoned in the Case itself ; the other two relating to Jerusalem and Jaffa respectively are dealt with separately and separate claims for compensation are submitted. The Court therefore, having ascertained that it only has jurisdiction to entertain the claim relating to Jerusalem, reserves this claim for judgment on its merits and declares that its jurisdiction does not extend to the claim relating to the works at Jaffa.

IV

Having thus established its jurisdiction under Articles 26 and 11 of the Palestine Mandate, the Court has to consider whether as concerns the dispute regarding the Jerusalem concessions, this jurisdiction may not be limited by another international instrument which might overrule the provisions of the Mandate.

If a State has recourse to the Court under a clause establishing the latter's compulsory jurisdiction, it must be prepared for the contingency that the other Party may cite agreements entered into [30] between the opposing Parties which may prevent the exercise of the Court's jurisdiction. Now His Britannic Majesty's Agent in his "Preliminary Objection to the Jurisdiction of the Court", introducing the "Preliminary Counter-Case", bases his request for the dismissal of the proceedings instituted by the Greek Government, firstly on the contention that Article 26 of the Mandate is not applicable in this case and, secondly on the contention that the only international instrument dealing with the recognition of concessions in Palestine is Protocol XII, and that this instrument contains no provision giving the Permanent Court of International Justice jurisdiction to decide disputes relating to the interpretation or application of that Protocol.

Though His Britannic Majesty's Agent does not expressly contend that the Court's jurisdiction under the Mandate - which he disputes - is incompatible with the provisions of Protocol XII, the Court considers that the citation of this document by the British Agent must be regarded as one of the grounds for the objection to the Court's jurisdiction. In the circumstances,

it will therefore not be necessary to consider whether the Court, whose jurisdiction is dependent on the will of the States concerned in the dispute, would be entitled, when giving judgment in regard to its jurisdiction, to consider arguments other than those advanced by the Parties.

It is certain that Protocol XII is an international instrument, quite distinct from and independent of the Mandate for Palestine. It deals specifically and in explicit terms with concessions such as those of M. Mavrommatis, whereas Article 11 of the Mandate deals with them only implicitly. Furthermore it is more recent in date than the Mandate. All the conditions therefore are fulfilled which might make the clauses of the Protocol overrule those of the Mandate. Although the provisions of the Mandate possess a special character by reason of the fact that they have been drawn up by the Council of the League of Nations, neither of the Parties has attempted to argue that a Member of the League of Nations cannot renounce rights which he possesses under the terms of the Mandate.

Before considering whether, and, if so, to what extent, the jurisdiction of the Court under Article 26 might be affected by Protocol XII, it should be observed that, as has already been established, Article II refers to Protocol XII. This international instrument [31] must be examined by the Court not merely as a body of rules which may limit its jurisdiction, but also and above all as applicable under the terms of Article 11 of the Mandate which is the very clause from which the Court derives its jurisdiction. In this respect, the Protocol is the complement of the provisions of the Mandate in the same way as a set of regulations alluded to in a law indirectly form part of it. Nevertheless, from whichever of the two aspects it is regarded, Protocol XII remains the same and has the same effect.

The fact that Article II only refers to the Protocol in general terms, and that the Protocol is more recent in date than the Mandate, does not justify the conclusion that the Protocol would only be applicable in Palestine in so far as it is compatible with the Mandate. On the contrary, in cases of doubt, the Protocol, being a special and more recent agreement, should prevail.

If this is true, it is equally true that the provisions of the Mandate and more particularly those regarding the jurisdiction of the Court are applicable in so far as they are compatible with the Protocol. The reservation in Article II regarding international obligations makes it quite clear that the intention is that these are to be respected in their entirety but that they are not to have any general limitative effect as regards the provisions of Article 11. The silence of Protocol XII concerning the Mandate and the jurisdiction of the Permanent Court of International Justice,

does not justify the conclusion that the Parties intended to exclude such jurisdiction ; for the Protocol does not only deal with mandated territories, and it includes amongst its signatories a State which is not a Member of the League of Nations. Though respect for Protocol XII, in so far as it constitutes a body of rules applicable in Palestine as concerns any Member of the League of Nations, is assured by Article 11 of the Mandate, the provision of Article 26 definitely establishing the jurisdiction of the Court in disputes relating to Article 11 cannot be in any way affected by the silence of the Protocol regarding this jurisdiction.

The Protocol XII and Article 11 of the Mandate are in no way incompatible. This may clearly be seen by a comparison of the two documents. Article 11 does not expressly mention concessions; it is confined to a definition of certain powers of the Mandatory and of certain of the objects of the economic policy of the Palestine Administration. On the other hand, the Protocol deals exclusively [32] and in detail with concessions ; it establishes tests according to which certain concessions must be recognised ; it lays down rules for the subrogation of the successor States as regards the rights and obligations of the Turkish authorities. This is substantive law. But the Protocol also contains clauses concerning the procedure to be followed : provision is made for administrative negotiations regarding the readaptation of certain concessions ; times are fixed within which these negotiations may take place or certain declarations on the part of concession holders may be made ; lastly it lays down a special procedure for the valuation by experts of the indemnities to be granted to concession holders.

It is these provisions of the Protocol concerning procedure which may be regarded as incompatible, not with Article 11 of the Mandate, but with the jurisdiction derived by the Court from that article. This incompatibility is twofold. In so far as the Protocol establishes in Article 5 a special jurisdiction for the assessment of indemnities, this special jurisdiction - provided that it operates under the conditions laid down - excludes as regards these matters the general jurisdiction given to the Court in disputes concerning the interpretation and application of the Mandate. On the other hand, the provisions regarding administrative negotiations and time limits in no way exclude the jurisdiction of the Court ; their effect is merely to suspend the exercise of this jurisdiction until negotiations have proved fruitless and the times have expired. Subject to the special powers given to the experts, and to the time limits and the declarations provided for, the Court's jurisdiction remains intact in so far as it is based on Article 11. In particular, this is

the case as regards disputes relating to the interpretation and application of the provisions of the Protocol itself.

Now in the present case it would appear that the dispute between the two Parties relates to points which are preliminary points as regards the application of Articles 9, 1 and 4 to 6 of the Protocol. Whilst a difference of opinion prevails regarding the question whether the Mavrommatis concessions at Jerusalem fall under the terms of Article 4 or Article 6 of the Protocol, the provisions relating to the procedure to be followed in either event cannot be used in argument against the Court's jurisdiction. For these reasons, neither the jurisdiction of the Court, nor the exercise of its jurisdiction, is, at the present stage of the dispute, affected by the [33] provisions of Protocol XII regarding the special tribunal provided for in Article 5 of the time limits mentioned in Articles 4 and 6. Nor can the argument that the concession holder has not exercised the right of option provided for in Article 4 be used against the Greek Government. The British Government cannot insist on the exercise of this right so long as it denies that the concession fall under the terms of that article. The question remains to be considered whether the negotiations which have taken place with regard to the application of the Protocol in anticipation of its coming into force can exert any influence as regards the expiration of the times in question. This question however cannot arise until it has been decided whether the time limits applicable to the concession are those laid down in Article 4 or in Article 6.

V.

The Treaty of Lausanne and Protocol XII were signed by Great Britain and Greece on July 24th, 1923. When the final negotiations between Greece and Great Britain in regard to the Mavrommatis concessions took place (January to April 1924), and at the moment when Greece filed its application (May 13th; 1924) the deposit of ratifications, which was provided for in Article 143 of the Treaty of Lausanne, had not taken place. This condition had to be fulfilled before the Treaty and its supplementary instruments could come into effect as regards signatories having then ratified it. The deposit was effected on August 6th, 1924. Already before that date Greece Greek law of August 25th, 1923 : Greek official Gazette of the same date) and Great Britain (Treaty of Peace - Turkey - Act of April 15th, 1924) had taken the necessary steps for

ratification of the Treaty. Since the Treaty is now in force and Protocol XII has become applicable as regards Great Britain and Greece, it is not necessary to consider what the legal position would have been if the Treaty had not been ratified at the time of the Court's judgment.

As His Britannic Majesty's Agent relied on the fact that the Protocol was not in force, the Court is constrained to state its opinion on the question whether its jurisdiction may be affected by the fact that this Protocol is only effective as from August 6th, 1924. [34]

Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognised therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection. The Court therefore considers that the Protocol guarantees the rights recognised in it against any violation regardless of the date at which it may have taken place.

In the same connection it must also be considered whether the validity of the institution of proceedings can be disputed on the ground that the application was filed before Protocol XII had become applicable. This is not the case. Even assuming that before that time the Court had no jurisdiction because the international obligation referred to in Article 11 was not yet effective, it would always have been possible for the applicant to re-submit his application in the same terms after the coming into force of the Treaty of Lausanne, and in that case, the argument in question could not have been advanced. Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the applicant's suit. The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law. Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications.

As has been explained above, the dispute relates to points preliminary to the application of certain provisions of Protocol XII, namely those dealing with negotiations to be undertaken and time limits to be observed. For this reason it cannot be argued against the applicant that he is under an immediate obligation to conform to these provisions. This conclusion is, in the present case, also pointed to for another reason: the Parties, and before them, the [35] persons interested, have by mutual consent and at the instance of His Britannic Majesty's Government, conducted their negotiations, since the signature of the Treaty of Lausanne, on the basis of Protocol XII. There would appear to be precedents for this.

Finally one last point remains which concerns the question of retrospective effect raised by His Britannic Majesty's Agent. If the Court's jurisdiction is based on Article n of the Mandate, this clause must be applicable to the dispute, not merely *ratione materice*, but also *ratione tempofis*.

It must in the first place be remembered that at the time when the opposing views of the two Governments took definite shape (April 1924), and at the time when proceedings were instituted, the Mandate for Palestine was in force. The Court is of opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In the present case, this interpretation appears to be indicated by the terms of Article 26 itself where it is laid down that "any dispute whatsoever which may arise" shall be submitted to the Court. The reservation made in many arbitration' treaties regarding disputes arising out of events previous to the conclusion of the treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above. The fact of a dispute having arisen at a given moment between two States is a sufficient basis for determining whether as regards tests of time, jurisdiction exists, whereas any definition of the events leading up to a dispute is in many cases inextricably bound up with the actual merits of the dispute.

Nevertheless, even supposing that it were admitted as essential that the act alleged by the Applicant to be contrary to the provisions of the Mandate should have taken place at a period when the Mandate was in force, the Court believes that this condition is fulfilled in the present

case. If the grant of the Rutenberg Concessions, in so far as they may be regarded as incompatible, at least in part, with those of Mavrommatis, constitutes the alleged breach of the terms of the Mandate, this breach, no matter on what date it was first committed, still subsists, and the provisions of the Mandate are therefore applicable to it. There is no doubt that the Mandatory régime was in force when the British Government, in its letter [36] of April 1st, 1924, adopted the attitude which, in the opinion of the Greek Government, rendered it impossible to continue negotiations with a view to a settlement and, by so doing, imparted to the breach of the Mandate, alleged by Greece to have occurred, a definitive character.

For these reasons the Court does not feel called to consider whether the provisions of the Mandate, once they are in force, apply retrospectively to the period when, according to the Greek application, the British Armies utilised, after 1918, certain of M. Mavrommatis' surveys, and when the Palestine Authorities and the Colonial Office, in 1921, failed to regard themselves as bound to respect the concessions in question to the extent claimed by M. Mavrommatis.

Without dwelling further on this aspect of the problem, the Court feels constrained to observe that the Mandate system including the Mandates to be established for territories formerly belonging to the Ottoman Empire, dates back to Article 22 of the Covenant of the League of Nations ; furthermore that the Mandate for Palestine was entrusted to Great Britain by the Principal Allied Powers in 1920, and, finally, that in 1921 the draft of the Mandate for Palestine contained a reservation regarding Articles 311 and 312 of the Treaty of Sévres.

FOR THESE REASONS

The Court, having heard both Parties,

Upholds the preliminary objection submitted by His Britannic Majesty's Government in so far as it relates to the claim in respect of the works at Jaffa and dismisses it in so far as it relates to the claim in respect of the works at Jerusalem;

Reserves this part of the suit for judgment on the merits;

And instructs the President to fix, in accordance with Article 33 of the Rules of Court, the times for the deposit of further documents of the written proceedings.

Done in French and English, the French text being authoritative. [37]

At the Peace Palace, The Hague, this thirtieth day of August one thousand nine hundred and twenty four, in three copies, one of which is to be placed in the archives of the Court and the others to be forwarded to the Agents of the Governments of His Britannic Majesty and of the Greek Republic respectively.

(Signed) Loder,

President.

(Signed) Å. Hammarskjöld,

Registrar.

