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27th, 1914, respecting certain works to be carried out at Jerusalem, which concessions the Court had, by Judgment No. 5, recognized as valid and as falling under the terms of Article 4 (and not of Article 6) of the Protocol signed at Lausanne on July 23rd, 1923, relating to certain concessions granted in the Ottoman Empire (hereinafter referred to as the Protocol of Lausanne).

In the Application it is submitted:

"That by delaying, regardless of the undertakings of the High Commissioner for Palestine, until the month of December, 1926, the approval, which should have been given in August, of the plans deposited by M. Mavrommatis on the preceding May 5th, and by thus preventing the putting into execution of the concessionary contracts concluded on February 25th, 1926, in substitution for those of 1914 (the validity of which the Court recognized by Judgment No. 5 and the readaptation of which in accordance with the Protocol of Lausanne it prescribed), the British Government has not complied with the terms of the Court's judgment and consequently, in its capacity as Mandatory for Palestine, has violated its international obligations within the meaning of Article 11 of the Mandate, as this article has been construed by the Court;

"That the delays above mentioned and the hostility displayed towards him by certain British authorities, by rendering it materially and morally impossible for M. Mavrommatis to obtain the financial assistance indispensable for the formation of the company for the operation of his concessions, which he had undertaken to form before February 25th, 1927, have done him irreparable injury the responsibility for which rests entirely on the British Government; [6]

"That the British Government is, consequently, bound to make adequate reparation for this injury, which is estimated on this date at a total sum of £217,000, with interest at 6% per annum from the date of filing of this Application until the date of payment."

In the Case filed with the Court on June 4th, 1927, the Applicant formulates his submissions as follows:

"(1) That by delaying, regardless of the undertakings of the High Commissioner for Palestine, until the month of December, 1926, the approval, which should have been given in August, of the plans deposited by M. Mavrommatis on the preceding May 5th, and by thus preventing the putting into execution of the concessionary contracts concluded on February 25th, 1926, the British Government, in its capacity as Mandatory for Palestine, has not complied with its international obligations under Article 11 of the Mandate;

"(2) That by these delays and by the hostility displayed towards him by certain British authorities - which delays and hostility were due to Mr. Rutenberg's opposition - it was rendered materially and morally impossible for M. Mavrommatis to obtain the

financing of his concessions and that he has thus unjustly suffered damage, for the reparation of which the British Government must pay him compensation;

"(3) That having regard to the whole of the damage sustained by M. Mavrommatis, he should be awarded just and equitable compensation, namely, the sum of £217,000, together with interest at 6 % from the filing of the Application until the date of payment."

These submissions have not been amended in the course of the oral proceedings.

The Application instituting proceedings was, in accordance with Article 40 of the Statute, communicated to the British Government on May 28th, 1927. On August 9th, 1927, that Government, which as from June 7th, 1927, had had at its disposal the Greek Case in the suit, filed with the Registry of the Court, in conformity with Articles 34 and 38 of the Statute, a Preliminary Objection to the Court's jurisdiction, in which it submitted that the Court had no jurisdiction and "asked the Court to dismiss the claim of the Greek Government upon this ground".

Under Article 38 of the Rules of Court, the Greek Government was invited to submit by August 26th, 1927, a written [7] statement of its observations and conclusions in regard to the objection to the jurisdiction taken by the British Government. In the Reply which was accordingly filed by it to that objection, the Greek Government, "being convinced that the standpoint of the British Government is inadmissible in every respect", asks the Court to "declare the objection to the jurisdiction to be ill-founded", to "dismiss it" and to "reserve the case for judgment on the merits".

Since, under Article 38 of the Rules, the remainder of the proceedings must be oral, the Court has, in the course of public sittings held on September 8th, 9th and 10th, 1927, heard the statements of Sir Douglas Hogg, His Britannic Majesty's Attorney-General, and of Counsel for the Greek Government, Professor Gidel and Mr. Purchase, and the reply made by the former, the Agent for the Greek Government having abandoned the right to submit an oral rejoinder.

THE FACTS.

The Court has previously had on two occasions to give judgment on questions concerning the concessions for the supply of water and electricity at Jerusalem, granted in January, 1914, to M. Mavrommatis by the Ottoman authorities, that is to say, in Judgment No. 2, of August 30th,

1924, and Judgment No. 5, of March 26th, 1925. In the first of these judgments the Court affirmed its jurisdiction to entertain a suit, brought on March 13th, 1924, by the Greek Government and based on Article 26 of the Mandate for Palestine, against the British Government, in so far as that suit, which also related to other concessions which it was alleged that M. Mavrommatis had obtained in Palestine under the Ottoman régime, related to the aforesaid concessions for works at Jerusalem.

By the second judgment, the Court, in the exercise of the jurisdiction thus established, decided amongst other things that the concessions in question were valid, and, in virtue of special jurisdiction conferred upon it by agreement between the Parties, decided that these concessions fell within the scope of Article 4 of the Protocol of Lausanne, that is to say, that the [8] concessionaire was entitled to have them put into conformity with the new economic conditions prevailing in Palestine.

These judgments, which will be analysed later, in so far as they are relevant to the decision of the preliminary question which is now before the Court, set out in detail the facts in regard to the Mavrommatis concessions leading up to the submission to the Court of the Application of March 13th, 1924. In so far as these facts are relevant for the purposes of the present case, the Court refers to those judgments. The following subsequent facts have been taken from the documents annexed to the Greek Government's Case:

Following the judgment of March 26th, 1925, the two Governments concerned took certain steps, commencing in the following May, with a view to putting the Mavrommatis concessions into conformity with ("readapting") the new economic conditions. In July, 1925, the experts provided for under the Lausanne Protocol who were to arrange the terms of readaptation, had been appointed by the two Parties. It had already at an earlier date become clear that whereas M. Mavrommatis conceived "readaptation" to mean the readjustment of the various clauses of the existing concessions, the British authorities thought that it should take the form of the substitution for the concessionary contracts obtained in 1914 of new contracts, to be signed by the concessionaire and by the new authorities of the country.

After lengthy negotiations, the two experts, on December 15th, 1925, were able to announce that they had successfully completed the work of bringing the old Mavrommatis concessions into conformity with the new economic conditions by means of substituting new contracts for the old ones. The new contracts were duly signed on February 25th, 1926, by M.

Mavrommatis and by the Crown Agents for the Colonies acting for and on behalf of the High Commissioner for Palestine. The contracts, which were two in number, related respectively to the water concession and to the electricity concession. To these agreements was added another, on February 26th, 1926, authorizing the concessionaire, notwithstanding the terms of the contracts of the previous day, to form a single company for the exploitation of the two concessions.

The contracts of February 25th, 1926, both contain clauses to the following effect: The concessionaire absolutely and [9] irrevocably surrenders and renounces all rights and benefits in and under the agreements of 1914, which are henceforth cancelled and annulled; in consideration of this renunciation the High Commissioner grants the new concessions, provided always that, within certain specified times, the concessionaire forms the companies for the carrying out of the concessions, arranges for the subscription of a fixed portion of the share capital and submits the plans for the works; within three months after the receipt of these plans, the High Commissioner is to notify his approval or disapproval or objections; in the event of disapproval, a special procedure before experts is provided for to prevent the possibility of a deadlock.

Before the signature of the concessionary contracts M. Mavrommatis had, on February 22nd, 1926, already concluded with the Right Honourable Baron Gisborough an agreement according to which he (M. Mavrommatis) transferred to the latter, in the capacity of trustee for the company to be formed by M. Mavrommatis for the exploitation of his future concessions, his rights and benefits in and under those concessions.

The plans referred to by the contracts of February 25th, 1926, were despatched to the High Commissioner by Lord Gisborough on the following April 19th; the High Commissioner acknowledged receipt on May 5th, 1926.

Meantime, the Palestine authorities had on March 5th, 1926, finally granted to Mr. Pinhas Rutenberg a concession for the supply of electricity by the utilization of the waters of the Jordan and Yarmouk; this concession of March 5th, 1926, to which Mr. Rutenberg was entitled under an agreement of September 21st, 1921, contains a clause (20) which corresponds to the clause (29) of the draft concession annexed to the afore-said agreement, which clause was, according to the Court's Judgment No. 5 of March 26th, 1925, incompatible with M. Mavrommatis' rights; but clause 20 of the final concession to some extent modifies the scope of clause 29 of the draft, and the concession of March 5th, 1926, also contains a clause (3 B) reserving the rights and privileges

granted by, amongst others, the concessions granted in 1914 by the Jerusalem Municipality for electric supply and electric tramways, and it has not been denied that this reservation refers to M. Mavrommatis' electricity concession. It should also be mentioned that [10] Mr. Rutenberg was the holder of a concession, dated September 12th, 1921, for the utilization of the waters of the river El-Audja for the generation of electric power and for irrigation works. Relying on this concession, Mr. Rutenberg objected to permission being given to M. Mavrommatis to take from this river the water required for the water supply of the city of Jerusalem. It has, however, been admitted, in the course of the present proceedings, by both Governments concerned, that this concession did not confer on the holder the right, should the contingency arise, to prevent M. Mavrommatis from using the same source for the purposes of his water concession.

On July 21st, 1926, M. Mavrommatis was informed that his contract with Lord Gisborough was regarded as an absolute assignment of his concessions, - an assignment unwarranted under the terms of the contracts, - and that therefore the deposit of the plans by Lord Gisborough was not accepted as valid. Having in the meantime - August 31st - determined his agreement with Lord Gisborough, M. Mavrommatis, on September 4th, requested the High Commissioner to retain the plans in question as deposited on his, M. Mavrommatis', behalf. The High Commissioner accepted them as so deposited on September 5th. Subsequently the plans for the electricity concession were approved on September 23rd, with certain modifications which were accepted by M. Mavrommatis on October 7th; on the other hand, the plans for the water concession were not approved until December 2nd, 1926.

On the previous day, however, December 1st, M. Mavrommatis had notified the British Government that his plans for the water concession, which he regarded as deposited on May 5th, should have been approved before August 5th; that the failure to approve the plans within the time fixed constituted a breach of the agreements for which he would seek damages; and that with this object in view he was putting himself in communication with his Government. He confirmed this-communication by a further letter on December 24th, 1926.

Subsequently, as from January 17th, 1927, the Greek Legation in London, on the instructions of the Greek Government, intervened on behalf of M. Mavrommatis, expressing the earnest hope that His Majesty's Government would examine the matter in a conciliatory spirit. On February 19th, 1927, [11] however, the Legation hinted at the possibility - failing an amicable settlement - of again instituting proceedings before the Permanent Court of

International Justice. The negotiations thus begun did not however lead to an agreement, and on May 23rd, 1927, the Greek Minister in London informed the Foreign Office of his Government's decision once more to have recourse to the Court and to submit to it "the differences which had arisen in the execution of the judgment ... of March 26th, 1925".

As regards the facts set out above and relating to the question now before the Court, it should be observed that, in accordance with a statement made in Court on behalf of the British Government, the latter accepts in a general way, for the purposes of the proceedings on the plea to the jurisdiction, the facts as given by the Greek Government in its Case.

THE LAW.

Before beginning the examination of the grounds on which the British Government disputes the Court's jurisdiction, it will be well to state in what the submissions of the Greek Government in reality consist - submissions which, in the contention of the British Government, the Court has no jurisdiction to entertain.

The Greek Government having in its Case amended the submissions of the Application, the Court takes as the basis of its examination the submissions of the Case, which are the submissions made in the last document upon which the opposite Party has been able to base his objection.

