AD HOC ARBITRATION

AMBATIELOS CLAIM (GREECE, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND)

AWARD

06 March 1956

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Award.................................................................................................................................................................................................................. 1
The facts leading up to the present case are as follows:

On 17th July 1919, the Greek shipowner Nicholas Eustache Ambatielos concluded with the United Kingdom Government represented by Sir Joseph Maclay, the Shipping Controller, a contract for the purchase of nine steamships, then building in the dockyards of Hong Kong and Shanghai, at a price of £40 per ton for vessels of 5,000 tons and of £36 per ton for vessels of 8,000 tons, the total purchase price amounting to £2,275,000.

The negotiations resulting in this contract were conducted on behalf of the United Kingdom Ministry of Shipping by Major Bryan Laing and on behalf of Mr. Ambatielos by his brother, Mr. G. E. Ambatielos.

Paragraphs 2, 3 and 7 of the contract of 17th July, 1919, which is set out in full in Annex 2 to this award, contain the following provisions:

2. The purchase money for the said steamers and engines shall be paid as follows:

A deposit of ten per cent in cash payable as to £100,000 thereof upon signing this Agreement and as to the balance of the said deposit within one month thereafter and the balance in cash in London in exchange for a Legal Bill of Sale or Builders’ certificate within 72 hours of written notice of the steamers’ readiness for delivery being given to the Purchaser or his Agent, such delivery to be given at the Contractor’s yard.

3. The steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor from the Contractors.

7. If default be made by the Purchaser in the payment of the purchase money the deposit shall be forfeited and the steamers may be re-sold by public or private sale and all loss and expense arising from the re-sale be borne by the Purchaser, who shall pay interest thereon at the rate of five pounds per cent per annum. If default be made by the Vendor in the execution of Legal Bills of Sale or in the delivery of the steamers in the manner and within the time agreed, the Vendor shall return to the Purchaser the deposit paid with interest at the rate of five pounds per cent per annum.

2 See p. 138.
The Greek Government claims that the words "within the time agreed" indicate that definite delivery dates had been fixed, whereas the United Kingdom Government claims that the contract is complete without any reference to special delivery dates and denies on various grounds that any delivery date had been agreed upon.

The Greek Government, in support of its claim concerning fixed dates for delivery, has produced a letter of 3rd July, 1919, from Mr. N. Ambatielos to his brother in London giving him written instructions for the transaction with the Ministry of Shipping, including fixed dates. In a telegram of 12th July, 1919, to the Shipping Controller, confirmed by a letter of the same date, Mr. Ambatielos stated that the only person authorized to act for him was his brother, Mr. G. Ambatielos, who had written authority to buy seven B. type ships “building in Hong Kong on certain conditions set out in the authority given to him”.

One of the B. type ships not being available, the written contract finally signed was concerned with six B. type and three C. type ships, without any dates being inserted. When Mr. Nicholas Ambatielos found that the contract did not contain specific dates he, according to his subsequent evidence, told his brother that he was going to repudiate the contract. However, Major Laing called on Mr. Ambatielos in Paris at the end of August, 1919, and assured Mr. Ambatielos that the ships would be delivered on dates certain which had been written down on a buff slip of paper. This buff slip of paper, the existence of which was never in dispute, contained dates certain. They were obtained by a Mr. Bamber, an official of the Ministry, from his records which contained reports from the dockyards. The Greek Government claims that the contract refers to this buff slip of paper and that fixed dates were definitely agreed upon as part of the contract. The United Kingdom Government claims that the dates written down on the buff slip of paper were merely indications of the time when the ships could be expected to be ready for delivery.

The Greek Government contends — quoting in support of their contention a statutory declaration by Major Laing, sworn in 1934 (which is set out in Annex 7 to this award) — that Major Laing had induced Mr. Ambatielos to pay half a million pounds more than the price then ruling for vessels of the same type because he, Major Laing, had been able to give fixed dates. The United Kingdom Government contends that the prices were not unduly high for ships of that kind and that the price could certainly be accounted for by the privilege granted to Mr. Ambatielos for “free charter-parties” not subject to the regulations of the United Kingdom Government, by Mr. Ambatielos’s being able to sail the ships under the Greek flag and by the favourable freight rates he would be able to obtain, the ships being stationed in the Far East where freight rates were very high.

By way of further proof of fixed delivery dates the Greek Government relied upon a telegram sent on 31st October, 1919, in the name of Sir John Espiéen, who was Major Laing’s superior in the Ministry of Shipping, to the Far Eastern representative of the Ministry of Shipping, and which was in the following terms:

From Espiéen Shipminder, London — To Britannia, Hong Kong. Following for Dodwell, War Trooper. As the steamer was sold to buyers for delivery not later than November it is of the utmost importance that she should be completed by that date stop Cable immediately progress of construction (Signed) M. J. Straker.

The existence of this telegram is not in dispute between the Parties, but the Parties are not agreed as to the circumstances in which it was sent. It is, further-

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1 See p. 150.
more, common ground between the Parties that the ships were delivered later than had been anticipated. According to the Greek claim, the ship *Cephalonia* should have been delivered on 31st August, 1919, the second ship, the *Ambatielos*, on 30th September, 1919, and so on down to the last ship, the *Mellon*, of which delivery had to be made at latest on 15th March, 1920. The two first-named ships were delivered after a certain delay, and the others after delays of varying length extending to as much as eight months. Freight rates having fallen heavily during that time, considerable loss was suffered by the purchaser.