Lord Finlay and MM. Moore, de Bustamante, Oda and Pessôa, declaring that they are unable to concur in the judgment delivered by the Court, and availing themselves of the right conferred on them by Article 57 of the Court Statute, have delivered the separate opinions which follow hereafter.

(Initialed) L.

(Initialed) A. H.

[38] Dissenting Opinion by Lord Finlay.

I regret that I am unable to agree with the Judgment which has just been delivered, so far as it relates to the Jerusalem Concessions. Three conditions must be fulfilled in order that the jurisdiction of the Permanent Court under Article 26 of the Mandate should be compulsory. The dispute must be a dispute between the Mandatory and another Member of the League of Nations, it must be a dispute which cannot be settled by negotiation, and it must be a dispute relating to the interpretation or the application of the provisions of the Mandate. In my opinion none of these conditions are fulfilled in the present case.

I.

The Permanent Court takes cognisance only of disputes between nations. It has no jurisdiction to deal with a dispute one of the Parties to which is an individual.

Article 26 is express on this head. Its provisions apply only if a dispute as to the Mandate has arisen between the Mandatory and another Member of the League of Nations. Of course, there are many cases in which a genuine dispute between two nations has originated in a wrong alleged to have been done to the subject of one of these two nations by the other. Out of the dispute between the individual and the State which is alleged to have committed the wrong there may develop a dispute between the two nations. Many international disputes of great gravity have originated in this way. It is obvious that Article 26 has reference to genuine international disputes only and that any attempt to bring its provisions into play with reference to claims of individuals against the Mandatory requires to be carefully watched.

It is a mistake to suppose that Article 26 can be made applicable to a dispute between an individual and a mandatory State merely by the intervention, as litigant, of the government of which that individual is a subject. To justify proceedings under Article 26, there must have been in existence before the *Requête* was filed a dispute between the Mandatory and another nation Member of the League of Nations. [39]

Was there such an international dispute in the present case?

The concessions to M. Mavrommatis dated from early in 1914, and in 1921 he urged the Government of Palestine to give effect to them. A very long correspondence followed in which

M. Mavrommatis and his solicitors urged his rights in respect of these concessions upon the British Colonial Office. He also got friends to write privately to persons in the British Foreign Office upon the subject. One of the letters so written, dated January 26th, 1924, was from a M. Collas who is stated to be in the Greek Foreign Office and was addressed to some person in the British Foreign Office. M. Collas in this letter asked whether his correspondent could let him know the views of His Majesty's Government about M. Mavrommatis' claim, and whether in their opinion M. Mavrommatis' claim could not be satisfactorily met. M. Collas added that M. Mavrommatis' solicitors said that he would be prepared to submit the matter to a Court of Arbitration. With reference to this note from M. Collas /*Supp. Corr. pp. 9 and 10*/ the Foreign Office on April 1st, 1924, wrote to the Greek Legation stating that the Jerusalem Concessions could be dealt with only under the Concessions Protocol of the Treaty of Lausanne and were not suitable for arbitration, and that the Jaffa Concessions could not be recognised being subsequent in date to October 29th, 1914.

On the same date, April 1st, 1924, Messrs. Westbury, Preston and Stavridi, M. Mavrommatis' Solicitors, wrote to the Greek Legation /*ibid, pp. I and III*/ enclosing an opinion of M. Mavrommatis' Counsel, and said: "From this you will see that in the opinion of Counsel, with which we entirely agree, the only way this question can be solved is by an appeal to the International Tribunal at The Hague, and on behalf of M. Mavrommatis we have the honour to suggest that steps should be taken for this submission to take place without delay." The enclosure in this letter contained a copy of an opinion of the same date given by Mr. Purchase, M. Mavrommatis' Counsel, which concludes thus: "We have tried every possible course, and now it would appear that the only way by which we can solve this question is to appeal to The Hague Tribunal under Articles 11 and 26 of the Mandate conferred upon Palestine by right of international law [40] and the Treaty of Lausanne. Such appeal cannot be lodged by virtue of the treaties but only by the Government of which M. Mavrommatis is a citizen. I therefore suggest that you should request the Greek Minister to cite the Colonial Office before the Hague Tribunal so that the matter can be adjudicated upon."

All this shows clearly that there was not any dispute between the Governments of Greece and Great Britain when the letter of May 12th, 1924, was written, and the *Requête introductive*

d'instance was lodged. A dispute between an individual and Great Britain is one thing; a dispute between the Government of that individual and Great Britain is quite another. There had been a long dispute between M. Mavrommatis and the British Government; there had been no dispute between the Greek Government and the British Government.

It is only necessary to quote the first paragraph of the letter of May 12th, 1924, from the Greek Legation to the British Foreign Office /*Ibid.*, p. 13/.

"With reference to your letter of April 1st, No. E. 2816/861/65, I have the honour to inform you by order of my Government, that an amicable arrangement having failed to be reached by His Britannic Majesty's Government giving adequate satisfaction to their national, they have arrived at the decision, in conformity with Article 26 of the prescriptions of the Mandate for Palestine of April 12th, 1922, to submit the case to the judgment of the Permanent Court of International Justice at The Hague."

We now know that this step was taken on the suggestion of M. Mavrommatis' solicitors merely to enable the Permanent Court to take cognisance of the claim against the British Government.

As I have said, there have been many cases in which a dispute between two States has arisen from the fact that an alleged wrong has been done by one of them to a citizen of the other. There was nothing of the kind here. There was no dispute between the two Governments. The Greek Government filed the *Requête* merely for the purpose of bringing M. Mavrommatis' claim within the jurisdiction of the Permanent Court. There was no dispute between the two Powers before the *Requite* was filed and it follows that the first condition required by Article 26 of the Mandate had not been satisfied. [41]

II.

But even if it could be supposed that there was a dispute between the two Governments, the dispute was not one which could not be settled by negotiation. Efforts had been made by the agents of M. Mavrommatis to settle his dispute with the British Government; no such efforts were made by the Greek Government. An effort made by an individual to get settlement of his claim against a foreign Government is one thing; an effort made by his Government, having

taken up his case, to effect a settlement of its dispute with the foreign government is another thing altogether.

It is said that it was of no use to try negotiations between the two Governments. I cannot see any ground for this assertion. It is a matter of common experience that governments frequently make a settlement of claims, the justice of which they do not acknowledge, and innumerable claims of the nature of the present have formed the subject of compromise. It is quite impossible to say that if the Greek Government had taken up the claim and, as a government, had pressed for a settlement, the negotiations might not have resulted in a settlement.

Article 26 does not make it a condition to the jurisdiction of the Court that there should have been negotiations with a view to settling the dispute between the two Powers, but it does make it a condition that the dispute is one which cannot be settled by negotiation. There may be some exceptional cases in which it can be predicated that from special circumstances it is obvious that negotiations would be a mere waste of time, but the present is not such a case. If the Government of Greece had really taken up the Mavrommatis matter and made it a subject of negotiation with Great Britain, who can say that a settlement would not have been arrived at?

The right to sue under Article 26 is carefully confined to nations. The Court must not deal with the Mandate in such a way that in practice any individual, the subject of a State Member of the League of Nations, who makes a claim against a Mandatory, based on some alleged infraction of the terms of the Mandate, can invoke the compulsory jurisdiction of the Permanent Court, merely by getting his own Government to file a *Requête*; anything of this kind might lead to many abuses. A State which has undertaken a Mandate [43] under the League of Nations has gratuitously taken upon itself a very arduous task and full effect must be given to the provisions of the Mandate for the protection of the Mandatory from litigation on any lines other than those laid down in the Mandate. The effect of the judgment of the Court in the present case might be to fritter these precautions away.

III.

The jurisdiction of the Permanent Court rests upon consent, and without consent there is no jurisdiction over any State. The consent may be by special agreement (*compromis*) in a

particular case, or general. In the present case the British Government objects to the jurisdiction, but it is claimed that such a general consent is to be found in the Mandate for Palestine, under Article 26 combined with Article 11.

I shall presently consider the effect of Article 11, but it is desirable in the first instance to consider the meaning and effect of Article 26 in itself.

Article 26.

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

There can be no doubt as to the class of case which primarily, at all events, this article was intended to meet. There are a number of provisions of the Mandate under which it is highly probable that questions may arise between different Members of the League of Nations. Article 5 forbids placing any Palestine territory under the control of any foreign Power. Some Member of the League might allege that this provision had been violated to its prejudice. Article 9 provides that the judicial system of Palestine shall assure to foreigners as well as to natives a complete guarantee of their rights. Questions might arise at any time with another Member of the League as to whether the judicial system is so constituted as to afford this guarantee to its subjects. Article 18 forbids all [43] discrimination against the nationals of any State, Member of the League of Nations, or against the goods originating in or destined for any such State, and provides for freedom of transit across the mandated area. Questions may arise between the Mandatory and another Member of the League as to the observance of this article. The same observation applies to Article 19, which provides for adherence on behalf of Palestine to international conventions on the slave traffic, traffic in arms and ammunition, traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation and postal, telegraphic and wireless communication, or literary, artistic or industrial property; and so under Article 20 providing for co-operation in a common policy adopted by the League, for preventing and combating diseases of men, plants and animals. In this connection Article 21 must be

mentioned. It provides for the enactment and execution of a law as to Antiquities. This law is to ensure equality of treatment of the nationals of all States Members of the League of Nations and under head (7) it is provided that in granting authorisations to excavate, the Administration of Palestine shall not act in such a way as to excludes avants of any nation without good grounds.

Under all these heads there are endless possibilities of dispute between the Mandatory and other Members of the League of Nations, and it was highly necessary that a Tribunal should be provided for the settlement of such disputes. Article 26 provides the Tribunal for this purpose.

The dispute in the present case is as to the alleged failure by the British Government as Mandatory to recognise the rights of M. Mavrommatis in respect of certain concessions in Palestine. This can be brought within the compulsory jurisdiction provided for in Article 26 only if it relates to the interpretation or the application of the provisions of the Mandate. The dispute here has obviously nothing to do with any of the provisions of the Mandate primarily contemplated in Article 26, and to which I have already referred. It is, however, contended for the claimant that Article 11 of the Mandate contains provisions which have been infringed by the action of the Mandatory as regards these concessions and that for this reason the case falls under Article 26. Article 11 is as follows: [44/6]

Article 11.

"The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the close settlement and intensive cultivation of the land.

"The Administration may arrange with the Jewish Agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a

reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration."

The French version agrees with the English and I refer to it only on one point on which it is slightly clearer. The English words "or of the public works, services and utilities established, or to be established therein" are rendered *ou des travaux et services d'utilité publique déjà établis ou à y établir*. The words whether in French or English denote works or services of public utility such as railways, provision for supply of water, gas, electricity, etc.

Protocol XII to the Treaty of Lausanne deals with Turkish Concessions such as those of M. Mavrommatis in Palestine. By Article 1 such concessions duly entered into before October 29th, 1914, are maintained, but subject to certain conditions, hereinafter referred to, contained in Articles 4, 5 and 6 and relating amongst other things to adaptation of such concessions to the new economic conditions.

The charge made against the British Government as Mandatory [45] is that it refused to give effect to the Mavrommatis Concessions and granted concessions covering in part the same ground to one Rutenberg. The Greek Government says that, if established, this would amount to a breach of the provisions of the Mandate, and that this would give the Court compulsory jurisdiction under Article 26. Great Britain denies this. This put shortly is the question which has been raised and discussed very fully on the Preliminary Objection.

For the Greek Government it is contended that the case falls under Article 11 of the Mandate in virtue of the words in the first sentence "subject to any international obligations accepted by the Mandatory". It is said that these words incorporated into Article 11 the provisions of the Lausanne Protocol XII, so that for the purposes of Article 26 that Protocol must be regarded as part of Article 11 of the Mandate, and that the grant of the Rutenberg Concession was an exercise of the power conferred in the first sentence of Article 11 to provide for public ownership or control and was in breach of the Protocol which recognises the Mavrommatis Concessions subject to certain conditions. It was further alleged that the granting of the Rutenberg Concession amounted to an arrangement made by the Administration of Palestine

with the Zionist Organisation within the terms of paragraph 2 of Article 11 and that the words reserving international obligations in the first sentence should be read into paragraph 2.

This in broad outline is the case made against the British Government on the question of jurisdiction. I proceed to examine it in detail.

The words relied on as showing that there has been a breach of the provisions of the Mandate within Article 26 are the following: "subject to any international obligations accepted by the Mandatory". An examination of the article shows conclusively that these words constitute merely a limitation which is attached to one only of the powers conferred on the Mandatory by Article 11, namely the power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. [46]

It will be observed that Article 11 begins with a general statement as to one duty imposed on the Administration of Palestine. This is contained in the initial words "The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country". These words are a statement of principle and provide that in the development of the country the interests of the community are not to be sacrificed to those of individuals and that all measures necessary to safeguard the interests of the community are to be taken by the Administration.