The submissions in question may be summarized as follows.

It is submitted:

(1) that the British Government, by delaying, regardless of the undertakings of the High Commissioner for Palestine, the approval of the plans submitted by M. Mavrommatis, and by thus preventing the putting into execution of the concessionary contracts of February 25th, 1926, has, in its capacity as Mandatory for Palestine, violated the international obligations incumbent upon it under Article 11 of the Mandate as [12] construed by the Court; (2) that M. Mavrommatis, by reason of the delays and hostility encountered by him in his dealings with certain British authorities, has unjustly suffered damage for which the British Government is

entirely responsible; and (3) that the British Government is bound to make adequate reparation, which is estimated at £217,000, with interest at 6 % from the date of the application until the date of payment.

The arguments advanced by the British Government in support of its objection to the Court's jurisdiction are as follows:

In the first place and in so far as concerns the Greek Government's contention in its Application that the British Government has not complied with Judgment No. 5 (by which the Court recognized the Mavrommatis concessions as valid and decided, in accordance with the Protocol of Lausanne, that they were to be readapted), the British Government objects that there is no provision giving the Court jurisdiction to decide whether one of its judgments has or has not been complied with.

In the second place and in so far as concerns the Greek Government's contention that the British Government, by preventing the putting into operation of the concessionary contracts concluded between the Palestine Administration and M. Mavrommatis on February 25th, 1926, has not complied with the international obligations assumed by the Mandatory, under Article 11 of the Mandate, and consequently has violated the terms of that article, the British Government objects that, under Article 11 of the Mandate, the Court only has jurisdiction to deal with an alleged breach of the international obligations of the Mandatory in so far as such breach results from the manner in which the Palestine Administration has exercised its full power to provide for public ownership or control of any of the natural resources of the country, or of the public works, services or utilities established or to be established therein. Now, the British Government says, there has been no exercise of this power, for no right conflicting with those of M. Mavrommatis has been granted to Mr. Rutenberg, and the fact that there has been delay in the approval [13] of the plans, even if such delay were due, as contended by the Greek Government, to the hostility of Mr. Rutenberg or of certain British or Palestine officials towards M. Mavromatis, cannot be regarded as an exercise of this power.

In the third place, and in so far as the violation of Article 11 of the Mandate, alleged by the Greek Government to have taken place, is said to arise from the violation of the Protocol of Lausanne, the British Government objects that this Protocol, in itself, does not confer any

jurisdiction upon the Court, and that, in any case, it does not apply in the present matter, as it only relates to the concessionary contracts concluded between M. Mavrommatis and the Turkish authorities in 1914, which contracts have, by common consent of the Parties, been expressly annulled and replaced by those concluded by M. Mavrommatis with the Palestine Administration on February 25th, 1926.

In the alternative, the British Government argues that even if the present dispute were covered by an international instrument involving that Government's consent to the reference of the dispute to the Court, the application should be rejected by reason of the non-fulfilment of a necessary condition precedent, namely, the submission by M. Mavrommatis of his claim to the Courts of England or Palestine which are competent to adjudicate thereon under the municipal law of both countries.

* * *

As regards the first point, it should be observed that the Greek Government, in its Reply to the Preliminary Objection to the Court's jurisdiction, contends that it is wrong to say that its claim is mainly and fundamentally based on the nonfulfilment of the terms of Judgment No. 5 ; it states that its claim is based solely on the British Government's dis-regard - in its capacity as Mandatory for Palestine - of its international obligations under Article 11 of the Mandate. Moreover, no special conclusion appears to have been drawn by the Greek Government from the alleged nonfulfilment of the terms of Judgment No. 5, and this point of view has been entirely dropped in the oral proceedings. [14]

In these circumstances, the Court does not find it necessary to consider the question whether, in certain cases, it might have jurisdiction to decide disputes concerning the non-compliance with the terms of one of its judgments.

* * *

Before proceeding to examine the other arguments put forward by the British Government, the Court feels called upon to observe that, although the present suit at first sight

would seem to be a continuation of the case decided by Judgments Nos.2 and 5, it does not follow from this circumstance that the jurisdiction accepted by the Court in Judgment No. 2 also exists as regards the present case. For this case concerns facts which have occurred since these judgments were given, and the solution of the question now before the Court depends upon the nature of these facts in relation to the clauses governing the Court's jurisdiction in the present suit.

* * *

As regards the second argument put forward by the British Government in support of its Preliminary Objection, reference should be made to the construction already placed by the Court upon Articles 11 and 26 of the Mandate for Palestine. For that construction, which is to be found in the Court's Judgments Nos. 2 and 5, already referred to, must undoubtedly be taken into account in the decision of the present case. The Application of May 28th, 1927, in fact, reproaches the British Government for having failed to carry out its international obligations precisely in regard to concessions which the British or Palestine authorities had granted to M. Mavrommatis in accordance with Judgment No. 5, and this - in the contention of the British Government - in order to replace concessions in regard to the disputes concerning which the Court had, in Judgment No. 2, declared itself to have jurisdiction. Again, the Court, which in Judgment No. 2 considered for the first time its jurisdiction under Articles 26 and 11 of the Mandate, examined these articles in that judgment from a general point of view. In the last place, the Parties have in the present [15] case, and more especially in the oral proceedings, discussed almost exclusively the construction placed by the Court on those articles in Judgments Nos. 2 and 5.

The articles in question are as follows:

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 utilized by it for the benefit of the country in a manner approved by the Administration."

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."

The Court, in Judgments Nos. 2 and 5, and on the basis of the development of the provisions of the Mandate and of the Treaties of Sévres and Lausanne, has decided that the [16] "international obligations accepted by the Mandatory", within the terms of Article 11, are constituted by the Protocol of Lausanne; but it has expressly stated that the jurisdiction bestowed upon it by Article 26 of the Mandate only covers the interpretation and application of the Protocol in so far as the Mandatory, in the exercise of the full power conferred upon him by Article 11, subject to the international obligations above mentioned, may have disregarded the obligations accepted by him in signing the Protocol. The jurisdiction possessed by the Court as concerns the interpretation and application of the terms of the Mandate does not, therefore, extend to the provisions of the Protocol of Lausanne, except in relation to Article 11 of the Mandate.

The full power, as regards the exercise of which Article 11 makes a reservation, is a 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". Since, in the case decided by Judgments Nos. 2 and 5, the question of "public ownership" did not arise but only that of "public control", the Court confined itself to the interpretation of the latter conception.

In this respect, it came to the conclusion that "public control" means an economic policy consisting in subjecting, in one way or another, private enterprise to public authority. This expression, in Article 11, serves to define a situation which, although it does not take the legal form of ownership, enables the public authorities to exercise certain powers normally inherent in ownership.

It follows that, within the limits fixed by Article 11, power to provide for public control does not mean all the rights generally recognized as belonging to any public administration for the safeguarding of public interests; and that the conception of "public control" must be construed in relation to Article 11 and to the programme for economic development contemplated therein. It also follows that the question whether, in a given case, there has been an exercise of the full power to provide for public control is essentially a question that can only be decided for each particular case as it arises. [17] That is why the Court, in Judgment No. 2, confined itself to establishing that the High Commissioner for Palestine, when he granted to Mr. Rutenberg, on September 12th, 1921, a concession for electricity and irrigation in the district of Jaffa, and when he undertook, by a contract concluded on September 21st, 1921, also with Mr. Rutenberg, to grant to the latter a concession for the exploitation of the hydraulic power of the Jordan and the Yarmouk, was exercising this full power. The Court came to this conclusion, more particularly because these concessions, which directly or indirectly secured to Mr. Rutenberg a monopoly, were to be worked by companies the formation of which could only be approved by the High Commissioner with the advice and co-operation of the Jewish Agency, which was provided for under Article 4 of the Mandate as a public body designed to cooperate with the Palestine Administration. And the participation of this Agency in the development of the natural resources of the country and in the construction or operation of any public works, services and utilities is precisely contemplated by Article 11 of the Mandate.

Such are the special circumstances which in the Court's opinion have endowed the grant of the Rutenberg concessions with the character of an exercise of the full power to provide for "public control"; but Judgment No. 2 does not fail to state very clearly that the grant of a concession does not in itself constitute an exercise of the full power in question. The right reserved in certain circumstances to the authorities in respect of concessionary undertakings, either by means of administrative regulations or by clauses inserted in the concessionary

contracts, to exercise powers of advice and supervision, does not come within the conception of "public control" as used in Article 11.

The Court, after satisfying itself that the Rutenberg concessions of 1921 at least partially overlapped the concessions which were obtained by M. Mavrommatis in 1914 and which, by reason of the date of grant, fell under the terms of the Protocol of Lausanne, accepted jurisdiction in so far as the application of 1924 related to these Mavrommatis concessions. Further, in Judgment No. 5, it decided that Article 29 of the concession promised to Mr. Rutenberg by the contract of [18] September 21st, 1921, was incompatible with the principle established by the Protocol of Lausanne to the effect that concessions granted by the Turkish authorities before October 29th, 1914, were to be maintained. Only in so far as such incompatibility existed was the Court, in virtue of the jurisdiction which it derives under Article 26 of the Mandate, able to find that there had been a breach of the "international obligations accepted by the Mandatory" and consequently a breach of Article 11 of the Mandate.

In the same connection, the Court stated that it was in virtue of an agreement arrived at between the Parties in the course of the proceedings that it gave a decision upon the question whether Article 4 or Article 6 of the Protocol of Lausanne was applicable to those concessions of M. Mavrommatis, which were to be maintained under the first Article of the Protocol. In regard to this point, the Court also observed that it could only consider other disputes in regard to the application of Articles 4 and 6 of the Protocol of Lausanne in virtue of a further agreement between the Parties "unless such disputes resulted out of the grant of the Rutenberg concession, and to this extent fell within the scope of the jurisdiction obtained, as indicated above, from Articles 26 and 11 of the Mandate" ; the same considerations no doubt hold good as regards the whole Protocol.

It is therefore clear that, according to the construction of Articles 11 and 26 of the Mandate established by the Court in Judgments Nos. 2 and 5, in all cases where an alleged breach of the Protocol of Lausanne is the outcome of the exercise of the full power given by Article 11 to provide for "public control", but in these cases only, the Court has jurisdiction under Article 26 of the Mandate to deal with such a breach.

The Court sees no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound, more especially seeing that the two Parties have shown a disposition to accept the point of view adopted by the Court.

Certain statements made in this connection by the representative of the Greek Government, however, rather tend to [19] place on Judgment No. 2 an other interpretation than the one accepted by the representative of the British Government. The Court having - as has been stated above - indicated in that judgment that the grant of a concession of public utility is not an exercise of the power to provide for public control within the meaning of Article 11, but that the grant may be accompanied by measures which give it that character, the representative of the Greek Government seems to have held that not only would the grant of a concession of public utility always constitute an exercise of public control, but that any act performed by the administration in connection with the grant of a concession would also have the same character. In regard to this, it will however suffice to say that if that was really his meaning, it would seem to be contrary to the doctrine enunciated in Judgment No. 2 and summarized above.

In considering the second argument put forward by the British Government in support of its objection to the Court's jurisdiction, it therefore remains to ascertain whether the facts alleged by the Greek Government in support of its claim constitute an exercise of the "full power to provide for.. public control" under Article 11 of the Mandate.