In November, 1920, the purchaser, Mr. N. E. Ambatielos, was indebted to the United Kingdom Government in a large sum of money. For the purpose of guaranteeing this debt he executed mortgage deeds and covenants on 4th November, 1920, on seven ships. (See Annex 31 to this award.) The last two ships, the *Mellon* and the *Stalhis*, were never delivered to Mr. Ambatielos. The contract for these two ships was not cancelled, and the ships were laid up from the date when they should have been delivered until the date of Mr. Justice Hill's judgment hereinafter referred to. During that time the cost of insurance and other expenses were charged to Mr. Ambatielos. The Greek Government now claims that it was wrong to cancel the contract as from the date of judgment, instead of cancelling it as from 4th November, 1920, when the mortgage deeds were signed. This is the claim contained in claim C.

In February, 1921, Mr. Ambatielos, through his brother, proposed that the purchase of these two ships be cancelled (see Annex 42 to this award), but his offer was refused by the United Kingdom authorities.

According to the Greek case, Mr. Ambatielos wanted to go to London to negotiate with the Ministry of Shipping in order to reach a compromise. However, he was, so the Greek Government alleges, prevented from going to London because the United Kingdom Government preferred a claim against him for a sum of £250,000 in respect of non-payment of taxes which might render him liable to imprisonment, and it was only after the United Kingdom Government had withdrawn this claim as being unfounded that Mr. Ambatielos was able to proceed to London to protect his interests. The United Kingdom Government does not admit that any such claim was made or that any threat was made to imprison Mr. Ambatielos.

Mr. Ambatielos went to London in May, 1921, and engaged in negotiations with Sir Ernest Glover, representative of the Ministry of Shipping who, according to Mr. Ambatielos, showed a conciliatory attitude. The Greek Government contends that Sir Ernest Glover consented to reduce the agreed price by £500,000 but the United Kingdom Government denies that any agreement was concluded. Meanwhile, Mr. Ambatielos had claimed arbitration under Clause 12 of the contract of 17th July, 1919, and arbitrators had been appointed.

The Board of Trade, as successors to the Ministry of Shipping, however, instituted proceedings in the Court of Admiralty on the mortgage deeds, and in consequence, by agreement between the parties, the claim of Mr. Ambatielos was put forward by way of defence to these proceedings, instead of being dealt with by arbitration. Mr. Justice Hill heard the case in November, 1922, and on 15th January, 1923, gave judgment for the United Kingdom Government for possession and sale of certain vessels which had been delivered, and for principal and interest due under the mortgage deeds.

During those proceedings the United Kingdom Government, in accordance

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1 See p. 140.
2 See p. 147.

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with the practice of Ministries, refused to produce certain inter-departmental minutes. The Greek Government claims that this was an unwarranted abuse of Crown privilege. Furthermore, letters exchanged in July, 1922, between the former Controller of Shipping, Sir Joseph Maclay, and Major Laing, referring to assurances said to have been given by the latter to Mr. Ambatielos about delivery dates, were not produced in court. These letters are set out in Annex 5 to this award. Major Laing and Sir Joseph Maclay were not heard as witnesses although Major Laing is alleged to have been subpoenaed by the Ministry of Shipping. The Greek Government claims that the withholding of this evidence was also an abuse of right which amounted to a denial of justice.

The United Kingdom Government claims that this correspondence was exempt from production in accordance with English law of procedure which exempts from production any document prepared for the purpose of the proceedings. Before the case was heard in the Court of Admiralty, Major Laing had indicated to Mr. Ambatielos that these letters were in existence. He did not, however, transmit copies of the correspondence to Mr. Ambatielos before the trial.

Mr. Ambatielos appealed against the judgment of Mr. Justice Hill and asked the Court of Appeal for leave to call Major Laing as a witness. This, however, was refused by the Court of Appeal, the Court holding that it was against precedent to allow a party to call a witness in the Court of Appeal when that party could have called the witness in the court of first instance. After the Court of Appeal had given its judgment in 1923 Mr. Ambatielos did not proceed with his general appeal, nor did he try to obtain a reversal of the decision of the Court of Appeal by appealing further to the House of Lords. When, later that year, the Crown brought another claim against Mr. Ambatielos for an account and possession of the Keramies, the Defendant did not appear; nor was he represented by Counsel. The case which was heard on 20th July, 1923, was in all respects similar to the case previously before Mr. Justice Hill. The judgment of July, 1923, was not appealed against by Mr. Ambatielos. Thus the proceedings before the United Kingdom courts came to an end, and the diplomatic phase of the case began. It began with a Note from the Greek Legation in London to the Secretary of State for Foreign Affairs on 12th September, 1925. The case was taken up again in a new Note from the Greek Legation to the Secretary of State for Foreign Affairs on 7th February, 1933. Further Notes were sent in 1934, 1936, 1939 and 1940. The case was then in abeyance from 1940 until 11th May, 1949. It was finally brought before the International Court of Justice on 9th April, 1951.

On 9th April, 1951, the Greek Minister in the Netherlands, duly authorised by his Government, filed in the Registry of the International Court of Justice an Application instituting proceedings before that Court.

The Greek Application referred to the Treaty of Commerce and Navigation between Greece and Great Britain, signed in Athens on 10th November, 1886, which is set out as Annex 1 to this award, and to the Treaty of Commerce and Navigation between the same Contracting Parties signed in London on 16th July, 1926, including a Declaration of the same date. The Declaration is set out as Annex 6 to this award. The Application requested the Court:

To declare that it has jurisdiction:

To adjudge and declare...

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1 See p. 148.
2 See p. 132.
3 See p. 150.
1. That the arbitral procedure referred to in the Final Protocol of the Treaty of 1886 must receive application in the present case;

2. That the Commission of Arbitration provided for in the said Protocol shall be constituted within a reasonable period, to be fixed by the Court.