Article n then proceeds to deal specifically with the work of the Administration and its powers under three heads: (1) The public ownership or control of natural resources or public works, etc. therein: this is closely connected with the statement of principle which precedes it and is dealt with in the concluding words of the same sentence. — (2) The introduction of a Land System (second sentence of the article). — (3) Arrangements with the Zionist Organisation for the construction or operation of public works, etc. or development of natural resources (paragraph 2).

I take these heads in their order. (1) The words which deal with the first head are the following: — "and subject to any international obligations accepted by the Mandatory", the Administration "shall have full power to provide for public ownership or control of any of the natural resources of the country, or of public works, services and utilities established or to be established therein".

We have been informed that in the draft of the Mandate the reservation at the beginning of these words ran thus: "subject to the provisions of Article 311 of the Treaty of Peace with Turkey", i.e. the Treaty of Sevres. It became, however, obvious that the Treaty of Sevres would never be allowed to take effect and to avoid delay in the completion of the Mandate for Palestine the reference to the Treaty of Sevres was replaced by the words "subject to any international obligations accepted by the Mandatory", words which would be applicable to the provisions of the Treaty which was expected to replace that of Sevres.

Article 311 of the Treaty of Sevres dealt with concessions in countries like Palestine detached from Turkey to be placed under the authority or tutelage of one of the Principal Allied Powers. It provided in substance that concessions granted before October [47] 29th, 1914, should be maintained subject, however, to power to buy out any concession contrary to the public interest, compensation being paid in the manner provided; there was further provision for adaptation of the contract to the new economic conditions. Article 311 of the Treaty of Sevres is now replaced by Protocol XII of the Treaty of Lausanne which deals with the same subject. It is obvious that the "international obligations accepted by the Mandatory" referred to in Article 11 are primarily, at all events, the provisions of Protocol XII of the Treaty of Lausanne. It would also include any other relevant international obligations but it does not appear that there are any others.

It is quite impossible to apply these words, "international obligations accepted", to international law either generally or in any particular respect. The words obviously refer to conventional obligations by treaty or other agreement; provisions of international law do not require acceptance to be binding but are binding by the sanction on which all international law rests, the general consent of nations. The words "accepted by the Mandatory" show that the "international obligations" referred to are contractual, that is by treaty or convention, and reference is clearly made to the provisions which were expected to replace the Treaty of Sevres and in particular Article 311.

It may be said, why make a particular reservation for these international obligations? They are binding, it might be said, by force of the treaty or convention which created them, and

which has been accepted by the Mandatory. The answer is clear. These words are introduced to show beyond doubt that the grant of the power to "provide for public ownership or control" is not to be exercised in a manner inconsistent with treaty obligations which the Mandatory has accepted. If the words of reservation had been left out it might have been plausibly argued that power was conferred on the Administration of Palestine to override any such obligations. Without these words of reservation the clause have run thus: the Administration "shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be estab[48]lished therein". It would have been said, if the Mandate had been thus worded, that the Administration might exercise this power to acquire as public property or to assume public control, unfettered by international obligations even if they had been accepted by the Mandatory. Nothing of the kind was intended, and, to make this clear beyond doubt, these words were inserted to show that the power conferred was subject to such obligations as had been accepted by the Mandatory. These words impose a restriction upon the power of acquisition or control conferred on the Administration by the first sentence of Article 11; it is to be subject to treaty obligations which have been accepted by the Mandatory.

These words of reservation apply only to the first head of the powers conferred by Article 11, namely, the power of acquisition of public property or control; they have no application to heads 2 and 3 which relate respectively to the introduction of a Land System and to arrangements to be made with the Zionist Organisation. With reference to both these last heads such words would be surplusage. No one could suppose for a moment that the power to introduce a Land System or to make arrangements with the Zionist Organisation could confer any authority to disregard the terms of any international obligations; any existing treaty might be enforced by the sanctions appropriate to treaties. But, as I have pointed out, if "full power to provide for public ownership or control" had been conferred *simpliciter* upon the Administration of Palestine, it might have been supposed that this was meant to empower the Administration to "nationalise" irrespective of treaty obligations. It was very proper under head (1) to make the reservation; under heads (2) and (3) it was wholly superfluous.

If the Administration of Palestine had provided for public ownership or control of any of the natural resources of the country or of public works, etc., in a manner which involved the disregard of international obligations accepted by the Mandatory, there would have been an infraction of Article 11 which might have been submitted to the Permanent Court at the instance of any Member of [49] the League of Nations under Article 26. The property would have been acquired or the control assumed contrary to Article 11, because Article 11 confers the power to acquire such property or control only in accordance with international obligations accepted. Here nothing of the kind took place. The Administration of Palestine has not made as to the subjects of the Mavrommatis concessions any provision for public ownership or control within the meaning of the first sentence of Article 11. The granting of concessions is not an exercise of the first power in Article 11 nor is their annulment, unless it forms part of a process of nationalisation by making the subject public property or putting it under public control. It has been contended that Article 28 of the Rutenberg *Annex to Mémoire of Greek Gov., p. 35, p 48* concessions for the supply of electricity within the Palestine area showed an assumption of public control within the meaning of the first sentence of Article 11 of the Mandate. This suggestion does not bear examination. The article provides that the undertaking of the Company shall be recognised as a Public Utility Body under Government control and all the installations and property of the undertaking shall receive protection as such. This provision does not vest the management in the Government to any extent; it merely recognizes the right of the Government to assume control if the public interest demands it. The management remains in the Company until the power is exercised. The existence of the power does not constitute an assumption of public control within the meaning of Article 11.

In the judgment of the Court is this connection great stress is laid upon a passage on page 5 of the Preliminary Counter-Case which runs as follows:

"The concessions granted to M. Rutenberg in September 1921, for the development of electrical energy and water-power in Palestine (Annex to the Greek Case, pp. 21 — 52) were obliged to conform to this Article 11, and it would have been open to any Member of the League to question provisions in those concessions which infringed the international obligations which His Britannic Majesty as Mandatory for Palestine had accepted."

It is perfectly true that any party to an international obligation accepted by the Mandatory and therefore binding on Palestine [50] might have complained if that international obligation had been infringed by any concession. The right so to complain would not have been confined to Members of the League, — any party to a treaty may take steps to prevent its violation or to obtain redress. I have called attention to the provisions of Article n in detail and have shown that the reservation in the first sentence only applies to cases in which provision is made for public ownership or control and that no such provision is made in the Rutenberg concessions. It follows that the right to object to any infringement of international obligations in such concessions would rest not on the reservation in the first sentence of Article n, but on the rights which every Party to a treaty has by international law.

It must be remembered that this passage in the argument cannot have been written with reference to the distinction between mere international engagements and international engagements which have been incorporated with and form part of the Mandate. It was only at a later stage of the case that the controversy on this point arose. It appears to me that language employed under such circumstances cannot be treated as an admission on a point that was not then under consideration. Article 11 must be construed according to its true meaning. The so-called "declaration" is merely part of an argument and would, I doubt not, have been differently expressed if the point now at issue had been then developed.

The second head of Article 11 provides for the introduction by the Administration of Palestine of a Land System. There is nothing said under this head as to existing international obligations for the reason I have indicated. It must not, however, for a moment be supposed that the Administration could proceed with a Land System at variance with international obligations without laying itself open to all the proceedings by which international obligations are enforced. Any such action might lead to diplomatic representation and give ground for any steps which the aggrieved Power might think proper to take. But it could not be brought compulsorily before the Permanent Court under Article 26, because there would be no violation of the provisions of the Mandate.

And so of the third head of powers under Article 11, as to arrangements with the Zionist Organisation. If any such arrangements amounted to an infringement of an international obligation, any Power interested might proceed by remonstrance and by all the steps which are taken to bring pressure to bear upon an offending State. The difference might by consent, general or special, be disposed of by the Permanent Court; it could not be brought compulsorily before the Court under Article 26.

I have already referred to the conditions with regard to the readaptation of concessions which are contained in Protocol XII to the Treaty of Lausanne. Article 6 of that Protocol provides that beneficiaries under concessionary contracts "which have not on the date to this Protocol" (July 24th, 1923) "begun to be put into operation (or as it stands in the French version, *qui n'auraient pas reçu à la date de ce jour un commencement d'application*) cannot avail themselves of the provisions of this Protocol relating to readaptation. It was on this point that the negotiations between M. Mavrommatis and the British Government broke down. The contention of M. Mavrommatis was that these words were satisfied by the deposit of plans and of security, while the British Government maintained that they require that the execution of the works should have been begun. In the judgment of the Court (p. 29) it stated that this question was one as to the interpretation of Article II of the Mandate and that Article 26 applied to it. The question depends entirely on the construction of the Protocol and the view that it falls to be decided under Article 26 must depend on the application of the doctrine of incorporation of the Protocol into Article 11 of the Mandate. It seems to me that the proposal to make any such application supplies a forcible illustration of the fallacy underlying the whole doctrine of incorporation as applied to this case. The Protocol is no part of the Mandate for any purpose; it is referred to in the first sentence of Article 11 merely by way of limiting the power of acquiring public property or control there conferred. With this these conditions have nothing to do. I cannot accept the view that Article 11 of the Mandate is to be read as if it contained *in extenso* the provisions of the Protocol. The difference on this point was one which, if it had existed between the two Governments, might have been submitted to the Permanent Court by consent; it could not have been compulsorily referred under Article 26. [52/7]

M. Politis in his argument for the Greek Government suggested that Great Britain could be made liable on the ground that in making the concessions to M. Rutenberg they were entering

into an arrangement with the Jewish Agency under paragraph 2 of Article 11 and that the arrangement was in violation of the international obligations referred to in the first sentence of that article.

This suggestion is not borne out by the terms of the Mandate. Paragraph 2 of Article 11 relates to arrangements to be made by the Administration with the Jewish Agency mentioned in Article 4 of the Mandate. By that article a Jewish Agency is to be recognised as a public body for the purpose of advising and cooperating with the Administration as to matters affecting the Jewish population in Palestine "and subject always to the control of the Administration to assist and take part in the development of the country." The Zionist Organisation, so long as the Mandatory thinks its organisation and constitution appropriate, is to be recognised as such agency. The arrangement mentioned in paragraph 2 is to be with this public body. The arrangement is to be for the construction or operation of public works, etc. or for the development of the natural resources of the country "in so far as these matters are not directly undertaken by the Administration". The fact that the memorandum and articles of the Rutenberg Concession for electricity, etc. were to be approved by the High Commissioner in agreement with the Jewish Agency (see Clause 2 of the Agreement of September 21st, 1921) cannot be regarded as such an arrangement. */Annex, p. 36/*. Any arrangement under paragraph 2 of Article 11 was to be for construction or operation of public works, etc. or for development of the country's resources, and was to be for an undertaking in which profits might be made by the Jewish Agency, as is shown by the last sentence of Article 11. There is nothing to show that any such arrangement was ever entered into. In the first place, the concession to M. Rutenberg was not an arrangement with the Zionist Agency. And, in the second place, it is quite impossible, for the reasons I have already given, to read into the second paragraph the reservation in the first sentence of Article 11. The judgment quotes a passage from the speech of the British Agent as containing an admission that the reservation in the first sentence is to be read into paragraph 2. What is said in this passage is that the reservation is so natural that it ought to be implied in the second para[53]graph. The stipulations of any treaties would of course apply to anything done under paragraph 2. But they would apply simply as treaties, not in virtue of the reservation which applies and can apply only to the power conferred in the first sentence — they could not be made the subject of proceedings under Article 26 — but could be enforced like all treaties by

representations with the possible exercise of force in the background. The difference between these two things was immaterial for the purpose of the point with which the British Agent was then dealing — it is vital for the purposes of the present controversy. I venture to refer to what I have already said with reference to a quotation from the British Preliminary Counter-case in a similar connection.

The statement in the judgment, that the Parties appear to have agreed in admitting that the reservation in the first sentence of Article 11 applies to the second paragraph appears to me to be a mistaken inference from the passages quoted from the British Counter-case and the British Agent's speech upon which I have commented already.

The whole question of Article 11 may be summed up in a very few words.

Article 11 does not prescribe that the terms of the international obligations referred to shall be observed; what it does prescribe is that public property or control shall not be established in violation of the terms of such obligations. The difference between these two things is vital and as soon as it is appreciated all difficulty as to Article 11 disappears. The mere violation of an international obligation does not constitute a breach of Article 11; it is only if the first power conferred by Article 11 is exercised in violation of the international obligation that there is an infraction of the terms of the Mandate.