The main fact relied on by the Greek Government in this connection is the alleged delay of the High Commissioner in approving the plans which M. Mavrommatis had to submit under the contracts of February 25th, 1926. For the reasons set out above, it is unnecessary for the moment to consider whether this delay would have constituted a breach of the Protocol of Lausanne, because the first question which arises is - as has already been stated - whether there has been an exercise of the full power mentioned in Article 11. In this respect, the following points must be considered:

The grant of the new Mavrommatis concessions and all other steps taken with a view to the readaptation of the old concessions, do not, for the reasons already set out, constitute an exercise of the full power in question. Notwithstanding the numerous powers reserved to the

authorities in the 1926 concessions, the latter contain nothing which, according to the [20] criteria adopted in Judgment No. 2 and retained in the present judgment, constitutes an exercise of the full powers referred to, because the powers reserved all fall within the category of administrative powers in respect of private undertakings to which public services are conceded, and they therefore do not suffice to give the concessions in question the character of an exercise of the full power to provide for "public control", within the meaning attributed to that expression by the Court in Judgment No. 2. It is impossible, therefore, for any violations of the Protocol of Lausanne which may have been committed in the course of the readaptation and by the grant of the new concessions, to be brought within the Court's jurisdiction, as defined by Article 26, on the ground of the exercise of the full power mentioned in Article 11.

Assuming that the attitude of the British and Palestine authorities, which is said to have resulted in the alleged delay, were not legally justifiable, or even were of an entirely arbitrary character, the non-approval of the plans within the time laid down - whether it should be regarded, as argued by the British Government, as a ground for the contention that the terms of the contract, having duly come into effect, have been infringed, or, as argued by the Greek Government, as a ground for maintaining that the contract had ceased to be effective - would not in any case constitute an exercise of the full power to provide for "public control".

Being satisfied as to this point, the Court must still ascertain whether any concessions granted in the exercise of the said full power - and, in the present case, the only concessions which enter into question are those of Mr. Rutenberg - constituted a legal obstacle to the approval of the plans within the required time. If that had been the case, M. Mavrommatis' rights would have been violated by the mere fact of the existence of these concessions, and, although the delay would merely have made manifest the violation, the Court might nevertheless have had jurisdiction. But the Greek Government does not base its conclusions on an alleged incompatibility between the Mavrommatis and Rutenberg concessions.

What the Greek Government really reproaches the British Government with, in respect of the latter concessions, is that the [21] British and Palestine authorities profited, in its contention, by Mr. Rutenberg's opposition to M. Mavrommatis' utilizing the waters of the El-Audja for his water concession, in order to delay the approval of the plans for that water concession, and that they did not, according to the Greek Government, in order speedily to overcome Mr. Rutenberg's opposition - which the British Government now declares to be unjustified - postpone the final

grant to Mr. Rutenberg of the concession promised to him by the contract of September 21st, 1921, for the exploitation of the hydraulic power of the Jordan and Yarmouk. This final grant which took place on March 5th, 1926, may be regarded as an act performed in the exercise of the full power referred to in Article 11. If it had been argued that the concession thus granted overlapped, at least partially, M. Mavrommatis' concessions and infringed the latter's rights, the Court would, in this respect, have been confronted with a situation resembling that with which it had to deal in its Judgment No. 2.

But in the present case, the situation is essentially different. All that the British and Palestine authorities are reproached with is that they did not refuse to grant this concession until Mr. Rutenberg had abandoned his claim to exclude M. Mavrommatis from utilizing the El-Audja. The reservation made by Article 11 in regard to international obligations may - according to the context - only be intended to prevent rights, acquired by private persons and protected by the Protocol of Lausanne, from being disregarded in order to render possible or easy the acquisition or exercise of public ownership or of public control; but it cannot be maintained that this reservation obliges the Mandatory to take advantage of negotiations in progress with the holder of a concession to be granted in the exercise of this full power, in order to bring pressure to bear upon him in favour of another concessionnaire, who claims to be protected by the Protocol of Lausanne.

In point of fact, the Greek Government does not accuse the British Government of having violated M. Mavrommatis' rights by definite action taken under Article 11; it is rather a question of a passive and negative attitude, which is said to constitute the "hostility" referred to in the second submission of the Greek Case as the cause of the unjust injury which, in the Greek Government's contention, has been inflicted. [22]

In the Court's opinion - even admitting that the exercise of the full power mentioned in Article 11 may also take the form of action designed to set aside private ownership and control, thus making possible the acquisition of public ownership and control - , there is no need to consider this hypothesis, seeing that, even *prima facie*, the contentions of the Greek Government do not seem capable of establishing the existence of acts of this nature. In actual fact, however, the assertion that "hostility" has been displayed towards M. Mavrommatis, as made before the Court, simply amounts to the suggestion of a reason for the alleged violation of the 1926 contracts or the alleged failure to carry out those contracts.

The Court therefore arrives at the conclusion that that argument put forward by the British Government in support of its objection to the Court's jurisdiction which has just been examined, is well founded.

* * *

Accordingly, the Court need not concern itself with the third argument set out by the British Government to the effect that the international obligations which are referred to by Article 11 of the Mandate and which are those arising under the Protocol of Lausanne, have nothing to do with the Mavrommatis concessions of 1926. Indeed, as the Court has expressly stated in Judgments Nos.2 and 5, that Protocol can only be applied by it upon a unilateral application in so far as is required by Article 11 of the Mandate. It was accordingly in virtue of the agreement between the Parties that the Court, in Judgment No. 5, dealt with the question whether the Mavrommatis concessions of 1914 fell to be dealt with under Article 4 instead of under Article 6 of the Protocol. As Article 11 of the Mandate has no bearing upon the present case, the question of applicability of the Protocol of Lausanne is entirely outside the ground for jurisdiction invoked by the Greek Government's Application: only in virtue of a subsequent agreement could the Court consider the question whether there has or has not been a breach of that Protocol arising out of the facts cited in the Application of May 28th, 1927. [23]

In these circumstances, the Court is also not called upon to consider certain points of municipal law bearing upon the provisions of the concessionary contracts of 1926, although these points were discussed at length by the Parties; for they would only be of importance in connection with the present question if the Court had to ascertain what is the relationship between the contracts and the Protocol of Lausanne.

* * *

Similarly, the Court need not consider the legal effect of the alternative ground for the objection taken by the British Government. It will confine itself to recording the statements made at the hearing by the representative of that Government, to the effect that it is open to M.

Mavrommatis to obtain reparation by process of law for the damage which he claims to have suffered as a result of the nonfulfilment of the obligations towards him which the High Commissioner for Palestine had accepted under the contracts of February 25th, 1926.

FOR THESE REASONS,

The Court,

having heard both Parties,

by seven votes to four,

upholds the Preliminary Objection taken by His Britannic Majesty's Government in Great Britain denying the Court's jurisdiction to entertain the Application filed by the Greek Government on May 28th, 1927, against the aforesaid Government in its capacity as Mandatory for Palestine.

Done in French and English, the French text being authoritative.

At the Peace Palace, The Hague, this tenth day of October one thousand nine hundred and twenty-seven, in three copies, one of which is to be placed in the archives of [24] 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) Max Huber,

President.

(Signed) Å. Hammarskjöld,

Registrar.

M. Pessôa, Judge, who had sat from the commencement of the session, took part in the discussions relating to the present suit, but was obliged to leave The Hague before the final draft

was accepted; he declared he was unable to agree to the conclusions of the judgment, the Court having, in his opinion, jurisdiction.

MM. Nyholm and Altamira, Judges, and M. Caloyanni, National Judge, 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 Statute, have delivered the separate opinions which follow hereafter.

(Initialed) M. H.

(Initialed) A. H.

[25] Dissenting Opinion by M. Nyholm.

[*Translation.*]

The present case is now before the Court only for a decision on the question of jurisdiction. The merits, therefore, namely, the claim for damages to be paid to M. Mavrommatis by the Mandatory for Palestine, in consequence of having prevented the readaptation of M. Mavrommatis' Turkish concession, which readaptation had been decreed by the Court (Judgment No. 5 of March 26th, 1925), have not now to be considered. Giving the case the degree of simplicity which it should have at the present stage, it is only necessary to consider the Mandatory's plea to the effect that the Court has no jurisdiction to entertain the suit.

Before approaching this question, it should be observed that in a suit brought in 1924 by the Greek Government (a suit of a nature entirely similar to the present one), the Court declared itself to have jurisdiction in Judgment No. 2 of August 30th, 1924, and in so doing expressly based its jurisdiction on Article 11 of the Mandate for Palestine of July 24th, 1922.

* * *

In order to determine the scope of the jurisdiction obtained by the Court from the Mandate for Palestine, which is the sole source of the Court's jurisdiction to consider the Mandate, regard must be had (1) to the character of the Mandate and especially to the reasons which led the League of Nations to insert in the Mandate a clause giving jurisdiction to the Permanent Court of International Justice, and (2) to the structure of the Mandate in order to ascertain in what manner, by which articles of the Mandate and within what limits, this jurisdiction has been established. *Ad* (1): As regards the first point, the historical development of the Mandate system shows that the mandatory Powers were to carry out this task under the control of the League of Nations to which they were bound to submit annual reports. [26]

The institution of this control was due to the fact that the Powers did not wish to leave a mandatory at liberty to govern mandated territories entirely at his discretion. Certain limits were to be fixed, not only with a view to harmonizing the principles established under the various

mandates, but also with a view to establishing special rules in regard to each country, that is to say, a guarantee that the administrations should act in accordance with the principles adopted in the interests of the community of nations by the Covenant.

The guarantee which offered itself consisted in conferring on the Court - a new international institution - jurisdiction to decide any questions regarding the interpretation and application of the Mandate.

Mandatories were not to infringe the rights either of States or of individuals. Each State therefore has a right of control which it may exercise by applying to the Court. It is true that there is no provision giving the Court jurisdiction as regards the relations between individuals and the mandatory, but it is to be presumed that, if a subject of a certain State suffered injury, his government would, if necessary, take action on his behalf. When a suit is conducted between a mandatory and another Member of the League of Nations, regarding a question of interpretation or application - which is precisely the case in the present suit - , Article 26 of the Mandate gives the Court jurisdiction. This article is also recognized by the judgment given to-day to be the general basis of the Court's jurisdiction. But whereas the judgment seeks to limit this jurisdiction on the basis of Article 11 of the Mandate, it may be shown that this article contains no rule in regard to jurisdiction.

Turning next to point (2): This follows from an examination of the structure of the Mandate. The latter contains, apart from various paragraphs of no importance from the point of view of the present case, Article 26 which lays down the general rule in regard to jurisdiction, and Article 1 which relates to the administration of the Mandatory. Article 1 says:

"The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this Mandate." [27]

These limits were necessary with a view to the control of legislation and administration. They are laid down in the following articles - 2 to 23 - which give special instructions regarding the exercise of his power by the Mandatory. Thus Article 2 relates to the creation of a national home, and the following articles relate to various matters such as emigration, nationality regulations, the establishment of a judicial system, etc. Article 11, with which the present case is specially concerned, refers to the necessary measures to be taken by the Mandatory, "for the development of the country".

In order to enable the case to be properly understood, it will be well at this point to reproduce the text of Article 11 in full:

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 arrangement 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 utilized by it for the benefit of the country in a manner approved by the Administration."