The Memorial of the Greek Government contained the following Submissions:

... the Hellenic Government requests the Court to adjudge and declare:

(1) That the United Kingdom Government is under an obligation to agree to refer its present dispute with the Hellenic Government to arbitration, and to carry out the Judgment which will be delivered;

(2) that the arbitral procedure instituted by the Protocol of the Greco-British Treaty of Commerce and Navigation of 1886, or alternatively, that of the Treaty of Commerce of 1926, must be applied in this case;

(3) that any refusal by the United Kingdom Government to accept the arbitration provided for in those Treaties would constitute a denial of justice (Anglo-Iranian Oil Company case, Order of July 5th, 1951: I. C. J. Reports, 1951, p. 89);

(4) that the Hellenic Government is entitled to seize the Court of the merits of the dispute between the two Governments without even being bound to resort beforehand to the arbitration mentioned under submissions 1 and 2 above;

(5) alternatively, that the United Kingdom Government is under an obligation, as a Member of the United Nations, to conform to the provisions of Article 1, paragraph 1, of the Charter of the United Nations, one of whose principal purposes is: "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations", and to those of Article 36, paragraph 3, of the Charter, according to which "legal disputes should, as a general rule, be referred by the Parties to the International Court of Justice". There is no doubt that the dispute between the Hellenic Government and the United Kingdom Government is a legal dispute susceptible of adjudication by the Court.

The Government of the United Kingdom filed a Counter-Memorial in which, whilst setting out its arguments and submissions on the merits of the case, it requested the Court to adjudge and declare that it had no jurisdiction:

(a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government based on Article XV or any other Article of the Treaty of 1886, or

(A) itself to decide on the merits of such a claim,

and that, likewise, it has no jurisdiction:

(a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government for denial of justice based on the general principles of international law or for unjust enrichment, or

(A) itself to decide upon the merits of such a claim.

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On 1st July, 1952, the International Court of Justice, by thirteen votes to two, found “that it is without jurisdiction to decide on the merits of the Ambatielos claim,” and by ten votes to five, “that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, in so far as this claim is based on the Treaty of 1886.”

* * *

During the second stage of the proceedings before the International Court of Justice subsequent to the above mentioned judgment the Greek Government presented the following submissions:

May it please the Court:

1. To hold that the Ambatielos claim, based upon the provisions of the Treaty of 1886, does not prima facie appear to be unconnected with those provisions.

2. As a consequence, to decide that the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim.

3. To declare that the Court will assume the functions of the arbitral tribunal in this case in the event of the Parties accepting its jurisdiction in their final submissions.

4. To fix time-limits for the filing by the Parties of the Reply and Rejoinder upon the merits of the dispute.

The United Kingdom Government formulated the following submissions:

1. That the United Kingdom Government is under no obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, unless this claim is based on the Treaty of 1886.

2. That the Hellenic Government's contention that the Ambatielos claim is based on the Treaty of 1886, within the meaning of the Declaration of 1926, because it is a claim formulated on the basis of the Treaty of 1886 and not obviously unrelated to that Treaty, is ill-founded.

3. That, even if the above Hellenic contention be correct in law, the Court should still not order arbitration in respect of the Ambatielos claim, because the Ambatielos claim is in fact obviously unrelated to the Treaty of 1886.

4. That the Ambatielos claim is not a claim based on the Treaty of 1886, unless it is a claim the substantive foundation of which lies in the Treaty of 1886.

5. That, having regard to (4) above, the Ambatielos claim is not a claim the substantive foundation of which lies in the Treaty of 1886, for one or other or all of the following reasons:

   (a) the Ambatielos claim does not come within the scope of the Treaty;

   (A) even if all the facts alleged by the Hellenic Government were true, no violation of the Treaty would have occurred;

   (c) local remedies were not exhausted;

   (J) the Ambatielos claim — in so far as it has any validity at all, which the United Kingdom Government
denies — is based on the general principles of international law and these principles are not incorporated in the Treaty of 1886.

6. That if, contrary to (4) and (5) above, the Ambatielos claim be held to be based on the Treaty of 1886, the United Kingdom Government is not obliged to submit to arbitration the difference as to the validity of the claim for one or other or all of the following reasons:
(a) non-exhaustion of local remedies;

(A) undue delay in preferring the claim on its present alleged basis;

(c) undue delay and abuse of the process of the Court in that, although reference of the dispute to the compulsory jurisdiction of the Court has been continuously possible since the 10th December, 1926, no such reference took place until the 9th April, 1951.

Accordingly, the United Kingdom Government prays the Court

To adjudge and declare

That the United Kingdom Government is not obliged to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim.

On 19th May, 1953, the Court held by ten votes to four "that the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity, under the Treaty of 1886, of the Ambatielos claim".

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Article 1 of this Agreement stated:

(a) The Commission of Arbitration (hereinafter called the Commission) shall be composed of:

Monsieur Ricardo J. Alfaro

Monsieur Algot J. F. Bagge

Monsieur Maurice Bourquin

Monsieur John Spiropoulos

Gerald Thesiger, Q.C.

(A) The President of the Commission shall be Monsieur Ricardo J. Alfaro.

(c) Should any Member of the Commission die or become unable to act, the vacancy shall be filled by a new Member appointed by the Government which nominated the Member to be replaced or by agreement between the two Governments, according to the manner of the original appointment.

According to Article 2 the Commission was requested to determine:

(a) the validity of the Ambatielos claim under the 1886 Treaty having regard to:

(i) the question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the Treaty;

(ii) the question raised by the United Kingdom Government of the nonexhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty;

(iii) the provisions of the Treaty;

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(A) in the event of the Commission holding that the claim is valid, whether the United Kingdom Government ought now in all the circumstances to pay compensation to the Royal Hellenic Government; and if so, the amount of such compensation.

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The Greek Government appointed as its Agent Monsieur Georges Bensis, Counsellor of the Royal Greek Embassy in London, and the United Kingdom
Government appointed as its Agent Mr. F. A. Vallat, C.M.G., Deputy Legal Adviser of the Foreign Office.

Pursuant to Article 5 of the Agreement of 24th February, 1955, the written proceedings consisted of a Case presented by the Greek Government on 17th May, 1955, and a Counter-Case submitted by the United Kingdom Government before the expiry of the time limit fixed for 17th September, 1955.