For these reasons, in my opinion, the Court has no jurisdiction to deal with this case.

(Signed) Finlay.

[54] Dissenting Opinion by Mr. Moore.

I regret that I am obliged to dissent from the judgment of the Court in the present case.

By the present application (*Requête*), filed on May 13th, 1924, the Greek Government, appearing as a plaintiff, has asked the Court in the exercise of compulsory jurisdiction to require the British Government to appear and, as defendant, answer on the merits a claim for damages preferred on behalf of M. Mavrommatis, a Greek subject, in respect of certain concessions which he obtained and of other which he had wished to obtain from the Turkish authorities in Palestine. All these concessions, actual and proposed, relate to public works, services, or "utilities". Two of them, respectively relating to the construction and operation of electric tramways and the supply of electric light and power at Jerusalem, and to the supply of drinking water to the same city, were definitively concluded with the local Turkish authorities on January 27th, 1914. It is alleged that M. Mavrommatis had begun to carry out these concessions by depositing in bank a sum of money and by submitting detailed plans for the approval of the authorities, when, on the Outbreak of war he availed himself, with the consent of the authorities, of a provision in the concessions for the postponement of construction in case of *force majeure*. A second group relates to the construction and operation of electric tramways and the supply of electric light and power and of drinking water in the city of Jaffa, and the irrigation of its gardens from the waters of El-Hodja. It is alleged that M. Mavrommatis, under agreements signed on January 27th, 1914, deposited a provisional security and made preliminary surveys; that on January 28th, 1916, concessions were signed by the local authorities, but that, under a new Turkish law, such concessions had to be confirmed by Imperial *firman*; that the documents were sent to Constantinople, and were returned to Jerusalem with a request for the change of a single and immaterial descriptive word, and that the issue of the *firman* involved a mere formality, when, in consequence of the outbreak of war between Greece and Turkey, M. Mavrommatis was obliged to leave the Ottoman dominions and the Imperial *firman* was not promulgated. The third concessionary group related to the irrigation of the valley of the Jordan. Here, again, it is alleged that, [55] under a verbal agreement in 1911 with the competent authorities, surveys and reports were made, that plans and the draft of a contract were submitted, and that a provisional security was deposited; but it is further stated that, by the Turkish law, the contract required the consent

of the Imperial Government after approval by the Parliament, and that this approval was not obtained because the outbreak of the war prevented the Parliament from assembling. In conclusion, the application asks the Court to give judgment that the Government of Palestine and consequently also the British Government has since 1921 "wrongfully refused to recognise to their full extent the rights acquired by M. Mavrommatis under the contracts and agreements concluded by him with the Ottoman authorities in regard to the works specified above", and that the British Government should make reparation for the consequent loss, estimated at £234, 339, together with interest at six per cent from July 20th, 1923, the date on which the estimate was made.

In the Case (*Mémoire*) subsequently filed on behalf of the Greek Government, the claim for damages in respect of the Jordan valley transactions is abandoned, as a proof, so the Case states, that where the claimant feels some doubt as to the international value of his rights, he is not disposed to press them. But the Court is then asked to give judgment against the British Government for the sum of £121,045 in respect of the Jerusalem concessions, and of £113,294 in respect of the Jaffa group, together with interest in each case at the rate of six per cent from July 20th, 1923, up to the date on which the judgment is given. The total of these two sums is the same as the total amount claimed before the Jordan group was withdrawn.

By Article 36, paragraph 1, of the Statute, "the jurisdiction of the Court comprises all cases which the Parties refer to it and all matters specially provided for in treaties and conventions in force"; and, where the compulsory jurisdiction of the Court is invoked, Article 40 requires a "written application" (*Requête*) to be addressed to the Registrar, indicating "the subject of the dispute and the contesting Parties". Article 35, paragraph 2, of the Rules of Court [56] provides that the application « shall include, in addition to an indication of the subject of the dispute and the names of the parties concerned, a succinct statement of facts", and "an indication of the claim". The application accordingly specifies as the grounds on which the compulsory jurisdiction of the Court is invoked, (1) Article 9 of Protocol No. XII annexed to the Treaty of Peace of Lausanne of July 24th, 1923", and (2) "Articles 11 and 26 of the conditions of the Mandate for Palestine conferred upon His Britannic Majesty on July 24th, 1922". The application then quotes, from Article 9 of the Lausanne Protocol, the provision that, "in

territories detached from Turkey under the Treaty", "the State which acquires the territory is fully subrogated as regards the rights and obligations of Turkey towards the nationals of the other Contracting Powers who are beneficiaries under concessionary contracts entered into before October 29th, 1914, with the Ottoman Government or any local Ottoman authority", and that "this subrogation will have effect.... as from October 30th, 1918". The application further quotes from the first paragraph of Article 11 of the Palestine Mandate, the following clause:

"The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein."

On June 16th, 1924, on the assembling of the Court in ordinary session, the British Government appeared and put in a plea to the jurisdiction, requesting the Court to dismiss the application on the ground among others that the British Government had not consented to the reference of the matter to the Court, that Article 26 of the Palestine Mandate was inapplicable to the case, that the only inter-national instrument by which the British Government's obligations in regard to the recognition of concessions in Palestine were or would be defined was the Concessions Protocol of Lausanne, that this instrument, which formed part of the peace settlement with Turkey, would not become operative until the Lausanne Treaty was duly ratified, and that the Protocol did not provide for the submission to the Court of disputes which might arise as to the interpretation and application of its provisions. [57]

The jurisdictional objection based on the fact that the Concessions Protocol, the provisions of which the application invoked, had not become, operative, was obviously well-founded. Not only is the Protocol annexed to the Treaty as part of the peace settlement, but, by the very terms of the Protocol, its coming into force depended upon the ratification of the Treaty. In fixing the periods within which concessions are to be dealt with, within which they may be re-adapted or dissolved, within which options concerning them may be exercised, and within which experts may be employed and arbitral proceedings taken, "the coming into force of the Treaty of Peace" is, all through the Protocol, fixed as the starting point. The treaty was at length ratified (August 6th, 1924); but, in the interval of nearly two months that elapsed after the Court met, the application evidently was, as it stood, subject to dismissal on the ground that the enforcement of

unratified treaties, whether by the award of damages for their alleged infraction or otherwise, is beyond the Court's jurisdiction. On this point Article 36 of the Statute, in limiting the compulsory jurisdiction of the Court to matters specially provided for "in treaties and conventions *in force*", is definite and conclusive. The doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, and that treaties may therefore be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo from the past.

With respect to the plea to the jurisdiction filed by the defendant Government, it has been suggested in argument before the Court that such pleas are especially common in Anglo-Saxon countries, where it is the usual practice to neglect no means of defence to an action, and that Anglo-Saxon jurists have long been in the habit of carrying this practice into the domain of international justice. But, even if a majority of the five judges who dissent from the assumption of jurisdiction in the present case were not from countries which do not derive either their substantive or their procedural law from Anglo-Saxon jurisprudence, I should be unable to admit that the suggestion is pertinent to the jurisdictional question raised by the plea to the pending application.

There are certain elementary conceptions common to all systems of jurisprudence, and one of these is the principle that a court of [58] justice is never justified in hearing and adjudging the merits of a cause of which it has not jurisdiction. Nowhere is this more clearly laid down than in the great French repository of jurisprudence by Dalloz, where it is stated that, as jurisdiction is essentially a question of public order, it being a matter of general interest that no authority shall transgress the limits to which its action is confined, an exception to the competence of a tribunal may be taken at any stage of the proceedings, so that, even though the Parties be silent, the tribunal, if it finds that competence is lacking, is bound of its own motion to dismiss the case (*se dessaisir d'office*); and a judgment of the highest Court in France is cited to the effect that that court may itself supply the exception, although the Parties had not raised the point before the courts of first instance and of appeal. (Dalloz, *Répertoire, Compétence* Art. 2, n° 36.)

Article 38, paragraph 4, of the Statute provides that the Court "shall apply", not as having binding force, but as "subsidiary means for the determination of rules of law", "judicial decisions

and the teachings of the most highly qualified publicists of the various nations". Having, in the performance of my duty under the Statute, referred to the principles applied by at least some of the Courts of the Continent, I beg leave to say that the decisions of the Courts of United States as to the fundamental character of the question of jurisdiction are practically identical in terms with those of the highest Court in France, and, no doubt, of the highest Courts in at least some other countries. In a leading case the Supreme Court of the United States has declared:

"It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; but the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception, which requires this Court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.... This question the Court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the Parties to it." (Mansfield v. Swan, 1884, III, U.S. 379) [59]

In the United States not only is jurisdiction divided between the State governments and the national government, but the jurisdiction of the federal courts is for the most part statutory and limited. By reason of these fundamental facts, pleas to the jurisdiction are necessarily frequent; and motions to dismiss a suit for want of jurisdiction are made and entertained not only in respect of the complaint, but whenever in the course of the proceeding it may appear that the essentials of jurisdiction do not exist. Whether the plaintiff would be precluded from bringing another suit would depend upon his ability later to meet the objection to his original complaint. If he could not do this, he would, legally and justly, be precluded from presenting his claim again ; but the dismissal does not in itself necessarily have such an effect. It merely means that the Court will not commit the flagrant illegality of entertaining a suit which, on the plaintiff's own statement, the Court has at the time no legal power to hear and determine.

The requirement of jurisdiction, which is universally recognised in the national sphere, is not less fundamental and peremptory in the international. It will suffice to quote on this elementary point only two publicists.

M. André Weiss, in his work entitled *Droit international privé*, published at Paris in 1913, says:

"The principle of *res judicata* can apply to foreign judgments only so far as they are regular in form and so far as they proceed from judges competent according to the *lex fori*. It is the duty of the tribunal before which they are invoked to examine them from these different points of view, and to decline to give effect to them if the result of the examination is unfavourable." (VI. 10.)¹

M. N. Politis in his volume entitled *La Justice internationale*, published at Paris during the present year, says: [60]

"One conceives of the possibility of a refusal to execute a sentence, only if it is tainted with nullity. It has this character in the case of a defective agreement, and in that of an excess of power on the part of the arbitrator" (p. 91).¹

Ever mindful of the fact that their judgments, if rendered in excess of power, may be treated as null, international tribunals have universally regarded the question of jurisdiction as fundamental. It would be superfluous to cite from the records of international tribunals particular decisions to this effect. An international tribunal with general jurisdiction, compulsory or non-compulsory, over independent States does not as yet exist. The international judicial tribunals so far created have been tribunals of limited powers. Therefore no presumption in favor of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the record.

¹ (L'autorité de la chose jugée ne peut appartenir aux sentences étrangères qu'autant qu'elles sont régulières en la forme et qu'autant qu'elles émanent de juges compétents d'après la *lex fori*. Le tribunal devant lequel on les invoque a le devoir de les examiner à ces divers points de vue, et de les arrêter au passage, si le résultat de l'examen est défavorable.)

¹ [60] (On ne conçoit la possibilité d'un refus d'exécution que si la sentence est entachée de nullité. Elle a ce caractère dans l'hypothèse d'un compromis irrégulier et dans celle d'un excès de pouvoir de la part de l'arbitre.)

This principle is peculiarly applicable to the Permanent Court of International Justice. By Article 36 of the Statute, the limited compulsory jurisdiction, which it was originally proposed to apply to all adhering States, now extends only to States which expressly declare that they accept it; and for this purpose there is attached to the Statute a special protocol, the nature of which is indicated by the title "optional clause" (*disposition facultative*). This "optional clause" has not been signed either by Great Britain or by Greece, so that, for the exercise of compulsory jurisdiction in the present case, grounds must be found elsewhere.

The Greek Government having assigned as grounds for the present compulsory claim Articles 26 and 11 of the Palestine Mandate, I will now consider the terms and effect of these articles.

Article 26 reads as follows:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations." [61]

This clause is found in identical form in all the mandates with one exception. In the Mandate which Great Britain holds for East Africa there is an additional clause, reading as follows: "States Members of the League of Nations may likewise bring any claims on behalf of their nationals for infractions of their rights under this Mandate before the said Court for decision." But, while I mention the existence of this clause, I draw no inference from the fact that a similar clause is not found in the rest of the mandates. My dissent from the judgment on the present case rests upon other grounds.

To the jurisdiction of the Court under Article 26 the concurrence of three conditions is indispensable. These conditions are: First, there must be a "dispute" between the Mandatory and another Member of the League of Nations; secondly, the dispute must relate to "the interpretation or the application of the provisions of the Mandate"; thirdly, it must appear that the dispute "cannot be settled by negotiation". Taking as a whole all that is set forth in the

present application (*Requête*) and the supporting documents, I am of opinion that none of these conditions is fulfilled. I will discuss the first and third together.