Upon examining the text of this article, it will be seen that it forms part of the series of indications laid down for the [28] Mandatory in Articles 2 to 23. It deals with the particular subject: "the development of the country". This development is supposed to be based upon the exploitation of the natural resources of the country, that is to say, of public works, services and utilities, such as tramways, railways, electricity and water works, ports, etc. The article also mentions as a special point the introduction of a land system appropriate to the needs of the country. Again, it adds that in carrying out this programme, the Mandatory will have full power to make arrangements, in order that, as far as possible, these public works shall be exploited by the State, or, at all events, subjected to government control. If the word "full" is not a mere pleonasm, it is perhaps intended to emphasize that the intention is that the Mandatory should make every effort to obtain ownership of or control over public enterprises, in accordance with modern ideas. That that is the intention and aim expressed in the first paragraph, appears indirectly from the second paragraph. The article therefore simply lays down the following general indication for the Mandatory : in the first place, it is desirable that the exploitation of public works should be in the hands of the State and that in any case government control should be procured by inserting appropriate articles in the concessions which form the bases of the

development of the resources of the country. Understood in this way, the interpretation of the article becomes simple; but this simple construction is not adopted in the judgment, which regards the article as containing rules concerning jurisdiction. This view has perhaps been taken to some slight extent on the basis of the French text which uses the word *décider*; this, however, is an inadequate translation, hardly in accordance with the intention of the clause of the English phrase "provide for", which here would be better translated by *avoir soin d'établir*. Article 11 indeed contains no provision regarding jurisdiction. The Court confines itself to saying (Judgment No. 2, page 18) that it "feels that the present judgment should be based principally on the first part of paragraph 1 of Article 11". It is not easy to see on what basis the judgment succeeds - without other commentaries - in establishing that the jurisdiction of the Court is determined in Article 11 and precisely by, the phrase to the effect that the Mandatory [29] acts in the exercise of his full power to provide for public ownership or control. These words are certainly not intended here to serve as a basis for a jurisdictional rule. They constitute in themselves a vague criterion. The judgment admits that "the exercise of full power to provide for public control" is essentially a question to be decided in each case as it arises, and the interpretations of a somewhat restrictive character which have to be placed upon them in order to apply them are often of a subtle character which is in contrast to the clearness which should govern the important question of jurisdiction.

The judgment thus finally says that the grant of a concession providing for public control does not in itself constitute an exercise of the "full power" in question, but that the special circumstances of each case must be considered; that jurisdiction is restricted to the actual grant of the concession, but that it does not in principle extend to cover the subsequent exercise of the control provided for in the concession; this appears to constitute an obstacle to a reasonable application of the rules of jurisdiction. The judgment then, basing the jurisdiction of the Court on the phrase in Article 11, which is not calculated to form a basis for jurisdiction, arrives successively at a number of hardly admissible conclusions.

Thus it says that the Mavrommatis concessions of 1914 do not fall within the scope of the article and that the Court can only deal with them in so far as they are affected by the Rutenberg concessions.

Although the Mavrommatis concessions may not have been granted by the Mandatory but previously by Turkey, the Mandatory is, concerned with them, since he must bring them

definitely into existence by readapting them, and that, in order to fulfil the international obligations set out in Protocol XII.

As regards this Protocol, the judgment concludes that, subject to a few particular cases, it cannot come into account except in pursuance of an agreement between the Parties, because the Protocol does not contain any special rule relating to jurisdiction. In Judgment No. 2, however, it was stated, with regard to a discussion relating to the origin of the Protocol (page 31), that 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. [30]

Moreover, the agreement does not possess a formal character but appears to be deduced from a few phrases which appear in the pleadings. Furthermore, Judgment No. 2 only contains a vague allusion to the necessity of an agreement, and it is only Judgment No. 5 which contains a statement relating to it; but this judgment cannot restrict the jurisdiction established by a previous judgment.

The development of the theory which bases jurisdiction upon Article 11 thus, as a consequence, provides an entirely vague criterion, dependent in each case upon a restrictive interpretation as regards jurisdiction, whereas precise terms were necessary in order to establish an exception to the general rule of Article 26.

This rule establishes as a guarantee for the Powers a system of control which ensures that the Mandatory will act in conformity with the provisions of the Mandate.

The intention underlying the Mandate was certainly not that the clear general rule as to jurisdiction inscribed in Article 26 concerning any question of "interpretation and application" of the Mandate should be capable of being overruled by specific interpretations of the different articles.

The same ground which enables the judgment to find in Article 11 a restriction upon the jurisdiction would enable also to find such a restriction in the other articles of the Mandate, and the result would be that the Mandatory would become more or less free from control by the Powers.

Other consequences which it is difficult to admit may also be deduced from the theory upon which the judgment is founded. According to this theory, the jurisdiction of the Court is confined to the cases in which one can discern an action on the part of the Mandatory which

consists of the exercise of a certain power of control. As regards any other action on the Mandatory's part, the Court would have no jurisdiction.

In the case under consideration the actions by the Mandatory which are in question have not regard to the grant of a concession, but are actions which would result in the annulment of the rights of M. Mavrommatis to obtain a definite concession. As regards these actions, the Court would thus have no jurisdiction. It is obvious that the Mandatory may choose [31] the methods of taking action that he wishes, but it follows that by the choice of *his own line of action* a mandatory may abolish the jurisdiction of the Court, an inadmissible proposition. Moreover, generally speaking, it may be said that if the jurisdiction of the Court, set up as a guarantee for the nations, is found, as regards concessions, to be limited to the sole grant of such a concession, and this having regard to the special conditions particular to each case, and according to the surrounding circumstances of such grant, this is a conclusion which appears to be unacceptable. Indeed, the jurisdiction of the Court as regards the Mandate should be *general*, subject to specific exceptions. The reason underlying the judgment admits the jurisdiction of the Court *as an exception*, which signifies in reality a cancellation of Article 26.

* * *

The demonstration which precedes will not be followed up by a detailed examination of the judgment. It is only necessary to point out that even the reasoning of the judgment leads to the acceptance of jurisdiction by the Court. In reality the present case is merely the *continuation* of the former one. If it is to be considered as a new *independent* case, it is, on this assumption, *identical* with the first. In both cases the jurisdiction of the Court should be affirmed.

That the case is a *continuation* of the former one, may be deduced from the fact that the Court (Judgment No. 5) had placed the Parties before the obligation of readaptation. The readaptation was interrupted. M. Mavrommatis claims that this was through the fault of the Mandatory and draws the conclusion that the case should be taken up again in order to be terminated by the allocation of damages. It is clear that this is a question merely of continuation.

On this important question of jurisdiction the judgment does admit (page 14) that "the present suit at first sight would seem to be a continuation of the case decided by Judgments Nos. 2 and 5", adding, however, that "it does not follow from this circumstance that the jurisdiction

accepted by the Court in Judgment No. 2 also exists as regards the present case. For this- case concerns facts which have occurred since [32] these judgments were given and the solution of the question now before the Court depends upon the nature of these facts in relation to the clauses governing the Court's jurisdiction in the present suit".

In the second place, even if the case is a new and independent one, it is identical with the former case. It is only necessary to recall the two concessions granted to Mr. Rutenberg on September 21st, 1921, and March 5th, 1926, respectively. The Court ruled that it had jurisdiction as regards the reaction of the first concession on M. Mavrommatis' position. It is submitted that the case is identical as regards the second concession. Here, as in the first case, the submissions refer to the fact that the Rutenberg concessions have influenced the financial circles, in which the smallest uncertainty is fatal as regards many transactions, and that they had effectively prevented the financing of M. Mavrommatis' undertaking. The Court has jurisdiction, as in the first case, to determine this question.

[33] Dissenting Opinion by M. Altamira.

[*Translation.*]

I regret that I disagree both with the conclusions and the reasoning of the present judgment, and I feel it my duty to state, very briefly, the essential points upon which my dissent is based.

1. - The doctrine of the Court, which has been enunciated in Judgments Nos. 2 and 5 and is repeated in the present judgment, is that it has jurisdiction to entertain questions concerning the interpretation and application of Protocol XII of Lausanne in so far as such questions originate in, or are in their turn dependent on, a question of the interpretation or application of Article II of the Mandate for Palestine in connection with a concession covered by the guarantees afforded in the Protocol itself, which question therefore falls within the scope of the international obligations accepted in this respect by the Mandatory.

This necessary connection between the Mandate and the Protocol, is the condition upon which the coming into play of Article 26 of the former instrument, which confers jurisdiction on the Court, is dependent, and it arises whenever there is incompatibility between the obligations contained in the Protocol and the use made by the Mandatory of the powers bestowed upon him by Article 11 of the Mandate in the sphere of economic policy to which the concessions contemplated by the Protocol belong, and whenever, as a consequence of this incompatibility, the reservation expressly made in Article II in regard to these obligations is disregarded.

It is clear that, according to the article referred to, disregard of international obligations may occur when the power exercised by the Mandatory is that of providing for *public ownership* as well as when it is that relating to *public control*, that is to say, both when the Administration declares a thing or a right forming part of a previously granted and valid concession to be public property, and in so doing means itself to undertake exploitation, and when it grants this thing or [34] right to a person other than the original concessionnaire, in a manner involving the exercise of public control. The wording of the second sentence of Article 11, paragraph 1, is very clear as regards this point. According to this sentence, the "reservation concerning international obligations" covers both *public ownership* and *control*. It is no less clear that the sentence makes

a definite distinction between two different powers: that of providing for ownership and that of providing for public control. Again, if the word "ownership" is here intended to convey - and it cannot well be otherwise - the idea of public or State (administration) ownership, it is obvious that "control" can only contemplate the only other form of ownership possible in connection with the development of the natural resources of the country or of works and services of public utility, that is to say, private ownership, which is economically necessary to the existence of a *private* enterprise. The degree or extent to which the administration may intervene in an enterprise of this second category, in preference to itself undertaking exploitation, is, in principle, a matter of no, or secondary, importance in characterizing the system. But one thing is certain, and that is that there is a limit to such interference which cannot be overstepped without destroying the very system established by the first paragraph of Article 11, and this limit is the border line which divides public ownership from private ownership in regard to the exploitation of resources, etc. Were it possible for the interference of the administration in a private enterprise of the kind contemplated in Article 11, when it uses the words "public control", to become in a particular case indistinguishable from or so closely akin to "public ownership" that it would be difficult to separate the two powers, it would be impossible to understand why a distinction has been made in the article between the two kinds of power. This conclusion would have still more weight if it were sought to interpret the expression "public control" in the Mandate as meaning only that form of intervention in which the action taken by the administration is indistinguishable from public ownership, or borrows from the latter most of its characteristic powers. It is therefore clear that the expression "public control" in Article 11 must cover many, if not all - a point which the [35] Court does not seem to accept - the possible degrees of interference by the administration in a private undertaking, but always excepting a degree of control which would obliterate the difference as regards "public ownership". Thus, even taking a very strict interpretation, it would be at all events very difficult to limit the meaning of public control to such forms of intervention on the part of the administration as would, for instance, result in the complete or almost complete nationalization or municipalization of a private concern. Even admitting that control may assume some of these extreme forms without ceasing to be "control" and becoming something more, it is certain that it may also assume other forms of intervention on the part of the administration, or, in other words, the reservation by the administration of certain rights of intervention in the operation of the private concern.

The foregoing reasoning, which is based on legal conceptions, is borne out by the logical interpretation of Article 11. In the expression of an idea, two things are never contrasted unless it is considered that they really possess characteristics sufficiently different, and even perhaps contradictory, to enable them to be regarded as logically suitable to be contrasted; and when the expression has a legal significance, the need for the observance of this rule is greater than ever. It might even be said that Article 11 only recognizes two ways of exercising the powers granted to the Administration and that, consequently - when the method chosen is not that of public ownership - , the only form of concession which is permissible in Palestine for the exploitation of the natural resources of the country or the carrying out of public works, services or utilities, is that which takes the form of public control. In that case it would be still less possible to hold that this control would only be exercised in one particular way.