The Commission appointed as their Registrar: Dr. Edvard Hambro.

The hearings were opened in London on 25th January, 1956.

The Greek Agent was assisted by the following Counsel:

The Rt. Hon. Sir Frank Soskice, Q.C.

Professor Henri Rolin

Dr. C. John Colombos, Q.C., Ll.D.

Mr. Frank Gahan, Q.C.

Mr. Mervyn Heald

and the United Kingdom Agent was assisted by the following Counsel:

Sir Harry Hylton-Foster, Q.C., M.P. (Solicitor-General)

Mr. John Foster, Q.C., M.P.

Sir Gerald Fitzmaurice, K.C.M.G.

Mr. Alan Orr, C.B.E.

Mr. D. H. N. Johnson

The Commission held hearings on 25th, 26th, 27th, 30th and 31st January and on 1st, 2nd, 3rd, 7th, 8th, 9th, 10th, 14th and 16th February.

During these hearings the Commission heard arguments by Sir Frank Soskice, Q.C., Mr. John Colombos, Q.C., Professor Henri Rolin and Mr. Frank Gahan, Q.C., on behalf of the Greek Government, and by Sir Harry Hylton-Foster, Q.C., M.P., Mr. John Foster, Q.C., M.P., Sir Gerald Fitzmaurice, K.C.M.G., and Mr. F. A. Vallat, C.M.G., on behalf of the United Kingdom Government.

In the Greek Case the submissions of that Government are set out as follows: The Greek Government's contentions on the three questions so submitted to the Commission of Arbitration, as more particularly set out hereafter, are as follows:

(i) With regard to the question of undue delay raised by the United Kingdom Government in the presentation of the Ambatielos claim, the facts are that the first Note of the Greek Government asking the United Kingdom Government "to cause a careful examination of the case" was presented to the British Foreign Office in September, 1925, viz., approximately two-and-a-half years from the date of the judgment of the English Court of Appeal, and from 1933 onwards (apart from the war period) continuous requests for international arbitration were being made to the United Kingdom Government by the Greek Government. These requests were met by stubborn refusals to negotiate in any way whatever;

(ii) On the question raised by the United Kingdom Government of nonexhaustion of the legal remedies...
by Mr. Ambatielos in the English Court, there are two points, namely: (a) failure to appeal to the House of Lords against the refusal of the Court of Appeal to admit fresh evidence on appeal from the judgment of the English Court of Admiralty and (b) failure to prosecute an appeal from the said judgment;

As to (a), the short answer is that in refusing Mr. Ambatielos's request for the production of fresh evidence, the Court of Appeal was exercising its discretion in a matter of practice and procedure and that an appeal to the House of Lords had no prospects of success.

As to (i), in the absence of the fresh evidence referred to in (a), the
prospect of success on appeal was so slight as to be "ineffective" within the meaning of international law;

(iii) On the question of the validity of the Ambatielos claim under the provisions of the Treaty, the Greek Government contends that its national did not receive at the hands of the United Kingdom the treatment to which Greek nationals are entitled under the provisions of the Treaty and generally under the rules of international law, justice, right, and equity applicable thereto. As argued by Sir Frank Soskice before the International Court of Justice in March, 1953: — "The plain, unvarnished truth here is that the Greek Government complain of the fact that one of their nationals paid £1,600,000 for nine ships, got no ships, got nothing for his money: £500,000 of that £1,600,000 was specifically paid in order to ensure that the ships should be delivered at a certain time; they were not delivered at that time; the British executive authorities then kept back evidence which prevented Mr. Ambatielos getting relief from the British Courts. He got no relief but was ordered to pay some £350,000 instead."

At the end of the Case the actual claims are set out as follows:

The main claim A, consisting of £8,059,488 11s. Qd., as compensation for breach of the contract of sale, an alternative claim B, based on unjust enrichment amounting to £4,140,075, and another alternative claim C, in connection with the cancelling date of the purchase of the Mellon and the Stathis amounting to £4,409,242.

At the end of the oral proceedings the Greek claims were put as follows: A. Under the claim based on Article X of the Anglo-Greek Treaty of Commerce and Navigation, 1886, read in conjunction with Article 16 of the Treaty of Peace and Commerce between Great Britain and Denmark of 1660 (1661); Article 24 of the like treaty of 1670; Article III of the Anglo-Spanish Treaty of 1667; Article 6 of the Treaty of Peace and Commerce between Great Britain and Sweden, 1661; Article 7 of the Anglo-Peruvian Treaty, 1830; Article 1 of the Anglo-Japanese Treaty, 1911; and Article X of the Anglo-Bolivian Treaty, 1911.

A. Facts

1. British Government contracted in 1919 to sell to Mr. Ambatielos nine ships to be delivered at or before definitely agreed dates.

2. British Government broke that contract by not delivering the ships within those agreed dates.

3. As an incident of that contract, the contract price was boosted to the extent of £500,000 because the dates of delivery were agreed.

4. By reason of delivery not having been made within the time agreed, Mr. Ambatielos received nothing for that £500,000.

5. The breaches of the contract inevitably placed Mr. Ambatielos in a position of acute financial embarrassment.

6. If Mr. Ambatielos had been able to come to London in 1920 he might have saved the wreck of his fortune and so have avoided ruin by negotiating a practicable settlement; but the British Government by an unfounded claim for income tax (which claim involved the possibility of his imprisonment if he came to the United Kingdom) prevented him from coming to London.
7. When in May, 1921, Mr. Ambatielos was able without danger to come to London, the claim for income tax was abandoned and Mr. Ambatielos arranged terms with Sir Ernest Glover reducing the price outstanding by £500,000 and submitting the matters in dispute to arbitration, but the
Board of Trade, arbitrarily and without any consideration as to the merits and fairness of the case, frustrated those negotiations by insisting upon resorting to action for the purpose of enforcing their mortgages.