The first condition - the existence of a dispute between the Mandatory and another Member of the League - is not met merely by the filing of a suit by the one government against the other in this . Court. There must be a pre-existent difference, certainly in the sense and to the extent that the government which professes to have been aggrieved should have stated its claims and the grounds on which they rest, and that the other government should have had an opportunity to reply, and if it rejects the demands, to give its reasons for so doing. Moreover, if it rejects some of the demands, but admits others, it is entitled to know why the compromise thus offered is not acceptable. These propositions, tested by the ordinary conceptions of fair dealing as between man and man, should seem to be self-evident; nor would it be difficult to cite cases in which governments have abandoned their claims on considering the arguments adduced on the other side. [62]

But it must also appear - and this is the third condition - that the dispute, if any is shown to exist, "cannot be settled by negotiation". This condition did not originate with the mandates. On the contrary, long before mandates were heard of, a similar clause was inserted in scores of general arbitration treaties, as a vital condition of their acceptance and operation. These treaties for the most part still exist. The condition in question does not mean that the difference must be of such a nature that it is not susceptible of settlement by negotiation; nor does it mean that resort to the Court is precluded so long as the alleged wrong-doer may profess a willingness to negotiate. The clause must receive a reasonable interpretation; but an interpretation cannot be reasonable which in effect nullifies the condition.

An international "dispute which cannot be settled by negotiation", cannot, upon the pending application (*requête*) and supporting proof, be said now to exist, either in law or in fact.

When Article 26 of the Mandate provides for the submission to the Permanent Court of International Justice of disputes which "cannot be settled by negotiation", it necessarily means disputes between governments. The article, by its very terms, includes only disputes which may

arise "between the Mandatory and another Member of the League of Nations". This obviously does not include a dispute between the Mandatory and M. Mavrommatis. Had M. Mavrommatis been a Member of the League of Nations, it would have been unnecessary for his government to appear here ; but, under Article 26, it is only of disputes between governments that the Court has jurisdiction, and, when the article speaks of the settlement of such disputes by negotiation, it also necessarily means negotiation between governments.

Moreover, in deciding whether such negotiation has taken place, the Court is not at liberty to interpret the word "negotiation" as a process by which governments are enabled to evade their obligations. Although this superficial view may to some extent popularly prevail, yet, in the international sphere and in the sense of international law, negotiation is the legal and orderly administrative process by which governments, in the exercise of their [63] unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences. Many celebrated judicial decisions might be cited to show the respect paid to this principle by national courts, and it is equally binding on international courts, which exercise their powers only with the consent of nations.

The theory that the Greek Government, at any moment when it might see fit to intervene, might be considered as having been a party to the discussions which M. Mavrommatis and his attorneys carried on directly with the British Colonial Office from 1921 to 1923, cannot be accepted. It is a common thing for aliens to negotiate with a government both concerning contracts or concessions which they desire to obtain and concerning contracts or concessions which the government is alleged to have failed to keep. Often the negotiations are thus directly carried on because it is perfectly understood that the subject matter is not a proper one for diplomatic intervention; and it can never be argued that the government, because it negotiated with the claimant, admitted the right of his government to espouse his cause. On the other hand, in the treatment of the points at issue, and in the making of proposals and counter-proposals, the alien claimant is not hampered by the international obligations which might limit or even preclude the interposition of his government, if he should ask it to make his claim the subject of an international demand.

It is an elementary principle that, when a government officially intervenes on behalf of its citizen, it makes his claim its own, and may settle the claim on such terms as it may conceive to be proper. From this it necessarily results that the government, in taking up the claim, is subject to all the limitations resulting from any obligations which it may have contracted towards the government against which the claim is made; and it cannot pretend to be freed from those limitations by reason of the fact that they were not observed in the negotiations which its citizen previously carried on with the other government. On the other hand, the private citizen, in placing his claim in his government's hands, must be held to have accepted the necessary legal consequences of his action. [64]

These observations are peculiarly applicable to what are called the negotiations in the present case, which embraced all the matters to which reference has been made, including the claims which the applicant's *memoir* *ø* has withdrawn. The exchange of views covered not only existing concessions but also proposals for new ones. In this there is no ground whatever for criticism. In treating directly either with the Colonial Office or with the local authorities in Palestine, M. Mavrommatis was justified in considering his own interests and in making such proposals as he might conceive to be for his advantage. But the situation of his government, especially during and after the negotiations which, in common with the British Government, it carried on with Turkey at Lausanne, was altogether different. For example, the Treaty of Lausanne, like the previous Treaty of Sévres, protects only concessions granted before October 29th, 1914. The judgment of the Court discusses somewhat extensively, but with much reserve, the possible effects of this stipulation. But, in reality, the only question with which the Court is now concerned is whether the stipulation does not imply that the contracting Parties are not to make •diplomatic claims, or bring suits for damages, against one another in respect of concessions granted after that date or not granted at all; and I feel compelled to say that, in my opinion, the stipulation necessarily has that effect.

Prior to the note of the Greek Legation in London to the Foreign Office of May 12th, 1924, announcing the intention of the Greek Government to bring a suit in the Permanent Court of International Justice, I find nothing whatever to indicate the existence of an international dispute. The Court is referred to the letter addressed by the Greek Legation to the Foreign Office

in London on January 26th, 1924 but in that letter there is nothing that goes beyond the domain of "good offices". It is an elementary and familiar principle that the use of good offices does not imply the existence of a right to intervene or, in other words, to make an official demand or raise an international dispute ; and, taking the character, the scope and the contents of the correspondence, the absence of such an implication in the present case is apparent. In so saying, I do not overlook the suggestion that some of the letters bear file numbers; but the indexing [65] of papers does not denote the nature of their contents, much less the existence of a dispute. Even the peaceful correspondence of the Court is indexed.

Particular reference is also made to a letter, dated January 27th, 1923, addressed by M. Melas, secretary of the Greek Legation in London, to Mr. Robartes, a subordinate official of the Foreign Office. In this letter, which is personal in form, M. Melas stated that M. Mavrommatis, after fruitless negotiations with the Colonial Office, for a fair and equitable arrangement as to his rights in Palestine, was compelled to appeal to the Legation "for advice and support". It is not intimated that the Greek Government had taken up the case or that the Legation had been instructed to intervene in the matter. The entire subject of concessions was in fact then under negotiation with Turkey at Lausanne. Moreover, when, on February 2nd, 1923, Mr. Robartes answered, in the same informal way, M. Mélas's letter of January 27th, he intimated that the attempt to treat the question "through diplomatic channels" would only introduce complications and delays, and that the matter could be more expeditiously dealt with by M. Mavrommatis's solicitor and the Colonial Office "than by complicating the negotiations with the introduction of further intermediaries in the shape of yourself (M. Mélas) and this department" (the Foreign Office). This suggestion evidently was accepted.

We next come to the note of the Greek Legation to the Foreign Office of January 26th, 1924, a year later. This note, after referring to the letter from Mr. Robartes of February 2nd, 1923, states that, from a letter addressed to the Legation "by M. Mavrommatis's solicitors", it appeared that after long negotiations "between him and the Colonial Office", no satisfactory solution had been reached. In these circumstances the writer of the note said that he should be grateful if the Foreign Office could see its way to "letting me know the views of His Majesty's Government on the matter, and whether, in their opinion, M. Mavrommatis's claim could not be satisfactorily met". The note then adds that M. Mavrommatis's solicitors had "suggested" that he

would "be prepared to submit - should such a course be agreeable to His Majesty's Government - the examination of the matter to a Court of arbitration; this Court to be composed either of a judge of the [66] High Court of Justice or by two members nominated one by either of the interested Parties, under an umpire who would be appointed either by a common accord of the two Parties, or by His Majesty's Government alone". Here, again, there is clearly nothing that goes beyond the domain of good offices. No intimation is made that the Greek Government was then to be considered as a Party to the case, much less as a Party to an existing international dispute. It was M. Mavrommatis and the British Government who were represented as being the interested Parties; it was by them that the two arbitrators were to be appointed, and it was by agreement between them, or even by the British Government alone, that the umpire was to be appointed.

To this note the Foreign Office replied on April 1st, 1924, saying that the concessions in question appeared to fall "into three categories governed by different conditions", which might be conveniently referred to as "(a) the Jerusalem, (b) the Jaffa, and (c) the Jordan groups". The reply then states that the Jerusalem concessions, since they alone arose out of an agreement entered into with the Ottoman Government before October 29th, 1914, were the only ones which His Majesty's Government were prepared to recognise, "subject to the production of the original signed copies of the documents and to their being found in order"; but that, as these concessions "were never put into operation", they could not be readapted under Article 4 of the Lausanne Protocol, but fell under Article 6 of that instrument, "to which Greece is a party"; that His Majesty's Government were "unable to agree to their being treated otherwise than in the manner laid down in this article"; and that they did not constitute a question suitable for arbitration except in so far as Article 6 provided for the assessment by experts of an indemnity in respect of a concession dissolved by the concessionary's request. The reply observed, however, that it was not then clear whether M. Mavrommatis desired the Jerusalem concessions "to be dissolved under Article 6 or maintained without readaptation, under the terms of Article 1". The reply then concludes with the statement that, as the Jaffa concessions were signed subsequently to October, 1914, and as, in the case of the Jordan concessions, no concessionary contract was actually completed or signed, the terms of the Lausanne Protocol made it clear that [67] M. Mavrommatis had no rights under them, and that they were not capable of submission to arbitration.

The only answer of the Greek Legation is to be found in its note of May 12th, 1924, announcing that the Greek Government had decided to submit the case to the Permanent Court of International Justice. It will be observed that, in this note, the Legation for the first time speaks of acting by order of the Greek Government; but no response whatever is made to the statements and inquiries contained in the communication of the Foreign Office of April 9th, 1924. On the contrary, instead of making a statement, no matter how meagre it may have been, of what the Greek Government conceived to be the respective grounds of M. Mavrommatis's various claims, and particularly of its own right, in view of the terms of the Lausanne Treaty, then to take them up diplomatically and prosecute them, the note merely declares that the Greek Government had "deemed" that the "best means of ascertaining the basis" of his claims was "to have recourse to the high international jurisdiction which has already given us so many proofs of wisdom and impartiality" - meaning the Permanent Court of International Justice. Thus, by the very terms of the note, the jurisdiction of the Court was to be invoked, not in order to obtain the adjudication of a dispute between the two governments which they had been un-able to settle by negotiation, but to ascertain without negotiation whether there was any basis for a dispute.

Such being the state of the case upon the petition and proofs presented by the applicant, the claim of jurisdiction appears to proceed upon an interpretation of Article 26 of the Mandate as if it read substantially as follows:

"The Mandatory agrees that, if another Member of the League of Nations should think that there may be grounds on which it might be found to be justified in presenting, on behalf of one of its citizens, a claim against the Mandatory, such Member may forth-with submit the claim to the Permanent Court of International Justice, which shall then proceed to adjudicate the claim and to avoid such damages, if any, as it may find to be due."

The first and third jurisdictional conditions under Article 26 having thus been held to have been satisfied, it yet remains to meet the third condition, namely, that the dispute must relate to "the [68] interpretation or the application of the provisions of the Mandate"; and for this purpose there is invoked the provision, in the first paragraph of Article 11 of the Mandate, that the Administration shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, "and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of

any ... of the public works, services and utilities established or to be established therein". But, in applying this clause to the present case, the Court gives not only to the clause itself but to the word "jurisdiction" an interpretation from which, with much regret, I am compelled to dissent.

I will not enlarge upon the question whether the phrase "subject to any international obligations accepted by the Mandatory" may include all the obligations to which the British Government may be subject either under international law or under international agreements; but I am clearly of the opinion that the clause has no such sweeping effect. Who are the Mandatory Powers ? As described in Article 22 of the Covenant they are "advanced nations", which, by reason of that character, are peculiarly fitted to undertake the "tutelage" of peoples "not yet able to stand by themselves". They are indeed the constituents of the community of nations in which the recognition by its members of the obligations of international law is necessarily and tacitly assumed. It is therefore not to be supposed that the Mandate was intended to announce in 1923 that the Mandatories had "accepted" the obligations of international law. In my opinion the word "accepted" applies only to obligations specially assumed and, in determining what international obligations are included, we must, in conformity with an elementary rule of interpretation, examine the context.