2. - Strictly speaking I might have spared myself the greater part of the foregoing observations, seeing that the hypothesis therein considered of a conception of public control entirely or partially obliterating the fundamental difference between [36] exploitation by the administration, or public exploitation, and private exploitation does not appear in the doctrine established and explained in Judgments Nos. 2 and 5.

All that I find in regard to this point in those judgments -and this might therefore seem to compel the Court not to deviate from them - is the following:

Firstly, that public control according to the meaning of this expression in the English text of the Mandate (selected by the Court for reasons which it is unnecessary to repeat here) does not cover the actual act of granting an undertaking or concession of public utility to an individual or company (i.e. the contract by which the administration leaves economic development to a private person instead of keeping it in its own hands), but only "the various methods whereby the public administration may take over or dictate the policy of" undertakings of the kind under consideration, which methods may "accompany" the grant of the concession.

Secondly, that this somewhat wide sense of public control has not been determined by any concrete definition (save that which I will consider shortly) nor by any enumeration of the methods covered by it. It remains open therefore to all possible interpretations as to the extent and as to the form in which the taking over or supervision by the administration may take place. One single observation in this respect has been made by the Court in Judgment No. 2, because it

particularly concerned the case of Mr. Rutenberg's concessions which were then under discussion. The observation in question is that concerning the connection between the *government control* stipulated in these concessions and their recognition as public utility undertakings. It seems almost useless to recall - because it is so well known - that recognition or a declaration of the character as a public service of a private enterprise of a very general nature concerned, for instance with the construction of communications (roads, railways, etc.) and the supply of water, is not necessarily accompanied by very pronounced forms of advice or of supervision over its management on the part of the administration. In many systems of legislation, it is rather a form designed to facilitate certain works of the undertaking or the fulfilment of certain necessary conditions such as the expropriation of land, the creation of servitude, etc. [37]

Thirdly, and this might also be regarded as a definition of the characteristic methods of public control in the sense of the Mandate, Judgments Nos.2 and 5 - and especially No. 2 which, as is generally known, relates to the jurisdiction - also establish two circumstances: that the High Commissioner for Palestine had to intervene in order to approve the statutes of the company to be formed by Mr. Rutenberg to operate his concessions, and that the Jewish Agency mentioned in the Mandate also played a part therein. The latter circumstance the judgment appears to regard - to use the language of the judgment - as a manifestation "of a programme of economic policy" which is referred to several times in the Mandate and is characteristic of that instrument from this point of view. And it is because it found that these two circumstances were present in the Rutenberg concessions of 1921 that the Court in 1924 held that there was in them an exercise of public control. It could certainly not follow from this that, apart from these methods of public control, there were no others which would also be covered by the general formula then adopted by the Court. It is, however, unnecessary, from the point of view of my main argument, to proceed further with the consideration of this question, since the observations I have just made seem to me sufficient. But I think it necessary to point out, as regards the part played by the Jewish Agency in the economic policy of Palestine, that this very fact has the effect of excluding any action on the part of the public administration which would destroy the interests and character of that Organization. The recognition of that Organization as a true public body, with the rights conferred on it by Article 4 of the Mandate, implies that it must be accorded privileged or exceptional treatment which would disappear if the control exercised by the

Administration were so extensive as to result in the substitution of the Administration itself for the Jewish Agency. In order to effect this substitution, the Administration might certainly base itself upon *public ownership* without having recourse to *public control*

3. - The doctrine in regard to public control which I have just indicated as flowing from Judgments Nos. 2 and 5 is not [38] substantially changed in the present judgment. The conception of control still means "a situation which, although it does not take the legal form of ownership, enables the public authorities to exercise *certain* powers normally inherent in ownership", or certain measures which may accompany the grant of the concession and give it the character of public control. At the same time this conception also covers, in the present judgment, the "programme of economic policy" referred to in Article 11 and several other articles of the Mandate. It should, however, be observed that the "certain powers" as also the "measures" alluded to, still cover a wide field which is only limited by an exception in regard to "the right reserved in certain circumstances to the authorities in respect of concessionary undertakings", with which I will deal later on. The general nature of the terms used only serves to emphasize the great variety of forms which these "powers" and "measures" may assume in practice ; and this is doubtless what the judgment means to convey when it says that "the question whether, in a given case, there has been an exercise of the full power to provide for public control *is essentially a question that can only be decided for each particular case as it arises*".

It would indeed be impossible to construe this sentence in any other way than as the recognition of the existence of many circumstances, other than those which in 1924 were found to exist in the Rutenberg concessions and which would be peculiar to each case. It would, in my opinion, be just as difficult to make a general assumption, covering all possible contingencies, to the effect that "the right reserved in certain circumstances to the authorities in respect of concessionary undertakings, either by means of administrative regulations or by clauses inserted in the concessionary contracts, to exercise powers of advice and supervision, *does not come* within the conception of 'public control' as used in Article 11". We will not pause to consider the fact that the insertion of these powers of advice and supervision in concessionary contracts is by no means essential, since it is a pure formality, as is shown by, amongst other things, the fact that in the case of the Rutenberg concessions of 1921, the powers of "public control" were set

out in the actual contracts. [39] As regards the scope of the powers of "advice and super-vision", it will suffice to recall the great variety of forms, which "these two powers" of the public administration may take in a private undertaking, and likewise the variety of forms which they actually take in modern administrative law, in order to arrive at the conclusion that, even only taking into account the definitions - very few in number - accepted by the judgment as regards "certain powers norm-ally inherent in ownership", the provisions of administrative law and of concessionary contracts, in all countries, create, and that very often, powers of advice and supervision of the same kind as those granted in the Rutenberg concessions of 1921. The line of demarcation between power of advice and super-vision constituting "public control" and that which does not do so (since such a line seems desirable), does not allow of a general affirmation which at all events would discard from the conception of "control" the greater proportion of the forms which advice and supervision may take and which are usual in modern concessions, but in a varying degree, and which reserve to the Administration powers normally inherent in ownership. The distinction between the circum-stances contemplated in the first of the quotations from the judgment, given at the beginning of this reasoning, and those contemplated in the second quotation, does not therefore correspond to a situation of fact separating two different domains in the relations between the Adminis-tration and private enterprises from the standpoint of the freedom of action of the latter or the intervention of the former.

After all, of all the forms and degrees which the public control mentioned in Article 11 may assume, the only ones which are of importance in each given case for the solution of the question of the Court's jurisdiction now under consideration, are those which would be incompatible with the rights of a previous concession, which must be maintained and protected in accordance with the obligations established by Protocol XII and reserved by Article 11 of the Mandate. For this fundamental reason, it was possible to say that a series of acts tending to set aside, and render impossible to carry out, certain concessions, in order to give free play to the Zionist [40] economic policy of the Mandate, may constitute a method of exercising public control. In my opinion this is certainly the case.

4. - In any case it is an accepted fact that, according to Article 11, the Administration must employ the powers which were conferred upon it in such a way as not to contravene the obligations which the Mandatory has accepted as regards the maintenance and respect of

formerly valid concessions. This undertaking cannot, in my opinion, be understood as meaning that it does not contemplate all the acts which might endanger the respect or the maintenance of the concessions indicated above. It cannot therefore end in the accomplishment of a single and formal act, representing the initial stages of respect and maintenance, but on the other hand it must include all the elements which would be necessary for the effacement of any form of contradiction between the application of a measure of public control relating to a concession of that kind and the respect and maintenance of another concession granted under the Protocol. That would be the case in the event of the signature of a contract for readaptation followed by acts which rendered the adaptation itself ineffective. It goes without saying that the consequences would be all the more harsh in the case where the contract for readaptation had annulled the former concession which had been the subject of such readaptation; because if by that fact the original concession totally disappeared while the one which had been substituted for it had been rendered incapable of execution, what then would remain of the rights of the concessionnaire ? It becomes clear that under any other assumption the guarantees provided for under the Protocol and affirmed under Article 11 of the Mandate would be entirely illusory.

It is thus obvious that every time we find ourselves confronted with such contradiction, we are entitled to say that the matter comes under the operation of Article 11 and consequently of Article 26 of the Mandate.

5. - In the case under consideration, this contradiction appears to have arisen with regard to the facts, the nature and interpretation of which are the subject of the dispute submitted to the Court by the Application of May 28th, 1927. [41]

Substantially, the grounds for the dispute are to be found in certain difficulties which the Palestine Administration and the Colonial Office had made to the carrying out in a reasonable time of certain conditions without which the concession granted to M. Mavrommatis as a readaptation of his former concession would be practically cancelled. The words "delays" and "hostility" employed in the conclusions of the Case of the Greek Government serve to show the nature of the alleged difficulties.

Whatever the nature of these acts may be, whether positive or negative, the Greek Government claims that they were due to the fact of the existence of a concession granted by the Administration to Mr. Rutenberg which the latter claimed covered one of the elements

considered by M. Mavrommatis to be essential for his concession. The fact that this allegation affected in a certain respect and to a certain degree the delays and the other acts of the authorities alleged by the Greek Government, is in my opinion clearly established. I am led to believe this is owing to two circumstances amongst others. The first amongst them is the suggestion made by the Colonial Office to Sir H. Greenwood on July 9th, 1926, to confer with Mr. Rutenberg with regard to the opposition set up by the latter with regard to the readaptation M. Mavrommatis had obtained on February 25th of the same year. This suggestion would certainly not have been made if the Colonial Office had not then thought that there was something more or less well founded in Mr. Rutenberg's opposition. Many of the acts of the Administration during the year 1926 may be explained on the assumption of this opinion. The second circumstance which goes to confirm what would otherwise be simple conjecture in what I have just stated is to be found in the explanation given by Counsel for the British Government in his reply made at the public hearing on September 10th last with regard to the delay by the authorities in deciding whether there had really been a contradiction, as alleged by Mr. Rutenberg, between his concession and that of M. Mavrommatis as far as concerns the use of the El-Audja source. It is impossible to judge now of the weight or of the justification of the grounds upon which, according to this explanation, the delays of the [42] authorities rested, because this question appertains to the merits of the case and not to the question of the jurisdiction of the Court to adjudicate upon those merits. But the fact of the existence of these grounds suffices for the question which the Court is now called upon to determine.

The essential facts for the purpose of reaching a decision are the following:

(1) The concession upon which Mr. Rutenberg's opposition was founded had been granted to him by the Administration in the exercise of its public control. As regards the original form of the concession of September 12th, 1921, the Court has already in its previous judgments stated its opinion. As regards the confirmation of the concession on March 5th, 1926 (clause 3 [A]), it is sufficient to say that it brought about no change and is confined to guaranteeing its maintenance. Moreover, the Court has recognized that this confirmation, which may certainly be defined as a final grant, is an act undertaken by virtue of the full powers provided for under Article 11 of the Mandate. It is thus in the same situation as the other concession of Mr. Rutenberg, which was the subject of dispute settled by Judgments Nos. 2 and 5.