8. In the circumstances obtaining, common equity and fairness required that the British Government should have handed over to Mr. Ambatielos the Stathis and the Mellon in order that Mr. Ambatielos could trade with them; but the British Government (whether acting within or outside its strict legal rights) refused to hand over those ships, thereby occasioning further serious loss to Mr. Ambatielos and making his ruin certain.

9. If Mr. Ambatielos had been able to establish, by way of defence and counter claim in the action before Mr. Justice Hill, his claim to damages for late delivery, he would have prevented the seizure and sale of the ships and, in addition, he would have been awarded substantial compensation; but the British Government, by its manoeuvres before and in the proceedings before Mr. Justice Hill, procured a miscarriage of justice in that it procured Mr. Justice Hill to reach an erroneous conclusion of fact, namely that there were no agreed dates of delivery.

10. The manoeuvres mentioned in 9 consisted in:

   (a) The Board of Trade abused the privileges available to it as a department of the British Government in that the Board of Trade under cover of state privilege withheld crucial and essential minutes and other departmental documents, whereas a proper exercise of state privilege would have required that those documents should all have been placed before the court.

   (A) The Board of Trade and those responsible for preparing its case in the proceedings before Mr. Justice Hill failed to make available, either to the court or to Mr. Ambatielos's advisers in reasonable time before or at the proceedings, the correspondence which had passed between Sir Joseph Maclay and Major Laing in July, 1922.

   (c) With knowledge that Major Laing could give vitally material evidence in support of Mr. Ambatielos's case and that Mr. Ambatielos's advisers were unlikely to have access to that evidence (since it related to Major Laing's actions while a government servant), the Board of Trade and those responsible for preparing its case nevertheless kept that evidence from the court by:

      (i) not calling Major Laing as a witness;

      (ii) not informing Mr. Ambatielos or his advisers in good time before or at the trial that the evidence was available and could be given by Major Laing;

      (iii) allowing their counsel to present before Mr. Justice Hill a version of the facts and an argument in respect of the Board of Trade's case which was contrary to the documents which they had or must have had in their possession (namely the July, 1922, correspondence, and a proof or written statement of the evidence which Lord, formerly Sir Joseph, Maclay and Major Laing were prepared to give) with the result that Mr. Justice Hill was allowed to arrive at a decision which amounted to a miscarriage of justice.

11. When Mr. Ambatielos, through his advisers, applied to the Court of Appeal for leave to call further evidence the Board of Trade ought to have consented to and indeed ought to have assisted that application, but instead the Board of Trade opposed it and persuaded the Court of Appeal to reject the application.
12. The totality of the facts above set out, or of such of them as the Commission may find to have been established.

The Greek Government contends that:

1. The above facts constitute a breach of Article X of the 1886 Treaty under which Greece and Greek subjects have the benefit of other treaties into which the United Kingdom had entered in that:

   (i) In breach of Article 16 of the Anglo-Danish Treaty of Peace and Commerce, 1660 (1661) the British Government, having broken its contract with Mr. Ambatielos and having put difficulties in his way, when his cause came before Mr. Justice Hill, caused to be administered to Mr. Ambatielos not justice and right, but injustice and wrong.

   (ii) Likewise in breach of Article 24 of the Anglo-Danish Treaty of Peace and Commerce, 1670, the British Government failed to cause justice and equity to be done, and caused injustice to be done.

   (iii) Likewise in breach of Article 3 of the Anglo-Spanish Treaty of Peace and Friendship, 1667, the British Government failed to abstain from force, violence and wrong, and did injury to Mr. Ambatielos against common right; when justice was sought in the ordinary course of law it was not followed, but justice was denied; and when the Greek Government asked for justice, and for Commissioners to receive and hear the matter, the British Government refused and delayed justice.

   (iv) Likewise in breach of Article 6 of the Anglo-Swedish Treaty of Peace and Commerce, 1661, when Mr. Ambatielos stood in need of the Magistrate's help it was not granted to him readily and in friendly manner according to the equity of his cause, and justice was not administered to him but injustice.

   (v) Likewise in breach of Article 7 of the Anglo-Peruvian Treaty, 1830, Mr. Ambatielos did not in England enjoy full and perfect protection of his person and property and did not have free and open access to the courts of justice for the prosecution and defence of his just rights. On the contrary the British Government threatened his person by an unfounded income tax claim; injured his property and procured the doing of injustice in the proceedings before Mr. Justice Hill.

   (vi) Likewise in breach of Article 1, paragraph 6, of the Anglo-Japanese Treaty, 1911, the British Government did not afford Mr. Ambatielos complete security for his person and property, but endangered his person by an unfounded income tax claim, and denuded him of his property.

   (vii) Likewise in breach of Article 10 of the Anglo-Bolivian Treaty, 1911, justice was denied to Mr. Ambatielos, and the principles of international law were violated in that Mr. Ambatielos was subjected to arbitrary and unfair treatment and an unjust court decision was procured against him.

The damage from these breaches is set out in Claim A in the Greek Case.

2. Alternatively if, contrary to the Greek Government's contention, the Commission should hold that there was not a contract for delivery of the ships on or before fixed dates, it is clear that Mr. Ambatielos paid an additional £500,000 because of the most specific assurances about early deliveries. By reason of these assurances being broken, the British Government, in violation of the principles of international law and in breach of Article 10 of the Anglo-Bolivian Treaty, 1911, and the other treaties mentioned at the outset of this chart as incorporated by Article X of the Anglo-Greek Treaty of 1886, has been unjustly enriched.
The damage thereby suffered by Mr. Ambatielos is set out in Claim B in the Greek Case.