By Article 11 the power the exercise of which is to be "subject to any international obligations accepted by the Mandatory" is the "full power to provide for public ownership or control" of public works, services and utilities. The plaintiff government nowhere alleges an attempt on the part of the Mandatory to exercise that power, unless such an allegation is to be inferred from references to a concession granted to a Mr. Rutenberg, which is said to infringe some of the rights claimed by M. Mavrommatis. But the judgment of the Court, as I understand it, directly holds that the granting of the concession to M. Rutenberg was an exercise of the power to provide for "public ownership or control" of public utilities. In this interpretation I am wholly unable to concur. The precise method of providing for the private control of public utilities as distinguished from public control is the granting of concessions to individuals or companies. The declaration in paragraph 28 of the Rutenberg concession that the company which was to be organized should be recognized "as a public utility body under government control", far from making the concession itself an act of public control, was merely a reservation of the right of public control, whenever the government should see fit to exercise that right. The

recognition of the distinction between public control and private control, as here stated, is by no means confined to English-speaking countries. The contest between the two systems may be said to run through the world.

The precise meaning of the phrase "public ownership or control" in Article 11 is indeed clearly shown by the second paragraph of the article, which authorizes the Administration to arrange with the Jewish agency, mentioned in Article 4 of the Mandate, to construct and operate public works, services and utilities, "in so far as these matters are not directly undertaken by the Administration". This is undoubtedly what the words mean in the English text; and, expressing my individual impression, derived from a studious comparison of the two texts, I strongly incline to believe that the French text, in the present instance, is a so-called "literal" translation of the English text, and was intended to mean the same thing. A "literal" translation, however, is often only a verbal imitation, which, if taken alone, may be so interpreted as to pervert or even destroy the meaning of the other text. But I take the two texts as they stand, discarding neither in favour of the other; and, without discussing the question whether a mandate, which is in a sense a legislative act of the Council, is on the same legal footing as a treaty, I accept for the present case the rules laid down by authorities on international law for the interpretation of treaties.

Bonfils, in discussing the interpretation of treaties, lays down the [70] rule that each clause should be interpreted in the sense which best reconciles the rights and duties of the contracting Parties (*d'interpréter chaque clause dans le sens qui concilie le mieux les droits et les devoirs antérieurs des deux contractants*). (Bonfils, *Manuel de Droit int. public*, 7th edition, by Fauchille, Paris, 1914, p. 571). Rivier likewise declares that it is necessary before all to ascertain the common intention of the Parties - "id quod actum est". (*Il faut avant tout constater la commune intention des Parties*, etc.) (Rivier, *Principes du Droit des Gens*, Paris, 1896, vol. 2, p. 122). But Rivier also points out another rule, to the effect that, if there is a difference as to the sense which usage gives to the text, preference is given to that of the country which is bound. (*S'il y a désaccord quant à l'usage, on s'en tiendra plutôt à celui du pays qui s'oblige.*) As an example of the application of this rule, Rivier cites the case of Article 14 of the Austro-Italian Treaty of peace of October 3rd, 1866, which mentioned the inhabitants (*habitants*) of the ceded territory. This word had a different official technical sense in Austria and in Italy. In Austria an

inhabitant (*habitant*) meant a person having a legal domicile; in Italy, a simple resident. As Austria was ceding a territory which belonged to her when the treaty was made, the word was taken in the Austrian sense (*Id.*, pp. 123—125). This example is directly applicable to the situation of Great Britain in Palestine.

Among those who concur in the judgment of the Court, an impression seems to prevail that the rules here laid down have been observed; but I am unable to share that impression. On the contrary, in the emergency, there has suddenly been discovered in the English text an unnatural and previously unheard of elasticity, which had made it unnecessary to try the suggested possibilities of the French text.

I will deal very briefly with the passage quoted in the judgment of the Court from the preliminary Counter-case filed by the Agent of the British Government and the passage quoted from his oral argument ; and I will not discuss the latter passage separately, as it adds nothing substantial to the former. In the passage quoted from the preliminary Counter-case it is stated that the Mandatory, when providing for public ownership or control, is subject to any international obligations which he has accepted. This in effect merely repeats the language of Article 11, as to the existence of which there can be no dispute. But, as an explanation of what he [71] means, the Agent of the British Government states that the League of Nations is pledged "to the maintenance of various beneficent principles, such as freedom of transit and communication, equality of commercial opportunity for all Members of the League, suppression of the arms traffic, and so forth", and that "this is the type of international obligation which the Mandatory has accepted and to which any concessions granted under Article 11 of the Mandate must conform". The judgment of the Court then textually quotes from the preliminary Counter-case a passage immediately following, in which the Agent observed that the Rutenberg concessions "were obliged to conform to this Article 11", and that it would have been open to any Member of the League to question any provisions which infringed the international obligations which the Mandatory had accepted. Here the quotation ends. But immediately after the quoted passage, the Agent goes on to declare that "there is nothing in this article which affects the Mavrommatis case"; and he further states that the questions raised by the application relate only to the extent to which the concessions granted to M. Mavrommatis are valid and binding on the Mandatory, and that this does not fall within the Mandate. This contention is consistent with the position taken in the plea to the jurisdiction, that the subject of "the

recognition of concessions in Palestine" is exclusively governed by the Lausanne Protocol and that, as this instrument does not provide for the submission to the Court of disputes relating to its interpretation and application, the Court cannot take cognizance of such disputes.

It is admitted that the phrase "subject to any international obligations accepted by the Mandatory", no matter what its ultimate potentialities may be, actually refers to the Concessions Protocol of Lausanne, which the applicant has in fact invoked. The original draft of the Mandate mentioned the concessions stipulations of the Treaty of Sévres and nothing else ; but, after the Treaty of Sévres was abandoned, the phrase was put in the form in which it now stands. Although, by reason of certain political incidents, the Mandate did not actually come into force until September 29th, 1923, its terms were definitively settled and approved by the Council on July 24th, 1922 (Official Journal, 1922, p. 825) ; and, as the Lausanne Treaty was signed on July 24th, 1923, a year later, the Mandate naturally did not mention it. Both at Sévres and at Lausanne, [72] the subject of concessions was, from first to last, specially and separately dealt with. The Powers, including Great Britain and Greece, in their negotiations with Turkey, adopted this plan. Concessions often involve considerations of public and political interest. Articles 73 and 77 of the Lausanne Treaty, dealing generally with contracts between governments and individuals and with contracts between individuals, expressly declare that their provisions do not apply to concessions.

The Parties to the Lausanne Protocol No. XII, dealing specially with the subject of concessions, are the British Empire, France, Italy, Greece and Turkey. The Protocol is divided into two sections. The first section, embracing Articles 1 to 8, relates to concessions in territory remaining to Turkey; the second, embracing Articles 9 to 13, related to concessions in territory detached from Turkey. The provisions of the first section are, however, with certain exceptions, made applicable by Article 10 to concessions in detached territory. Among the articles thus made applicable to detached territory are Articles 4,5 and 6, which contain provisions relating to the readaptation of concessions to "the new economic conditions", the settlement of accounts, and the dissolution, on the request of the concessionnaire, of concessions for which the right of readaptation cannot be claimed. Periods ranging from six months to a year are allowed for such transactions; and, if the Parties cannot agree upon the terms of readaptation, or upon the

indemnity, if any, to be paid in case of dissolution, or upon the settlement of accounts, provision is made for the appointment of two experts and, if they should disagree, for the selection of a third to decide. The Protocol, having at length come into force, now constitutes a legal obligation between the Parties to the present suit; and, if its terms are less favourable to individuals holding or claiming concessions than might have been desired, this Court has no power to correct its defects.

There can be no doubt that the Protocol was understood by the contracting Parties to cover the entire subject of concessions. This is shown by its elaboration of principles and the provision of machinery for their application. If anything is lacking, only the voluntary action of the contracting Parties can now supply it. The judgment of the Court admits as much, when it states that the Court [73] has no compulsory power to interpret and apply the Protocol as such, since the Protocol itself confers no such power. The judgment however, further states that the Court is competent to apply the Protocol in the measure which Article 11 of the Mandate requires. This is indeed self-evident ; but, when we search for particulars, we are brought back to the laboured conjecture that the granting of the Rutenberg concession was or may have been an exercise of the power "to provide for public ownership or control", and to the supposition that the question whether the Jerusalem concessions are entitled to readaptation under the Protocol falls under Article 11. The former I have already discussed. The latter is, in my opinion, solely a question under the Protocol as such, and therefore not within the compulsory power of the Court. Article 11 could apply to concessions covered by the Lausanne Protocol only in the case the Mandatory should, in the exercise of the power to provide for public ownership or control, disregard an existing concession which the Protocol protects.

But, no matter what the jurisdictional possibilities in respect of the Protocol might be, I think that, as between the contracting Parties, governments ruling over territories detached from Turkey are clearly entitled, now that the Protocol has come into force, to full opportunity to consider, discuss and apply its provisions as a whole, and that its regular and orderly application should not be frustrated or interrupted by a suit based on a previous expression of opinion on a single point, concerning which there have been no negotiations between the governments. This objection to the pending application has not passed unperceived; but, in the judgment of the

Court, it is met with a conception of jurisdiction which has, I believe, materially contributed to the difference of opinion which has taken place. The judgment states that, while the "special jurisdiction" which the Protocol creates, for the assessment of indemnities and other matters, excludes as regards those matters the "general jurisdiction given to the Court in disputes concerning the interpretation and application of the Mandate" ; yet, "on the other hand, the provisions regarding administrative negotiations and time limits in no way exclude the jurisdiction of the Court", since "their effect is merely to suspend [74] the exercise of this jurisdiction until negotiations have proved fruitless and the times have expired". But, under this theory of suspended jurisdiction, what becomes of the provision, in Article 26 of the Mandate, by which the jurisdiction of the Court is in every event limited to "disputes" which "cannot be settled by negotiation" ? How can this jurisdictional condition be said to be fulfilled, when periods of time, yet to run, are fixed for "administrative negotiations" ? Who can say how such negotiations would result ? On what principle can it be assumed that they will result in a disagreement ? It is evident that, if the Court may assert jurisdiction of a conjectural future dispute in an abstract sense, and hold jurisdiction of the matter pending the happening of an event which will show whether a dispute, in an actual, concrete sense, will ever exist, the Court might become a mere makeweight in negotiations. Nor is this the only reason for rejecting the theory of suspended jurisdiction. It is a well-settled principle of public law that it is inadmissible for courts to assert jurisdiction where, even though there should exist some present ground for complaint, it appears that, for the time being, the power to deal with the subject matter rests with governments, in the exercise of their political and administrative functions. Not only is this principle recognized in the Statute and in the Mandate, but many judicial decisions, national and international, of the highest authority might readily be cited to show the respect which has been paid to it as a principle essential to the regular legal administration of public authority and the maintenance of the public order.

The plea presented by the defendant Government in the present case is what is commonly and technically known as a "plea to the jurisdiction". The word "jurisdiction" signifies "the authority by which judicial officers take cognizance of and decide cases", "the power to hear and determine a cause". (Bouvier, Law Dictionary, "Jurisdiction".) This definition implies that a court cannot assert jurisdiction of a case which it has not at the same time the power to hear and

decide. The plea to the "jurisdiction " was in effect a motion to dismiss the application because the allegations which the applicant had made showed that the court could not law-fully proceed to try the merits of the claim and render judgment [75] upon it. The plea did not raise any question as to the truth of the allegations; for the purposes of the case, the plea admitted them to be true. Nor did the plea mean that the Court lacked the power to consider the allegations. On the contrary, it meant that the Court not only had the power to consider them, but was legally bound to do so ; and that, taking them as a whole, and accepting them just as they stood, the Court could not legally proceed to hear and determine the merits of the cause, and therefore could not legally assert jurisdiction of it for that purpose.

In disposing of this plea, I think that the Court would, on the facts before it, have adopted an obviously appropriate and legal course, if it had dismissed the present application.

The Hague, August 30th, 1924.

(Signed) John Bassett Moore.

[76] Dissenting Opinion by M. De Bustamante.

I, THE UNDERSIGNED, cannot, for reasons of which the principal are set out below, concur in the judgment rendered by the Court with respect to its jurisdiction in the Mavrommatis Case.

In order to arrive at a decision regarding the preliminary plea to the jurisdiction made by His Britannic Majesty's Government in reply to the Application and Case of the Government of the Greek Republic concerning the Mavrommatis Palestine Concessions, the nature of the question, submitted to the Court by the latter Government must, above all, be taken into consideration.