(2) In 1924 the concession of September 12th, 1921, called "El-Audja. Concession", was not in contradiction with any of the previous valid concessions of M. Mavrommatis. Nor could there in 1926, it seems, have existed any contradiction with the readapted concessions of M. Mavrommatis, unless the El-Audja concession were to be interpreted as a monopoly over the waters of that source considered as having been necessarily granted to Mr. Rutenberg for the purpose of generating the supply of electrical energy and thus preventing the use by M. Mavrommatis of these same waters which were considered technically to be necessary for the sufficient supply of the town of Jerusalem and consequently for the carrying out of the concession itself. This eventuality was not provided for in the Rutenberg concession of March 5th, 1926, because that concession, although subsequent to M. Mavrommatis' readapted concessions (of February 25th), only referred in clause 3 to one of the latter such as it was granted in 1914 by the Municipality of Jerusalem for the supply of electricity and electric tramways, a concession which did not refer to the [43] waters of El-Audja, and the Rutenberg concession of September 12th, 1921, and was confined to guaranteeing them both against the possible and inconsistent application to them of the concession granted to the Palestine Electric Corporation. Nothing was thus said with regard to the water concession of Jerusalem granted to M. Mavrommatis, although on March 5th the possibility might have been foreseen of a conflict between the El-Audja concession of Mr. Rutenberg and this concession of M. Mavrommatis, owing to the fact that under clause 6 of the contract of February 25th (a clause which is a typical clause of readaptation, namely, of bringing an undertaking into conformity with the new economic conditions of the country) "a source or sources" was mentioned capable of providing not less than 6,000 cubic metres of water per day and up to a maximum of 11,000, and that technical opinions had already been given that this condition could not be fulfilled unless the El-Audja waters were utilized. The fact that at the time of the grant of an electricity concession a water concession, the property of Mr. Rutenberg, had been reserved, would have made possible without any hardship a reservation also of the concession for the supply of water newly granted to M. Mavrommatis.

(3) Although it may be admitted that in form there was no express incompatibility in the terms of the two concessions of Rutenberg and the two concessions of

Mavrommatis, Mr. Rutenberg endeavoured to question the matter. All his opposition during 1926, all his attempts to approach M. Mavrommatis in order to get rid of him in the Jerusalem under-takings, all his threats with regard to M. Mavrommatis and even to the British authorities, were based on the claim that his concession of September 21st, 1921, finally granted on March 5th, 1926, conferred upon him a monopoly over the El-Audja waters and on that ground he could prevent the carrying out of the Mavrommatis concession which depended upon the approval of the plans in which the El-Audja waters were included as indispensable.

We are therefore confronted with a concession - that of Mr. Rutenberg - granted, as has already been stated, in the exercise of public control and which had become incompatible with another concession - that of M. Mavrommatis - which [44] belongs to the type of concessions coming under the guarantee of international obligations provided for under Article 11 of the Mandate. The fact, recognized some months later by the authorities, that Mr. Rutenberg's allegation was ill-founded in law, does not deprive that allegation of being in the nature of an obstacle which had effectively been in the way of M. Mavrommatis' concession during a certain time, a time sufficient to produce the disastrous economic consequences of which the Greek Government complains. If Mr. Rutenberg's allegation had been well-founded, it would have produced exactly the same result with this difference: that these results would not have come to an end at a certain date in the way in which they have done in the present case. But it must again be repeated that the time during which opposition was made was sufficient to bring about the vexatious consequences for the Mavrommatis concession which constitute the subject matter of the discussion between the Parties.

The difference between an allegation founded in law, and another which is not, but which has the same effect, is not sufficient in a case such as the present one to destroy, in the facts which have taken place, the characteristics necessary for founding the jurisdiction of the Court, that is to say, in order to consider them as being included in the category of facts which, being in themselves a direct exercise of public control by the Administration or resulting from such a previous exercise, lead in practice to incompatibility with the obligations concerning the respect and maintenance of the concessions guaranteed under Protocol XII. A mere external form should not be sufficient. It does not appear to be in conformity with juridical common sense to consider that the only method of acting in a manner contrary to and of infringing the respect and

maintenance of a concession is the existence, in another concession granted in the exercise of public control, of a clause which directly contravenes the rights of the earlier one or which would give to the concessionnaire of the second the possibility of contravening the other. In the 1924 case it was the existence in the Rutenberg concessions of Article 29, the application of which led to the failure in respect for and maintenance of the concessions of M. Mavrommatis. It should be recalled that Mr. Rutenberg [45] did not make use of this article in 1921-1924. However, the mere existence of that article and the effect which it seemed to produce on the attitude of the Palestine and British authorities with regard to the rights of M. Mavrommatis is sufficient for the Court for the purpose of determining that, in the practical case under consideration, there was a valid reason for ruling that it had jurisdiction.

The identity between this situation in 1924 and that existing in the present case seems to me to be so strong that it would be impossible in my opinion to justify a decision to the contrary:

As concerns the significance to be attached to the acts now imputed to the Palestine and British authorities in connection with the interests represented by the Mavrommatis concession, regard must also be had to the well known fact that law is not an abstract and merely speculative science. On the contrary, it is a practical force which reacts on human life, and generally with a view to the achievement of practical aims. These aims, in the case of rights over property, assume an essentially economic character. If these aims are affected by facts which result in an irreparable injury, those facts will not disappear simply through the intervention of a tardy declaration to the effect that they are, it is claimed, not legally justified. That is exactly what the Greek Government says in the present case and what the British Government denies. The Court cannot give a decision at the present stage of the proceedings, as this question - in regard to which moreover I make all necessary reservations - belongs to the merits of the case. But it is precisely for this reason and because of the conditions in regard to the existence of public control and the conflict between one concession which falls within the scope of that conception and another which is covered by the international obligations accepted by the Mandatory, that it appears to me to be established that the Court should reserve the case for decision on the merits.

I do not wish to terminate without explaining that in all the foregoing, I only have in mind the Court's right to declare itself to have jurisdiction. It is by reason of my respect for this right, which I consider made out in the present case, that I have dissented from the judgment. I do not intend my opinion to have the slightest bearing upon the opinion the Court might adopt

(or that I might adopt myself) in [46] regard to the merits of the case, that is to say, the question whether there has really been a violation of international obligations as regards the responsibility of the British authorities, if the Court were to hear that question, nor to prejudge the solution of that question in any way in so far as I myself am concerned. Just as Judgment No. 2 did not and could not decide this question in the case of the application of 1924, I think that a decision in favour of jurisdiction in the case now before the Court would also be incapable of deciding in advance the case on the merits, just as, moreover, a decision against jurisdiction, such as the present judgment, could in no case be supported upon an opinion to the effect that, contrary to the contention of the Greek Government, there has been no violation by the British Government of its international obligations.

6. - Having regard to the reasons for my opinion, based on the questions raised by Article 11 of the Mandate, I do not think it necessary to consider the other question whether the case, indicated in Judgment No. 5 (page 26) in regard to the possibility of deciding disputes concerning the application of Articles 4 and 5 of Protocol XII without the necessity for a fresh agreement between the Parties, has or has not arisen. I will confine myself to saying that, in my opinion, it would have been possible to argue this point, if it had been thought advisable to do so.

[47] Dissenting Opinion by M. Caloyanni.

[*Translation.*]

I regret to state that I am unable in the case submitted to the Court to concur with the opinion of the majority of my colleagues.

The Court has based its judgment upon the second argument put forward by the British Government in support of its objection to the jurisdiction, according to which argument it is claimed that, in so far as the Greek Government has shown that the British Government, by preventing the carrying out of the concessionary contracts entered into by the Palestine Administration with M. Mavrommatis on February 25th, 1926, had not conformed to the international obligations accepted by the Mandatory within the meaning of Article 11 of the Mandate and consequently had committed a breach of the terms of that article, the British Government puts forward, as against this, that the Court, by virtue of Article 11 of the Mandate, has no jurisdiction to adjudicate upon an alleged breach of the international obligations of the Mandatory otherwise than as the result of the exercise the Palestine Administration had made of its full powers, in order to decide as to the public ownership or control of all the natural resources of the country, or of the public works, services and utilities established or to be established therein ; now there has been no exercise of these full powers, since no right inconsistent with those of M. Mavrommatis has been granted to Mr. Rutenberg ; and the fact that there was delay in approving the plans, even if this delay were due, as the Greek Government alleges, to Mr. Rutenberg's hostility or that of certain British or Palestine officials towards M. Mavrommatis, cannot be considered as an exercise of the said powers.

The Greek Government had, in its Case submitted to the Court on June 4th, 1927, concluded as follows:

1° that by delaying, regardless of the undertakings of the High Commissioner for Palestine, until the month of December, 1926, the approval, which should have been given in August, of the plans deposited by M. Mavrommatis on the [48] preceding May 5th, and by thus preventing the putting into execution of the concessionary contracts concluded on February 25th, 1926, the British Government, as Mandatory for Palestine, has not complied with its international obligations under Article 11 of the Mandate;

2° that by these delays and by the hostility displayed towards him by certain British authorities - which delays and hostility were due to Mr. Rutenberg's opposition - it was rendered materially and morally impossible for M. Mavrommatis to obtain the financing of his concessions, and that he has thus unjustly suffered damage, for the reparation of which the British Government must pay him compensation.

The Greek Government estimates this compensation at the sum of £217,000 to be paid by the British Government, together with interest at 6 % from the filing of the application until the date of payment.

Although the discussions therefore dealt with all the questions raised by the British Government in its Preliminary Objection to the jurisdiction, the Court did not go beyond the question which related to the application and interpretation of the meaning of Article 11 of the Mandate and the inter-national obligations which resulted therefrom.

The two preceding judgments of the Court determined certain questions relating to the interpretation of Article 11 of the Mandate, and at the same time established the relationship between Protocol XII of Lausanne and that article.

In these two judgments it was a question of defining the jurisdiction of the Court in the first place, and then of considering the violation of international obligations alleged by the Greek Government.

As regards jurisdiction, the Court had declared that, indeed, certain concessions granted to Mr. Rutenberg had been granted by virtue of the full powers which the Palestine Administration were entitled to exercise, and that, in granting these concessions, the Mavrommatis concessions, whilst not coming within the terms of Article 11 themselves, came, however, within the jurisdiction of the Court by virtue of Article 26 of the Mandate ; because, indeed, it was a question of inter-national obligations accepted by the Mandatory and provided for under Protocol XII of Lausanne, obligations which the [49] Palestine Administration was obliged to respect subject to the rich penalty of disregarding and consequently of violating such obligations which would involve reparation to M. Mavrommatis.

As a result of these judgments, the Court ordered the readaptation of the Mavrommatis concessions, having noted that the Rutenberg concessions constituted a violation of the international obligations accepted by the Mandatory, and this principally owing to two facts which were: the grant of certain concessions to Mr. Rutenberg, namely, the concession of

September 21st, 1921, and that of September 12th, 1921, both of which comprised an article (29) in which the Court found one of the grounds on which it rested its jurisdiction. The second fact related to the close connection which existed between the exercise of the full powers which Article 11 granted to the Palestine Administration with regard to public control and Zionism, an organization recognized by the Mandate and intended to collaborate towards the development of the country. The Court held, however, that as regards the readaptation, it was upon an agreement entered into between the Parties in relation to the application of Article 4 or Article 6 of the Mandate that it rested its jurisdiction.

In the present case the question of the interpretation of Article 11 of the Mandate is again raised in relation to the Court's jurisdiction.

* * *

Article I of the Mandate runs as follows:

"The Mandatory shall have full powers of legislation and of administration, save as they may be limited by the terms of this. Mandate."

Article II:

"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 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. The Administration may [50] arrange with the Jewish Agency mentioned in Article 4 to construct or operate. any public works, services and utilities, and to develop any of the natural resources of the country ."