3. Alternatively, if regard is had only to the proceedings before Mr. Justice Hill and to the British Government's manoeuvres in relation thereto (facts No. 9, 10 and 11), the British Government procured a denial of justice to Mr. Ambatielos in breach of the above-cited Articles of Treaties between the United Kingdom and Denmark, Spain, Sweden and Bolivia.

The damage thereby suffered is set out in Claim A in the Greek Case.

4. Alternatively to Contentions 1 and 3, equity and fair dealing required that the sale of the Mellon and Stathis should have been treated as cancelled about November, 1920, and not later than 3rd February, 1921 (see the penultimate paragraph of Exhibit 4F to the Greek Case). The failure to do as equity and fair dealing required and the aggravation of damage to Mr. Ambatielos was a breach of the Treaty Articles cited.

The damage thereby suffered by Mr. Ambatielos is set out in Claim C in the Greek Case.

B. Under the claim based on Article XV of the Anglo-Greek Treaty of Commerce and Navigation, 1886.

1. The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.

2. The British Government withheld those documents, thereby preventing Mr. Ambatielos knowing that they were putting forward a case of that kind, namely a case known to be false.

3. The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, they having the right to refuse to disclose them.

The Greek submission was that these three alleged facts constituted denial of free access to the Courts.

The United Kingdom submissions which were retained at the end of the oral proceedings are as follows:

In the light of the facts, considerations and contentions set out in the present Counter-Case, the United Kingdom Government asks the Commission to adjudge and declare the Greek Claim to be invalid, because

(1) there has been undue delay in presenting the claim on the basis of the 1886 Treaty;

(2) the Claimant failed to exhaust his legal remedies in the English Courts;

(3) the Claim discloses no breach of the 1886 Treaty, direct or indirect.

* * *

The Commission will begin the determination of the issues submitted to it by examining the question raised by the United Kingdom Government of undue delay in the presentation of the claim on the basis of the 1886 Treaty.

The Commission thinks it desirable thereafter to determine the question of the validity of the Ambatielos claim under the 1886 Treaty. Finally, the Commission will determine the question whether the legal remedies in the English Courts were exhausted by Mr. Ambatielos.
THE QUESTION OF UNDUE DELAY IN THE PRESENTATION OF THE CLAIM

ON THE BASIS OF THE TREATY OF 1886

The Government of the United Kingdom contends that the claim of the Greek Government ought to be rejected by reason of the delay in its presentation.

It is generally admitted that the principle of extincive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases (Oppenheim — Lauterpacht — *International Law*, 7th Edition, I, paragraph 155c; Ralston — *The Law and Procedure of International Tribunals*, paragraphs 683-698, and *Supplement*, paragraphs 683 (a) and 687 (a)). L'Institut de Droit international expressed a view to this effect at its session at The Hague in 1925.

There is no doubt that there is no rule of international law which lays down a time limit with regard to prescription, except in the case of special agreements to that effect, and accordingly, as L'Institut de Droit international pointed out in its 1925 Resolutions, the determination of this question is "left to the unfettered discretion of the international tribunal which, if it is to accept any argument based on lapse of time, must be able to detect in the facts of the case before it the existence of one of the grounds which are indispensable to cause prescription to operate".

The Commission does not find in the circumstances of the present case any reason which would justify the application of the principle of prescription to the claim of the Greek Government.

The diplomatic correspondence produced by the Parties shows that the Greek Government intervened from 1925 onwards in order to exercise its diplomatic protection on behalf of Mr. Ambatielos, and that, since then, it has made repeated representations at intervals which cannot be regarded as abnormal in the particular circumstances of the case.

It should also be noted that the Government of the United Kingdom has not, before the Commission, persisted in the argument which it put forward before the International Court of Justice in support of its allegation of "undue delay". Before the International Court the Government of the United Kingdom contended that the Greek Government had been dilatory in taking up the Ambatielos Claim initially, and in prosecuting it generally. Before the Commission it abandoned this complaint. (United Kingdom Counter-Case, paragraphs 168 and 169).

In the arguments addressed to the Commission, the undue delay imputed to the Greek Government did not relate to the diplomatic representations made and pursued by that Government, but to the use the latter made of the Treaty of 1886 as being the basis of its action.

It is a fact that until 1939 the claim of the Greek Government seemed to be based solely on general international law, and that it was in the Note of 21st November, 1939, addressed by the Greek Legation in London to the Secretary of State for Foreign affairs of the Linked Kingdom (International Court of Justice, Ambatielos Case, Pleadings pp. 96-98) that the Treaty of 1886 was for the first time relied upon to support the claim.

The Government of the United Kingdom explains this change of attitude as being due to the anxiety of the Greek Government to submit the dispute to arbitration. So long as the dispute remained within the sphere of general international law, there was no obligation on the United Kingdom to submit to arbitration or judicial settlement. On the other hand, by linking the dispute with the Treaty of 1886, the Greek Government could, by virtue of the Declaration which the two Governments had signed on 16th July, 1926, rely upon the obli
gation provided for in this Declaration, to the effect that "claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886" were to be submitted to arbitration.

This explanation is a plausible one, but it is difficult to see what effect it can have on prescription.

The Greek Government, by changing the legal basis of its action in order to obtain a settlement of the dispute by arbitration, only exercised the right to which it was entitled. If it did not adopt this attitude until 1939 when its initial diplomatic intervention dates back to 1925, that fact cannot be held against it in so far as concerns the operation of prescription, unless it brought about results which, in themselves, would justify the operation of prescription — such, for instance, as the difficulties of the United Kingdom in assembling the elements of proof requisite for or useful to its defence.

Furthermore, it is not very clear from the United Kingdom Counter-Case whether the allegation against the Greek Government is directed to that Government's having waited until 1939 to decide upon the present legal basis for its action, or whether it is not rather directed to the Greek Government's having waited until 1951 to institute the legal proceedings which it was open to it to "institute, compulsorily, as early as, at the latest, 1926". (Counter-Case, paragraph 168.)