The Greek Government in its Case dated May 22nd, 1924, requests the Court to give judgment as follows:

(a) With respect to the Jerusalem Concessions for the construction and working of a system of electric tramways and supply of electric light and power and of drinking water in that city according to the definitive contracts signed with the Ottoman authorities on January 27th, 1914:

(1) That these concessions having been begun to be put into operation, the British Government, in its capacity of Mandatory for Palestine, is bound to maintain them and to agree to their readaptation to the new economic conditions of the country or to redeem them by paying the claimant reasonable compensation;

(2) That having in fact already made its choice by rendering impossible, directly or indirectly, the carrying out of the works for which the claimant holds a concession, it must pay him compensation;

(3) That taking into account all the various elements of the loss occasioned to the claimant, he shall receive fair and reasonable compensation by means of the payment to

him of the sum of £121,045 together with interest at 6 % from July 20th, 1923, until the date on which judgment is given. [77]

(b) With respect to the Jaffa concessions:

(1) That the fact that these were granted after October 29th, 1914, does not justify the British Government in refusing to recognise them;

(2) That the fact that they were not confirmed by Imperial *Irade*, which is a simple formality not to be withheld at discretion, does not deprive them of their international value;

(3) That though the British Government in its capacity as Mandatory for Palestine is at liberty not to maintain them, it is nevertheless under an international obligation to compensate their holder for the loss it has inflicted upon him by deciding - as it has done - not to allow him to proceed with them;

(4) That taking into account all the elements of the loss thus sustained by the claimant, he shall receive fair and reasonable compensation by means of the payment to him of the sum of £113,294 together with interest at 6% from July 20th, 1923, until the date on which judgment is given.

On page 8 of the Greek Government's Case it is stated that, from the end of October 1922, M. Mavrommatis' negotiations with the British Government entered upon a new phase owing to the very intransigent attitude adopted by the Colonial Office.

It is very important to note that the Greek Case recognizes the British Government's right not to recognize or put in execution the concessions in question, and that it confines itself to a claim for an indemnity on the ground of that Government's refusal to recognize them and to readapt them to the new economic conditions of the country.

It should also be noted that the Greek Government asks for nothing for itself and that in the Case reference is always made to an indemnity to be paid, not to the Greek Government, but to the beneficiary under the concessions.

The jurisdiction of the Court to entertain this Case has been based on the Mandate for Palestine conferred on the British Government by the Council of the League of Nations on July 24th, 1922, but which did not come into force until September 29th, 1923. [78]

The Mandate is not mentioned in the Case of the Greek Government, which only considers the provisions of Protocol XII of the Treaty of Peace with Turkey signed at Lausanne on July 24th, 1923. In the application instituting proceedings however, the Greek Government expressly mentions Articles 26 and 11 of the Mandate for Palestine which run as follows:

Article 26.

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

Article 11.

The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein. It shall introduce a land system appropriate to the needs of the country, having regard, among other things, to the desirability of promoting the close settlement and intensive cultivation of the land.

The Administration may arrange with the Jewish agency mentioned in Article 4 to construct or operate, upon fair and equitable terms, any public works, services and utilities, and to develop any of the natural resources of the country, in so far as these matters are not directly undertaken by the Administration. Any such arrangements shall provide that no profits distributed by such agency, directly or indirectly, shall exceed a reasonable rate of interest on the capital, and any further profits shall be utilised by it for the benefit of the country in a manner approved by the Administration. [79]

By a careful perusal of Article 26 of the Mandate it will be noted that the Court's jurisdiction is subordinate to several conditions, of three of which special mention must be made. The dispute must relate to the interpretation or application of the terms of the Mandate. The dispute must not be a dispute which has already arisen, but a dispute which *may arise*. Further, this dispute must be between the *Mandatory* and another *Member of the League of Nations*.

It will readily be seen that Article 11 of the Mandate imposes upon the Mandatory no obligation to pay compensation and that it contains no express or implicit reference to concessions granted by Turkey. This is perfectly reasonable. Turkey is not a Member of the League of Nations and the fate of concessions granted before the military occupation of Palestine by the British Army during the Great War could not be settled except in agreement with Turkey. This is the reason why the concessions are not mentioned in the Mandate and why, on the other hand, they have been made the subject of special provisions in the discarded Treaty of Sévres of August 10th, 1920, and in the Treaty of Lausanne, the ratifications of which were deposited on August 6th, 1924. I will not dwell on the untenability of the argument that the question relates to the interpretation or application of Article 11 of the Palestine Mandate, even with respect to the nature of the international obligations accepted by the Mandatory ; and this, not only because the point has been completely established by certain of my colleagues but also because the two other objections, which I will now proceed to consider, render such insistence somewhat superfluous.

I must however observe that if the Application and Case of the Greek Government are to be read as meaning that the dispute relates to preliminary points in connection with the application of certain provisions of Protocol XII, it is clear that the question is not one of interpreting or applying the Mandate but of interpreting the Protocol. Now the interpretation of

the Protocol is not within the jurisdiction of the Court, for there is no clause of the Protocol or the Treaty of Lausanne establishing that jurisdiction.

It will have been observed that the Mavrommatis Concessions were obtained from the Ottoman authorities and it is stated in the Greek Government's Case that M. Mavrommatis approached the representatives of the British Government in Palestine and London [80] as early as April 16th, 1921 ; but from the month of October, 1922, he is stated to have been faced by an intransigent attitude on the part of the Colonial Office. Moreover, as the Mandate did not come into force until September 29th, 1923, it is clear that the facts on which the Case is based date from before the Mandate and from before the time when the British Government acquired the legal position of Mandatory, which it did only as from September 29th, 1923. In other words, retrospective effect must be attributed to the Mandate in order to maintain that the terms of Article 26 are applicable.

Before the coming into force of the Mandate, Great Britain had no other title to the exercise of public power in Palestine than that afforded by its military occupation. Whatever responsibility might devolve upon it in consequence of its acts whilst in military occupation, a dispute concerning such responsibility cannot be entertained by the Court under Article 26 of the Mandate. That article contemplates the future, not the past. The Mandatory agrees that if any dispute whatever *should arise* (not a dispute which has arisen) between the Mandatory and another Member of the League of Nations, such dispute shall be submitted to the Permanent Court. If language has any value in legislation and in treaties, it is impossible to interpret a verb used in the future as referring to acts which have already taken place. Moreover the League of Nations has not given any retrospective effect to the position of the Mandatory. In conformity with Article 22 of the Covenant, the Mandatory must send the Council an annual report concerning the territories which it administers, and a permanent Commission has been appointed to receive and examine these annual reports and to give the Council its opinion on any question regarding the execution of the Mandate. This Commission completed its task when, in connection with its Fourth Session held only a few weeks ago, it submitted to the Council on July 16th, a report of which the part devoted to Palestine contained the following words: "The Commission, although it was not called upon to examine any report concerning the administration of Palestine because of the recent coming into force of the Mandate", etc.

If the League of Nations, which fixed the terms of the Mandate for Palestine, and of which Greece is a Member, appears to recognize that the British Government was only in the position of Mandatory as from the coming into force of the Mandate, and if the facts alleged [81] in the Greek Government's Case occurred before that date, the logical conclusion is that the dispute is not one between the *Mandatory* and a Member of the League of Nations but rather between the British Government, being in military occupation of Palestine, and M. Mavrommatis, represented before the Court by the Greek Government.

It has been alleged that the Rutenberg Concessions fall within the scope of Article 11 of the Mandate and that they afford justification for the application of Greece because they render the carrying out of the Mavrommatis Concessions impossible. It appears that of the two Jerusalem concessions granted to M. Mavrommatis, one only, that for electric power is affected by those of Mr. Rutenberg; the latter however were granted to Mr. Rutenberg on the 12th and 21st September, 1921. This being so, and since the Mandate did not come into force until September 29th, 1923, two years after these concessions, the fact that the Mandate has no retrospective application is also opposed to the argument in question and to this method of establishing the Court's jurisdiction.

There is a further circumstance which proves that the Court has no jurisdiction. Great Britain is not the sovereign of Palestine but simply the Mandatory of the League of Nations and she has accepted the Permanent Court's jurisdiction for any dispute arising between her, as Mandatory, and any Member of the League from which she holds the Mandate. As the latter could not appear as a party to a dispute concerning the application or interpretation of the Mandate, having regard to the restrictive terms of Article 34 of the Court's Statute, it is the Member of the League who have been authorized, in their capacity as Members, to bring before the Court questions regarding the interpretation or application of the Mandate.

Whenever Great Britain as Mandatory performs in Palestine under the Mandate acts of a general nature affecting the public interest, the Members of the League - from which she holds the Mandate - are entitled, provided that all other conditions are fulfilled, to have recourse to the Permanent Court. On the other hand, when Great Britain takes action affecting private interests and in respect of individuals and private companies in her capacity as the Administration of Palestine, there is no question of juridical relations between the Mandatory and the Members of

the League from which she holds the Mandate, but of legal relations [82] between third Parties who have nothing to do with the Mandate itself from the standpoint of public law.

The mere fact that a Member of the League of Nations represents third Parties does not alter the nature of the problem, because in so doing the State is not acting as a Member of the League which issues the Mandate, but as a third Party, its intervention as such being consequent upon the acts of the Mandatory with respect to the actual third Party. Acts performed in such circumstances are not subject to the jurisdiction of the Permanent Court under Article 26 of the Mandate.

If the claims of third Parties, put forward on their behalf by a Member of the League of Nations, were subject to the jurisdiction of the Court under the Mandate, an express statement to that effect would have been necessary, since it is a thing entirely different from that which is now clearly expressed in Article 26.

Four days before the signing of the Palestine Mandate a provision of this sort was inserted in Article 13 of the Mandate for East Africa signed at London on July 20th, 1922. This Mandate contains an Article 13 which runs as follows:

Article 13.

The Mandatory agrees that if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations.

After this passage, which is reproduced word for word in the Palestine Mandate, is to be found in this same Article 13 of the East African Mandate, a second paragraph which runs as follows:

States Members of the League of Nations may *likewise* bring any claims on behalf of their nationals for infractions of their rights under this Mandate before the said Court for decision.

After reading this Article 13 of the Mandate for East Africa, it will at once be observed that claims on behalf of the nationals of States Members of the League of Nations, for infractions of their [83] rights under that Mandate, are not included among the disputes mentioned in the first paragraph of the article, the only one which has been reproduced in the Mandate for Palestine. It will also be observed that the Mandate for Palestine signed four days afterwards, in which this second paragraph does not appear, must exclude from the jurisdiction of the Permanent Court the claims of M. Mavrommatis which are supposed to be based on an infraction of his rights under the Mandate.

It cannot be said that this second paragraph of Article 13 of the East African Mandate contemplates disputes between private interests concerning neither the interpretation nor the application of the Mandate. Quite the contrary; it expressly lays down that there must have been an infraction of rights under the Mandate.

The Treaty of Lausanne and Protocol XII annexed thereto are of the greatest importance in this discussion. They are an instrument signed by the interested Parties which fixes their interpretation of Article 26 of the Mandate and also of Article 11. The Parties desired to effect a separate settlement of the whole question of Ottoman concessions, and they have done so in this Protocol of Lausanne without giving the Permanent Court jurisdiction over the matter. This is yet another method of fixing the interpretation of Article 26 which does not give the Court jurisdiction in the Mavrommatis case.

The sole object of Protocol XII is to regulate the treatment of Ottoman concessions, and it contemplates all the hypotheses under which those of M. Mavrommatis may be included. As regards the indemnities which the Court is asked to award, Article 5 of the Protocol lays down a procedure by experts and makes no provision for the jurisdiction of the Permanent Court. Since the contracting Powers have specifically referred to all Ottoman concessions previous to its coming into force, the Protocol undoubtedly has a retrospective effect. Moreover, as it constitutes an agreement between the litigant Parties, which has come into force during the course of the proceedings, with regard to the question in dispute, it suffices to terminate them.

Any one of these reasons would be enough to show that there was no jurisdiction, and taken together they have an irresistible effect. The present case relates neither to the interpretation nor the application of the Palestine Mandate. The facts leading up to the present

suit took place long before the existence and entry into force of the Mandate, which has no retrospective effect. There is [84] no dispute between the Mandatory and a Member of the League of Nations which issued the Mandate, but rather between the Power in military occupation of Palestine and a third Party which is a private person who claims an indemnity. The whole question of the Ottoman concessions, and also therefore the Mavrommatis concessions, has been dealt with by the Parties in the Protocol, which is now in force and which does not give the Court jurisdiction over the matter. The Court therefore has no jurisdiction and cannot now entertain the proceedings on the merits of the dispute.

The Hague, August 30th, 1924.

(Signed) Antonio S. De Bustamante.

[85] Dissenting Opinion by M. Oda.

[*Translation.*]

Since the compulsory jurisdiction of the Court is not the rule and since Article 26 of the Palestine Mandate constitutes an exceptional clause creating such jurisdiction, that article cannot be interpreted extensively.