Article 4:

"An appropriate Jewish Agency shall be recognized as a public body for the purpose of advising and cooperating with the Administration of Palestine in such economic, social and other matters ... and ... to *assist* and *take part* in the development of the country",

always subject to the control of the Palestine Administration.

From a study of these texts it clearly appears that the Zionist Organization is so closely connected with the Palestine Administration that for purposes of developing the country as regards economic questions and as regards works of public utility, it appears to be unable to do without this Organization, unless it consented. It is true that in the French text of Article 11 the indefinite expression *pourra* occurs, but that does not exclude such an obligation, because it refers to the Administration and not to the Jewish Organization; the words contained in Article 4 are imperative as far as concerns the co-operation of the Jewish Organization in all economic questions and those concerning the development of the country; indeed, the words employed in the French text are *aura le droit* to do so, the only restriction being, in relation to all these matters, that the Palestine Administration reserves the right of control.

It may thus be seen that any action by the Palestine Administration in its relations with Zionism, and one may add that of persons proved to have intimate relations with the Jewish Organization, assumes a special character and legal significance; if it is true that the Palestine Administration has reserved the right of control, it follows that this control can only be the control which the Court has declared in its two preceding judgments as being the forcible cancellation or interference in concessions granted by the Administration.

Moreover, the full powers which that Administration exercises are not the full powers of an ordinary public administration; [51] they are powers within the meaning always of public control because the purpose of the Mandate is the development of the country, either as regards natural resources, or as regards public works and utilities which have to be undertaken in the public interest. As a result of these preliminary considerations, it becomes necessary to investigate certain points with regard to the nature and purpose of the Mandate.

It is by reference to the spirit of Article 22 of the Covenant of the League of Nations that one finds the essential element underlying the Mandate from the point of view of the full powers in question ; indeed, it is upon the idea of "development" that the principles of Article 22 are mainly based; whenever the exercise of the full powers is therefore concerned, the Administration has an *obligation* to exercise them, because in the development of the country a great deal of its mission and all its activities are comprised. It could not be otherwise, having regard to the responsibility voluntarily assumed by the Mandatory when accepting the Mandate;

a limit, however, was placed upon the exercise of these full powers: it was the reservation made with regard to the international obligations accepted by the Mandatory; clearly, this was an application of a principle of international law as against which the powers granted by the Mandate could not be applied; this *tutorship* had to be determined without, however, for the purpose of its exercise, granting powers which would infringe upon the principles of international law from which international obligations arise. Indeed, the concessions granted prior to October 29th, 1914, had to be maintained and this principle of international law had to be respected. The terms of the treaty guaranteeing the maintenance of this principle on every occasion on which the full powers of control would be exercised, must contemplate not only *positive* acts but also *negative* acts, in this sense that the Palestine Administration would be obliged to respect international obligations accepted by it, not only when it granted concessions, but also when it exercised its powers in a manner which would cause injury to the concessionnaire ; indeed, it could not be otherwise because it would confer upon the Palestine Administration powers of action and at the same time give it complete liberty every time that acts were concerned which constituted, [52] as regards their application or their effects, a failure to observe these international obligations; and this is all the more true since the purpose itself of *safeguarding* public interests is closely connected with the idea of *control*; the Administration must see that all the natural resources, the use of which it allows, and all public works and utilities, the carrying out of which it authorizes, should tend to safeguard the interests of the community and the development of the country. And, as has been stated, the Palestine Administration is not by the nature of the Mandate itself an administration similar to others. It has a purpose, expressed at the time of the origin of its rights, which differs from that of any other public administrations, in the sense that it could not have acted if there had been no Mandate or this *tutorship*, which was conferred upon it by Article 22 of the Covenant. Owing to the nature *sui generis* of the Mandate and owing to its purpose or special mission of tutorship, a tutorship which dominates the whole of the Mandate, the exercise by the Administration of its full powers becomes *compulsory*, whether it is a question of deciding with regard to a public ownership or public control ; in other words, it is obliged, in order to safeguard the interests of the community, to decide whether it has to exercise these full powers by the method of ownership or by that of control ; hence, the words "provide" or *décider* have a specific and identical legal meaning. Similarly, the words "ownership" and "control" cannot be separated

from the word "public". Furthermore, the words "public control", whilst supporting the restricted meaning attributed to sequestration or intervention by the Court, acquire an obligatory character. That is to say that the Administration, in deciding to exercise its full powers, *must* decide whether it is going to exercise them by sequestration or by intervention; it is obliged to do one or the other.

It follows therefore that in applying these legal conceptions we cannot assimilate the Palestine Administration to an ordinary administration, and we must refuse to confer upon it this ordinary control and apply in its relation a form of control within the meaning the Court has laid down ; consequently, in regard to concessions, every *positive* or *negative* act which the Administration accomplishes in the exercise of its full powers [53] is an act of *public control* within the meaning above indicated. In exercising, therefore, this public control, the Administration must respect the international obligations which it has accepted and which constitute a restriction upon its freedom of action whenever it is a question of determining public control.

In applying these conceptions to Article 11 of the Mandate, this article cannot go beyond the purpose and the nature of the Mandate and the purpose which the Covenant has conferred upon the Mandate. The connection between the provisions of Article 22 of the Covenant and those of the Mandate with regard to the safeguarding of the interests of the community is close and inseparable; the development of the peoples cannot be separated without including one of the essential elements of that development, namely, the economic development of the country. It is a tutorship *sui generis* which the Mandate has imposed upon the Mandatory, who must render a full account of this tutorship. Moreover, this Mandate is a complex tutorship, and one of the aspects of this complexity is the one which relates to the Jewish Organization. This Organization has the *right* to assist and participate in the development of the country ; in other words, the Administration, although tutelary, has a necessary collaborator in the accomplishment of its mission; the only right which the Administration has in relation to this assistance and to this participation in the development of the country is the right of control. And when, later on, El-Audja will come to be considered, the importance of Mr. Rutenberg will be observed, owing to his indisputed ties with the Jewish Organization. This tutorship thus constitutes a legal element as regards the mandatory Administration, which is entirely different from that of any ordinary public administration.

In the light of these principles, what relation does Protocol XII of Lausanne bear to Article 11 of the Mandate?

Protocol XII takes the place of Article 311 of the Treaty of Sévres. The Court in its Judgment No. 2 states: "Later when it be-came 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 for Pales- [54] tine, 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 the provisions which, in the future peace treaty with Turkey," (in the present case the Treaty of Lausanne and its protocols), "were to take the place of the provisions of Article 311 of the Treaty of Sévres."

The Court, after quoting Article 311 of the Treaty of Sévres, continues as follows in its Judgment No. 2: "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 Man-date, certainly include the obligations arising out of Protocol XII of the Lausanne Treaty."

And after having stated that 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", the Court adds: "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."

The Court adds that these international obligations which are stated and established by Protocol XII of Lausanne only fall within the scope of Article 11 and set in operation the jurisdiction of the Court under Article 26 if the Mandatory has exercised his full power to provide for public ownership or control. By applying the principles set out above, that is to say

those relating to the special character of the Mandate, we arrive at the conclusion that Protocol XII always falls within the scope of Article 11 of the Mandate, because the Administration always exercises its full power to provide for public ownership or control. [55]

Moreover, a natural consequence of the foregoing is that there was no need for Protocol XII to state what tribunal should hear disputes arising in connection with the application and interpretation of the Mandate; for being always covered by Article 11, the Court would necessarily have jurisdiction and thus there would be no need for an agreement between the Parties to decide which article, 4 or 6, would be applicable, because readaptation or compensation, being international obligations, in the sense indicated above, would come within the scope of Article 11, and necessarily involve the jurisdiction of the Court.

* * *

We thus stated certain principles which, whilst maintaining the principles in regard to public control established by the Court's judgments, nevertheless, both by their nature and object, extend the sphere of application to cover the circumstances of the present dispute. For it is important to begin by establishing a parallel between the cases which led up to the two previous judgments and the present case.

Can it be said that the present case is independent of the preceding ones ?

The present case concerns, on the one hand, concessions granted to M. Mavrommatis and, on the other hand, concessions granted to Mr. Rutenberg. Furthermore, the concessions granted to M. Mavrommatis constitute the execution of the Court's judgment ordering the readaptation of M. Mavrommatis' concessions of 1914. We are therefore in point of fact concerned with the execution of the international obligations which the Palestine Administration was bound to respect by maintaining the concessions obtained by M. Mavrommatis from the State to which the British Government succeeded as succession State and at the same time as Mandatory. From these points of view, therefore, it is necessary to consider what is the relation in law between the preceding cases and the present one. [56]

* * *

The new contracts, both dated February 25th, 1926, have been concluded between the Palestine Administration and M. Mavrommatis. Have these contracts been granted to M. Mavrommatis in the exercise of the full power belonging to the Palestine Administration ? Are the contracts granted to Mr. Rutenberg on March 5th, 1926, incompatible with M. Mavrommatis' new contracts? Does readaptation in itself constitute an international obligation to which the Mandatory must give full effect ?

From the principles developed above, it follows that the contracts of February 25th, 1926, granted to M. Mavrommatis, were granted in the exercise of the full power preserved by the Palestine Administration, because they concern the grant of a concession for works of public utility and also the utilization of natural resources. Has this full power been exercised by the Administration to provide for the public control both of natural resources and of works of public utility ? According to the principles set out above, there can be no doubt as to this, for the Palestine Administration is under an obligation to exercise its powers of public control owing to the special nature of the public administration ;. the protection of the interests of the community as regards the development of the country is of a peculiar character owing to the nature of the Mandate. The Administration is not free to act as an ordinary administration could. It must exercise particular care because it has to render account of the manner in which it protects the interests of the community; this it has to do not only under Article 11 but also in accordance with the spirit of Article 22 of the Covenant of the League of Nations.

Again, the Palestine Administration, being closely linked with the Zionist Organization, is obliged, under Article 4, to co-operate with the Jewish Agency in regard to all economic questions and questions concerning the development of the country. But the question of the development of the country is inseparable from that of works of public utility, just as it is also inseparable from questions in regard to the natural resources of the country; when therefore concessions had to be granted to [57] M. Mavrommatis which the Administration was obliged to maintain under Protocol XII, it was at the same time bound to remember the interests of the Jewish Agency and, consequently, also the concessions it had already granted to Mr. Rutenberg. The close connection therefore existing between these concessions of Mr. Rutenberg and those

of M. Mavrommatis is precisely the Palestine Administration's obligation to confirm what it had already granted by the agreements of September, 1921. This connection obliged the Palestine Administration to do nothing conflicting with its obligations in respect of the Rutenberg concessions which it had already granted and with which the Zionist Organization was closely associated.

The foregoing simply amounts to this: when the question of the plans and their approval came up, the point which irked the Palestine Administration was that the El-Audja source had been granted to Mr. Rutenberg, and this source therefore became the link which established the close connection between the Rutenberg concessions and those granted to M. Mavrommatis on February 25th, 1926.