In the latter case the alleged delay would be concerned not with the fact that reliance was placed on the Treaty of 1886, but that legal action was taken on the basis of that Treaty.

The Government of the United Kingdom desires it to be understood that if the Greek Government had acted earlier, the evaluation and appreciation of the events in dispute would have been simpler and more certain. (Counter-Case, paragraph 169). This contention, however, does not find support in any specific fact, and it would seem to be all the more difficult to accept because — even though the legal basis of the claim has been changed during the diplomatic exchanges — the facts which constitute its substance have remained the same from the beginning, and from the point of view of difficulty of proof these facts are, above all, important.

The Commission is therefore of opinion that the objection of "undue delay" raised by the Government of the United Kingdom is not well-founded, in so far as it is intended to cause the claim of the Greek Government to be rejected.

But the Government of the United Kingdom would appear to draw a further conclusion from the delay which it imputes to the Greek Government. It contends, in fact, that as the Greek Government invoked the Treaty of 1886 as the basis of its claim only belatedly, there would, for this reason, be a presumption unfavourable to its case. (Counter-Case, paragraphs 175 and 176.)

This consideration, however, is irrelevant to prescription, and could have a bearing only on the requirements of proof.

**THE VALIDITY OF THE AMBATIELOS CLAIM UNDER THE 1886 TREATY**

As stated in the Greek Case (paragraph 6, iii) "the Greek Government contends that its national (Mr. Ambatielos) did not receive at the hands of the United Kingdom Government the treatment to which Greek nationals are entitled under the provisions of the Treaty, and generally under the rules of international law, justice, right and equity applicable thereto."

Further on, the part of the Case dealing specifically with the question of "the validity of the Ambatielos claim under the provisions of the 1886 Treaty" (paragraph 58), reads as follows: "The Greek Government contends that there has been a breach by the United Kingdom of all or any of the following provisions
of the Anglo-Greek Treaty of Commerce and Navigation of November 10, 1886, to wit:". Articles I, X, XII and XV of the Treaty are then quoted in full in paragraphs 58, 59, 78 and 80 of the Case, respectively, and comments are made on each of the aforesaid provisions, in support of the Greek contention, in paragraphs 58 to 90 of the Case.

The position of the Greek Government as outlined above and as it presented itself when the oral hearing began, was subsequently changed. The Commission requested Counsel for the Greek Government at the end of the 6th meeting, held on 1st February, to indicate at the conclusion of their arguments and in a precise manner:

(1) the facts which in the opinion of that Government resulted in the international responsibility of the British Government;

(2) the Article or Articles of the Treaty of 1886 to which each of these facts, according to the Greek Government, was referable.

In accordance with this request, Sir Frank Soskice, Chief Counsel for the Greek Government, at the 8th meeting of the Commission, held on 3rd February, made the following statement:

I accept that in order to succeed in this claim the Greek Government must be able to establish that there was a breach of some provision, some Article of the 1886 Anglo-Greek Treaty. The only Articles which, in the submission of the Greek Government, were breached, were Article X and Article XV... It is not asserted any longer that there was a breach of Article I.

After this statement Sir Frank Soskice set out the facts and claims which have been enumerated above.

In paragraph 12 of those submissions Chief Counsel for the Greek Government, Sir Frank Soskice, stated:

The totality of the facts above set out or of such of them as the Commission may find to have been established.....the Greek Government contends...

constitute a breach of Article X of the 1886 Treaty.

Furthermore, Counsel for the Greek Government at the 6th meeting withdrew the contents of paragraphs 70, 71 and 74 of the Greek Case; and at the 8th meeting the previous allegation in respect of a breach of Article XII of the Treaty of 1886 was also withdrawn.

These paragraphs and a Statement made on their withdrawal are set out in Annex 8 to this award.

Furthermore, Counsel for the Greek Government asserted that Article XV of the above-mentioned Treaty had been violated in the manner specified in the three particulars set out at the very end of the final submissions, and which will be the subject of consideration in connection with Article XV.

On the other hand, the Government of the United Kingdom, in paragraph 178 of the Counter-Case, maintains that ‘no breach of the Treaty could be established, even if the Greek version of the facts were accepted as correct'.

It is apparent, therefore, that the essential task of the Commission is to determine, in the light of such facts as it may consider duly established by the Claimant Government on whom the burden of proof obviously lies whether or not Articles X and XV of the Treaty of 1886, or either of them, have been violated by the Government of the United Kingdom.

1 See p. 152.
THE INTERPRETATION OF ARTICLE X OF THE TREATY OF 1886

Article X of the Treaty of November 10 1886, reads as follows:

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

* * *

The Greek Government claims that by virtue of the most-favoured-nation clause contained in this Article, it is entitled to claim for its nationals treatment in accordance with "justice", "right", "equity" and the "principles of international law", such treatment having been assured by the United Kingdom to the nationals of other States, by virtue of the Treaties concluded by that country with Denmark, Spain, Sweden, Peru, Costa Rica, Japan and Bolivia. (Greek Case, paragraphs 60-63, and International Court of Justice, Ambatielos Case, Pleadings, pp. 509-515.)

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The United Kingdom Government disputes that this is so. It puts forward the following:

(a) that a most-favoured-nation clause can, in principle, only attract treatment accorded to other countries or their nationals as a privilege, favour, or immunity, and not treatment accorded as a right (irrespective of any conventional basis), such as treatment in accordance with the principles of international law;

(b) that a most-favoured-nation clause can only attract matters belonging to the same category of subject as the clause itself relates to;

(c) that the most-favoured-nation clause in Article X of the 1886 Treaty only relates to commerce and navigation and not to the administration of justice;

(d) that even were Article X of the 1886 Treaty so worded as to attract a right to treatment in accordance with the general rules of international law, justice, right and equity, relative to the administration of justice, no such right is in fact conferred by the provisions of the other Treaties cited by the Greek Government. (United Kingdom Counter-Case, paragraphs 237-249.)