According to Article 26, in order that a dispute may be submitted to the Court, the following conditions must be fulfilled: (1) it must be a dispute between a Member of the League of Nations and the Mandatory; (2) it must be incapable of settlement by negotiation; and (3) it must relate to the interpretation or the application of the terms of the Mandate.

Of these three conditions, the two first are matters of form and the last of substance.

On the facts as set out by the Parties, it is very difficult definitely to state that the formal conditions have been fulfilled. The dispute, in the first place, was only between the Colonial Office and a private person, and after the intervention of the Greek Government to protect this person, there was only a single exchange of views between the Foreign Office and the Greek Legation in London. Even assuming the formal conditions to be fulfilled, the condition of substance is entirely lacking. The dispute, which relates to the validity of certain concessions and to the vindication of certain rights which, in the contention of the concessionnaire, have been prejudiced, has nothing whatever to do with either the interpretation or the application of the terms of the Mandate.

The history of the preparation of Article 11 of the Mandate shows that for unavoidable reasons the present reservation was substituted for that contained in the original draft which ran "subject to Article 311 of the Treaty of Peace with Turkey"; it is therefore perfectly reasonable to regard the present version as possessing the same scope - neither more nor less - as the original one. Assuming this to be correct, there is no doubt that the international obligations accepted by Great Britain, referred to in the present version, are those arising out of the special provisions of a convention - such as the Protocol of Lausanne in the present case - and that they are entirely unconnected with the legal relationship created by the Mandate. [86]

The position as Mandatory has no bearing on the conclusions to be drawn from the Protocol, since the relations created by the Mandate, which exist as between the League of

Nations and Great Britain only, are not *if so facto* applicable as between the Powers signatory to the Protocol. The word "Mandatory" in the reservation made in Article n is merely used for the sake of convenience in order to keep to the terminology used in other articles of the Mandate. The legal relationship resulting from the Mandate, which only exists as between Members of the League of Nations, must be distinguished from the obligations arising out of the principle of State succession, which may be binding on all States throughout the world, including Members of the League of Nations, quite apart from the obligations arising under the Mandate. It must also be remembered that the Mandatory has to assume certain special and burdensome obligations over and above those arising out of his position as successor State, and that consequently these obligations of the Mandatory do not in any respect extend beyond the limits fixed by the Mandate.

Considered in this light the Protocol of Lausanne is neither a special statute nor a set of rules to be regarded as the complement of the Mandate. Its provisions are entirely distinct and cannot in any sense form part of the terms of the Mandate. It follows therefore that the dispute regarding the concessions granted under the Ottoman Empire has nothing to do either with the interpretation or the application of the terms of the Mandate and is not by its nature within the Court's jurisdiction.

Since the Mandate establishes a special legal relationship, it is natural that the League of Nations, which issued the Mandate, should have rights of supervision as regards the Mandatory. Under the Mandate, in addition to the direct supervision of the Council of the League of Nations (Articles 24 and 25) provision is made for indirect supervision by the Court; but the latter may only be exercised at the request of a Member of the League of Nations (Article 26). It is therefore to be supposed that an application by such a Member must be made exclusively with a view to the protection of general interests and that it is not admissible for a State simply to substitute itself for a private person in order to assert his private claims. That this is the case is clearly shown by a reference to Article 13 of the Mandate for East Africa, in which Members of the League of Nations are specially authorized to bring [87] claims on behalf of their nationals. It is impossible to ascertain why this special provision was only inserted in the East African Mandate ; but, as it appears that in all the drafts of "B" Mandates the same provision was inserted, but deleted in the final documents, except in the case of the Mandate for East Africa, it is at all events clear that it was intended to establish a difference between "B" and "A" Mandates

to which latter category the Palestine Mandate belongs. The logical conclusion is that an action in support of private interests is excluded under Article 26 of the Mandate now in question, and that, precisely from this standpoint, the Court has no jurisdiction in the case of the Mavrommatis concessions.

(Signed) Y. Oda.

[88] Dissenting Opinion by M. Pessôa.

[*Translation.*]

I have expressed my vote to the effect that the Court has no jurisdiction in this suit.

Article 26 of the Mandate for Palestine runs as follows:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

The Greek Government maintains that the Mavrommatis claim is a dispute relating to the interpretation and the application of Article 11 of the Mandate, and therefore falls within the jurisdiction of the Court.

But, in order that it shall be legitimate for the Court to deal with a question, it is not sufficient that it be one relating to the actual interpretation and the application of the Mandate; it is further necessary, as follows from Article 26, that the dispute shall have arisen between two States and that it cannot be settled by diplomatic negotiations. Such diplomatic settlement may be shown to be impossible either by the nature of the dispute itself or by the failure of the negotiations.

These two conditions are also substantial. The first is closely related to the nature of the Court, to its particular duties and to its international mission. The Parties which may appear before the Court being States, it cannot be called upon to protect the rights of *individuals*, but only those of *States*. The other condition gives expression to the respect due to the sovereignty of nations. As being sovereign they have the fundamental right to settle their disputes between themselves, and the interposition of an outside authority is only understandable when the former solution cannot be arrived at.

Neither of these two conditions is fulfilled by the suit submitted to the Court.

Mavrommatis obtained from the Ottoman Government, between [89] 1911 and 1914, certain concessions, and he maintains that, in 1921, the British Government as Mandatory in Palestine violated these. Mavrommatis protested, and from that moment onwards he discussed the question of his rights *personally and directly* with the British Government.

It was only on December 22nd, 1922, that the Greek Government intervened. But for what purpose did it intervene ? To espouse the Mavrommatis claim and to negotiate for its settlement ? By no means ; it merely intervened for the purpose of forwarding to the Foreign Office a letter of Mavrommatis in which the latter, after giving the Greek Government a detailed statement of his claim, declared that he was inclined to appeal to the League of Nations.

Here is the proof of this:

"I am therefore obliged to appeal to the Tribunal of the League of Nations provided for by Article 311 and 312 of the Treaty together with the first paragraph of Article 287, and to pray to take the necessary steps to bring my case before the Competent Authority, so that, as soon as possible, consideration may be given to my request".

(Letter from the Greek Agent to the Registrar of the Court, dated May 26th.)

The Foreign Office replied that as the matter was in the hands of the Colonial Office, it would be much simpler and more speedy to deal direct with that Office:

"I understand that the Colonial Office are still in correspondence with this gentleman's solicitors in this matter.

"In the circumstances it appears to me quite unnecessary for this Department to intervene, as matters can be settled much more expeditiously and satisfactorily by means of direct discussion between the Colonial Office and M. Mavrommatis' solicitors, who are parties principally concerned and who possess first-hand knowledge of the points at issue." (Ib., page 8.)

And that is all.

Up to this point then there had been no negotiations between the two States.

After this date two further steps were taken by the Greek Government.

The first was the letter of January 27th, 1923. But in this letter [90] Greece does not yet put forward its claim; nor yet does it discuss the reasons alleged against this claims on behalf of Great Britain; it merely asks the British Government what is its opinion with regard to the Mavrommatis claims:

"After these explanations I hope you will be able to kindly see your way to inform me *what is the view of His Majesty's Government on the matter*, and venture to hope that a *settlement* will be possible in the near future." (Ib., page 8.)

The other step is constituted by the letter of January 26th, 1924. This time it might be expected that the Greek Government was going to state that it undertook the defence of its national, to set out his titles and to prove his rights ; to discuss the reasons put forward by the Colonial Office. Not so ; Greece still persists in asking the opinion of the British Government and informs it that Mavrommatis' solicitors (Mavrommatis' solicitors and not the Greek Government) suggest recourse to a Court of Arbitration:

"In these circumstances, *I should be grateful to you if you could see your way to letting me know the views of His Majesty's Government on the matter and whether, in their opinion, M. Mavrommatis' claim could not be satisfactorily met.*

"I have the honour to add *that M. Mavrommatis' solicitors suggested that he would be prepared to submit* - should such a course be agreeable to His Majesty's Government - *the examination of the matter to a Court of Arbitration.*" (Ib., page 10.)

Thus we have so far no dispute and no negotiations between States.

Let us go further.

Great Britain, on April 1st replied that its intention was to recognize M. Mavrommatis' rights as far as concerned the Jerusalem contract, but not the Jaffa or the Jordan concessions; and it stated its reasons. It might be expected that once the Greek Government's curiosity was satisfied, the British Government's intention having been made known, Greece would also at length decide to state what she thought of the matter, to set forth her arguments in law and in equity and to refute those of her opponent. It is possible that in the face of these arguments the

British Government would have decided either to abandon its own Case or at any rate to modify it. [91]

How many times has it happened that for reasons of courtesy or other considerations one nation has made to another concessions which it would not make to a national of such other State!

Well, once again Greece said nothing as to her view of the Mavrommatis concessions ; nor did she formulate any claim on the subject ; she simply wrote a letter to the British Government announcing that she intended to sue that Government before the International Court of Justice !

Such are the facts. Having regard to them, can it be asserted that there was a *dispute* between Greece and Great Britain in regard to the Mavrommatis concessions, and that, for the purpose of settling it, negotiations took place between the two Governments?

Negotiation consists of debate or discussion between the representatives of rival interests, discussion during which each puts forward his arguments and contests those of his opponent. Now, I ask to be shown a single document in which Greece stated its claim and put forward its arguments in support. There is not one. I ask to be told at least what these claims and what these reasons are. Nobody knows.

There is no doubt that International Law lays down no protocol or formulae for *negotiations*; but in order that the existence of negotiations may be recognized, it naturally requires that they shall have taken place' in some form or other. In the present case we have not before us any negotiations that have taken place in any form whatever. There is a complete absence of negotiations.

It must further be remarked that under Article 26 of the Mandate, the mere fact that negotiations have taken place between the two Governments does not suffice to bring a question within the jurisdiction of the Court; it is further indispensable that either the conflict from its very nature cannot be settled by negotiation or else that negotiations shall have failed. The fact of requiring such negotiations is, as I have already stated, a tribute to the sovereignty of nations ; the principle is that all disputes shall be settled between the nations concerned themselves. The Court can only interpose its authority when such solution is recognized as impossible.

Now the dispute is clearly not one which cannot be settled through diplomatic channels; and even if it be admitted that negotiations have taken place, where is to be found the proof that such a settlement has been found impossible? [92]

It is said that Great Britain, in her reply to the Greek Government, at once declared that her views on the matter were capable of no modification.

I beg to be excused if I state that this is not correct. Great Britain said that she recognized Mavrommatis' rights as far as concerned Jerusalem ; that she was not prepared to recognize the Jaffa concession and that she denied the existence of the Jordan concession. The only claim which she definitely rejected was therefore the Jordan one ; and even in this case she relied on the absence of a document ; she would perhaps change her opinion if this document was presented to her:

"The Jerusalem concessions, as M. Mavrommatis' solicitors have been informed, are the only ones which His Majesty's Government are prepared to recognize, subject to the production of the original signed copies of the document and to their being found in order, since they alone arose out of an agreement entered into with the Ottoman Government before October 29th, 1914

"The Jaffa concessions were signed at a date subsequent to October 29th, 1914, and, as M. Mavrommatis has already been informed, His Majesty's Government are not prepared to recognize that he possesses any right in respect of them

"In regard to the third group, the Jordan concessions, no concessionary contract was actually completed or signed and M. Mavrommatis has already been informed that His Majesty's Government do not recognise that he has any rights in this area whatsoever." (Ib., pp. 12 - 13.)

Where is the insurmountable opposition of Great Britain to be found ?

In view of the facts which I have stated, it seems clear to me that the Mavrommatis affair is in no way a dispute between two States.

Greece is entitled to bring claims on behalf of its nationals, and that is in my opinion sufficient to give to the Mavrommatis claim an international character ; but the truth is that Greece, *up to the time when it applied to the Court*, had not said what it thought or what it wanted as regards the Mavrommatis concessions; it had neither explained the nature of these

concessions nor stated what were, in its opinion, their importance or their extent; it had further put forward no arguments in law to uphold them nor had it shown the weakness of the British opposition. [93]

It follows, in the second place, from the facts stated that no negotiation took place between the two Governments in regard to these claims; the Greek Government asked the British Government what were its views with regard to the Mavrommatis contracts; the British Government stated how it envisaged each of the contracts; the Greek Government made no reply.

The conclusion to be finally drawn from the facts stated is that the *impossibility* of settling the dispute through diplomatic channels has in no way been proved.

Under Article 26 of the Mandate, however, the Court has jurisdiction only when these conditions have simultaneously been fulfilled: if the dispute arises between States and if it cannot be settled by negotiation.

But these conditions are not fulfilled in the suit submitted to the Court by the Greek Government.

The Court has therefore no jurisdiction to hear and determine it.

(Signed) Epitacio Pessoa.