There was an incompatibility between these contracts, owing to the fact that the former conflicted with M. Mavrommatis' interests, and from this very fact arose the international obligation of the Palestine Administration not to do anything which might prevent the application of the Mavrommatis contracts, which consisted in complete and effectual readaptation, readaptation which was ordered by the Court and which the representative of the British Government promised, should be effected not only without difficulty but under its especial protection. There is no doubt that readaptation, being a condition laid down by the Protocol of Lausanne, constitutes an international obligation; this obligation falls under Article II of the Mandate when the full power to provide for public control has been exercised. When there is a question of readaptation, it is necessary to refer to the contracts whereby such readaptation has been effected ; since the Palestine Administration exercised public control when granting the concessions, readaptation as regards every stipulation and condition comprised therein, becomes an international obligation, owing to this exercise of the power to provide for control of natural [58] resources and of works of public utility. In this respect the Administration, at the time of the readaptation, must do all in its power to make this readaptation effectual and must not allow anything to impede it. This therefore amounts to saying that when, in connection with readaptation, there are certain conditions to be fulfilled, these conditions must be entirely protected by the Administration. At the same time the Administration must *effectually* contribute towards their fulfilment in order, that the readaptation may be properly carried out and to render possible the *effective* operation of the concessions granted. Accordingly, if in one of the

conditions of readaptation there were an essential point requiring acceptance or refusal, that point must be accepted: refusal would engage the responsibility of the Palestine Administration towards the concessionaire: therefore there would or would not be a breach of international obligations in respect of the plans which were to be approved within a fixed period, according to whether the Palestine Administration did or did not approve them within that period. Again, if it proved impossible to approve the plans owing to some particular circumstance, for instance, owing to discussions raised in connection with some source of water supply (in this case the El-Audja), this very circumstance would constitute the factor requisite for determining the responsibility arising under the international obligations accepted by the Mandatory.

Turning, therefore, to the present case and examining the Rutenberg concessions, it will be seen that the concessions of March 5th, 1926, considered from the standpoint of readaptation and in connection with the approval of the plans, constitute a factor which necessarily compels the mandatory Power to accord to the Mavrommatis concessions a full measure of the protection to which they are entitled by reason of the international obligations accepted under Protocol XII and the exercise of public control constituted by the grant of the Rutenberg concessions of March 5th, 1926, in which it was undertaken to respect the Rutenberg concession of September 12th, 1921, which was described as the "El-Audja Concession".[59]

* * *

On a closer consideration of the facts of the case, it will be seen that the Mavrommatis contracts of February 25th, 1926, were entirely dependent on the fulfilment of two conditions: the approval of the plans and the financing of the concessions. These two conditions were vital to the readaptation, which formed the subject of the concessionary contracts.

It is true that only one of these conditions was an essential part of the contracts, but the two were so closely inter-connected that it may be said that they were both vital to the contracts. It was impossible to separate the question of the time-limit for approval from that of the financing of the concessions, for the very simple reason that if the plans were not approved within the times fixed, the financial arrangements were bound to be detrimentally affected, and this circumstance was one of the main causes of the ill-success of the attempts to form the

company for the carrying out of the works of public utility for which M. Mavrommatis held a concession.

In this connection, it will be well to recall what has been said in regard to M. Mavrommatis' new contracts. It has been maintained that they destroyed the connection between the 1914 concessions and the international obligations arising under the Protocol of Lausanne which brought them within the scope of Article 11 of the Mandate, giving the Court jurisdiction; it has been said that these are new contracts concluded between the present Palestine Administration and M. Mavrommatis; consequently, they have been substituted for the former ones and they have caused the latter to be deprived of the protection to which they were internationally entitled. It is worth while considering this more closely in order to see whether they are a continuation of the old contracts and whether no link connecting the present situation with the previously existing one has been broken. Now these contracts state categorically that the concessionaire finally and irrevocably abandoned his right to the previous concessions. From this express renunciation it has been deduced that the new contracts have been substituted for the old [60] ones and consequently that they are entirely new in character. But it is not possible to dispute the fact that M. Mavrommatis, in these contracts, has always had in view the readaptation of his old concessions, that is to say, firstly, their *maintenance* and, secondly, their *putting into operation* after readaptation to the new economic conditions which arose after the war. M. Mavrommatis, as he has said from the outset, and as was stated in the first correspondence exchanged on the question, did not consider the signature of the new contracts as implying anything except the adaptation of the concessions to the economic conditions, a view which, moreover, must have been shared by the British Government; for it is impossible to imagine that the British Government, which had promised to protect M. Mavrommatis against any other concessionaire, would have itself changed the character of the contracts and substituted for them contracts which no longer corresponded either to the international obligations accepted by it, or to the Court's judgment in regard to which it had not only declared its readiness to comply, but also that it would assist in the readaptation of these very contracts; it follows therefore that both Parties were thinking the whole time of the old concessions and of the rights of M. Mavrommatis protected by Protocol XII and Article 11 of the Mandate. These expressions, therefore, of categorical renunciation can only have their normal meaning, that is to say, that he is abandoning his rights under the clauses of the old contracts and that new clauses

are being substituted for the old ones; but it is indisputable that it remained understood that these new contracts only contemplated readaptation and that, if this were not effected, the whole arrangement became purposeless, and consequently the former situation would be reestablished with all its legal consequences. In this connection it is not indeed necessary to construe the meaning of the words "in consideration" in English law; it is a question of expressing the leading idea which is readaptation. The two Mavrommatis contracts of February 25th, 1926, contain the following:

"And whereas it is necessary by reasons of the provisions of the Concessions Protocol attached to the Treaty of [61] Peace . . . signed at Lausanne on the 24th day of July 1923 to put the provisions of the said Agreement into conformity with the new economic conditions";

and in actual fact this readaptation meant nothing else than the maintenance of the old concessions.

If therefore, in the course of readaptation, circumstances arose which, in themselves, contravened the international obligations accepted by the Mandatory, it becomes clear that the latter could be held responsible for their violation ; at the present stage of the proceedings, attention cannot be devoted to this violation or to a more considered interpretation of the contracts, as this question belongs to the merits of the case. Nevertheless, as regards the Court's jurisdiction, it is common ground that readaptation is the main object of both Parties. Therefore the objection raised in regard to the renunciation of the previous concessions, being a question concerning the merits, and because it relates to the existence or non-existence of the contracts, cannot validly be supported.

The important point at the present stage of the case is to ascertain whether readaptation has or has not taken place. It is undeniable that this readaptation has not taken place and that consequently the old concessions have not been maintained, for readaptation was a condition essential to their maintenance; from this point of view, therefore, the position is the same as it was before the signing of the contracts and, therefore, it is legitimate to say that it was necessary to ascertain whether the Palestine Administration had respected its international obligations.

In continuation of what has been said above, the Administration, having expressed its full power to provide for public control, has failed to observe its obligations by reason of the fact that it has not readapted the concessions as it was bound to do.

This failure to effect readaptation is closely connected with the objection raised by Mr. Rutenberg in connection with the El-Audja. If he had not made this objection, readaptation would certainly have taken place, and it would seem that, once readaptation had been completely and finally effected, the concessionary contracts would have entered upon the [62] stage of execution and would have been applied in their entirety; then only would it be possible to discuss the contracts and to raise some other objection to the Court's jurisdiction, an objection which might be based on the following point : would the concessions, in spite of readaptation, still retain their international character under the terms of Articles 11 and 26 of the Mandate and the Protocol of Lausanne ? But this is not the time for the Court to consider these questions, which are outside the scope of the present deliberations.

* * *

It was also contended that Mr. Rutenberg's opposition to the use of the El-Audja source by M. Mavrommatis did not establish incompatibility between the concessions granted to M. Mavrommatis and those granted to Mr. Rutenberg on March 5th, 1926; that, consequently, the present case was of a different character to that of the cases which were previously determined by the Court. On a closer scrutiny of this objection, one will observe that there need not be such an incompatibility in all cases; in the preceding cases there had been such an incompatibility because there was an opposition between the Rutenberg concessions and the Mavrommatis concessions. The reason for this opposition was not the same in the present case; but this did not prevent another reason than the one given in the previous judgments becoming the subject upon which the incompatibility between the two concessions was based. Indeed, had the British Government not granted the El-Audja concessions to Mr. Rutenberg before approving the plans of M. Mavrommatis, the grant of the concessions to M. Mavrommatis would have constituted a good title as against Mr. Rutenberg for the use of El-Audja; that is to say that Mr. Rutenberg would have found it impossible to delay the approval of the plans and M. Mavrommatis would have been fully placed in a position to carry out his concessions. Whereas the British

Government did just the contrary; whilst it was discussing the plans with M. Mavrommatis, it simultaneously granted concessions to Mr. Rutenberg on March 5th, 1925, which included in Article 3 (A) a confirmation of the concession of [63] September 12th, 1921; this concession had already been declared to be the basis upon which the jurisdiction of the Court rested in the first case, because it had been granted for two reasons: firstly, because it constituted an exercise of the full powers to provide for public control, and secondly because it was the result of the close collaboration of the Zionist Organization and the Palestine Administration; to the achievement of what practical and material ends, so far as concerns the readaptation, the approval of the plans and the financing of the undertaking was the reservation made in Article 3 (B) of the Rutenberg concession of March 5th, 1926, directed, in which reservation it is stated: "A concession granted by the Jerusalem Municipality in the year 1914 for electric supply or electric tramways" and in which it must be understood that M. Mavrommatis was in question, although he is not mentioned by name? The Palestine Administration gave notice of Mr. Rutenberg's concessionary contracts of March 5th, 1926, only in March, 1927, one year after those of M. Mavrommatis, who, being unaware of the grant of the concessions, had been struggling with Mr. Rutenberg, so much so that the latter had threatened the British Government with seeking a remedy for his claims in the municipal courts; moreover, the British Government has itself later recognized by the approval of the plans not only that M. Mavrommatis was entitled to make use of the El-Audja source, but it also formally recognized that Mr. Rutenberg had no right to oppose such use. It thus becomes evident that the Palestine Administration, by its own acts of recognition, had *negatively* in the exercise of its full powers of control prevented the approval of the plans in the appointed time and consequently had prevented the readaptation of the concessions, which it was obliged to readapt. It would have acted *positively* by approving the plans in the period fixed in the new contracts of the Mavrommatis concessions whilst ignoring Mr. Rutenberg's threats, and besides, it would have acted *positively* if it had given instant protection to M. Mavrommatis' rights by suspending the grant of new concessions to Mr. Rutenberg until the readaptation had been completed and the concessions had been placed in a complete state of executory applicability. Quite to the contrary, the British Government, in [64] this case as in the previous cases, instead of taking prompt action by *positive* acts, preferred to adopt a method of reconciliation by asking M. Mavrommatis to come to an agreement with Mr. Rutenberg. The other way would have been a *positive* act by the Palestine Administration, an act which would have

consisted of immediately approving M. Mavrommatis' plans and, in the event of Mr. Rutenberg's opposition, referring him to M. Mavrommatis so that he should come to an understanding with him and, failing such understanding in the time prescribed for the approval of the plans, approving the plans and then dealing with Mr. Rutenberg's claims; being protected by international obligations, M. Mavrommatis' rights should have had priority over Mr. Rutenberg's private rights even if these might have been connected with the Zionist Organization. Therefore, in exercising the full powers to provide for control over the natural resources, that is to say the El-Audja source, and for the public works and utilities which were dependent upon the El-Audja source, the Palestine Administration has, by adopting a *negative* attitude, made the readaptation impossible because such readaptation depended upon the approval of the plans and that the financing of his undertaking in turn depended upon that approval.

From the preceding it is evident at the present stage of the proceedings, that, *prima facie*, the acts of the Palestine Administration come under Article 11 of the Mandate, which, owing to its relationship with Article 26, confers jurisdiction upon the Court.

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It is for these reasons that I am of opinion that the Court has jurisdiction.