* * *

The Commission does not deem it necessary to express a view on the general question as to whether the most-favoured-nation clause can never have the effect of assuring to its beneficiaries treatment in accordance with the general rules of international law, because in the present case the effect of the clause is expressly limited to "any privilege, favour or immunity which either Contracting Party has actually granted or may hereafter grant to the subjects or
citizens of any other State”, which would obviously not be the case if the sole object of those provisions were to guarantee to them treatment in accordance with the general rules of international law.

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On the other hand, the Commission holds that the most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.

The Commission is, however, of opinion that in the present case the application of this rule can lead to conclusions different from those put forward by the United Kingdom Government.

In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including "all matters relating to commerce and navigation". It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3, of which guarantees to the subjects of the two Contracting Parties “free access to the Courts of Justice for the prosecution and defence of their rights”. That is also the case as regards the other Treaties referred to by the Greek Government in connection with the application of the most-favoured-nation clause.

It is true that "the administration of justice", when viewed in isolation, is a subject-matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.

Although the wording of Article X does not provide a clear and decisive indication in this respect, the Commission is of opinion that it is difficult to reconcile the narrow interpretation submitted by the Government of the United Kingdom with the indications given in the text, in particular in the last part of the sentence: "it being their (the Contracting Parties') intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation”.

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Having thus determined the meaning of the most-favoured-nation clause contained in Article X of the Treaty of 1886, the next question is whether this clause effectively brings about the results which the Greek Government believes it does, by relying on the various Treaties concluded by the United Kingdom with other States.

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One of these results, it is contended, would be to incorporate in the Treaty of 1886 the "principles of international law. To justify this argument, the Greek Government relies exclusively on Article 10 of the Treaty of Commerce concluded on 1st August, 1911, between the United Kingdom and Bolivia, which reads as follows:

The High Contracting Parties agree that during the period of existence of this treaty they mutually abstain from diplomatic intervention in cases of claims or complaints on the part of private individuals affecting civil or criminal matters in respect of which legal remedies are provided.

They reserve, however, the right to exercise such intervention in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favour by one of their nationals or violation of the principles of international law. (International Court of Justice, Ambatielos Case, Pleadings, p. 515.)

The Commission cannot agree that a provision such as this has the effect of incorporating the principles of international law in the Anglo-Greek Treaty of 1886 by virtue of the most-favoured-nation clause.

As stated above, the most-favoured-nation clause contained in the Treaty of 1886 applies only to privileges, favours and immunities granted to other countries, and therefore cannot incorporate the principles of international law in the said Treaty. If need be, this observation would suffice to reject the conclusion which the Greek Government considers itself entitled to draw from Article 10 of the Anglo-Bolivian Treaty. There is another decisive reason, however, which corroborates the preceding one: It is the fact that it is in no way the object of this provision to guarantee to the nationals of the Contracting States the principles of international law. Its object is to provide in a special manner, as between Contracting States, for the exercise of diplomatic protection. According to the first paragraph of the Article the Contracting Parties undertake to abstain from any intervention of this kind in respect of claims by private individuals for which local remedies are provided. The second paragraph provides for certain exceptions to this rule, one of which reserves the right to exercise such intervention in case of violation of the principles of international law. It is with regard to this exception that the Article refers to the principles of international law. However, it refers to these principles solely for the purpose of laying down the condition which governs this exception, and not for the purpose of guaranteeing the benefit of these principles to the nationals of the Contracting States.

Whichever way the matter is envisaged, it is impossible to accept the proposition that Article 10 of the Anglo-Bolivian Treaty has the effect, by virtue of the most-favoured-nation clause, of incorporating the principles of international law in the Treaty of 1886.

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The provisions of other treaties on which the Greek Government relies are concerned with the administration of justice. Several of them date back to the seventeenth century (the Treaties of 13th February, 1660-1661, and of 11th July, 1670, with Denmark; a Treaty of 23rd May, 1667, with Spain; Treaties of 11th April, 1657, and of 21st October, 1661, with Sweden). Naturally, their wording was influenced by the customs of the period, and they must obviously be interpreted in the light of this fact. It is only in these Treaties of the seventeenth century that certain references appear to "justice", "right" and "equity" on which the Greek Government relies in support of its claim that
these concepts have been incorporated as such in the Anglo-Greek Treaty of 1886.

The Commission takes the view that to attribute such significance to these provisions would be to strain their meaning. "Justice", "right" and "equity" are not guaranteed by these provisions as rights independent of and superior to positive law, but simply within the framework of the municipal law of the Contracting States. It was not an ideal system of "justice", "right" and "equity" which the signatory Governments intended to assure to their respective nationals; it was the application of their national laws concerning the administration of justice.

Furthermore, the Treaties concluded with Denmark provide an indication in this respect which leaves no room for doubt: Article 46 of the Treaty of 1660/1661 specifies, "according to the laws and statutes of each country", and Article 24 of the Treaty of 1670, "according to the laws and statutes of either country".

The same idea is expressed in different fashion in the Treaty of 1667 with Spain: "until such time as Justice is sought and followed in the ordinary course of Law "to the end that all such differences be compounded in friendship, or according to Law

It is true that the Treaties of 1654 and 1661 with Sweden do not expressly mention municipal law, but there is nothing which permits us to ascribe a different meaning to them. The provision that "in case the people and subjects on either part... shall stand in need of the Magistrate's help, the same shall be readily and according to the equity of their cause in friendly manner granted to them and justice shall be administered to them without long... delays" must refer to help and equity and justice according to municipal law. Moreover, these Treaties were contemporary with those concluded with Denmark and Spain, to which reference has just been made, and it is difficult to believe that, notwithstanding some discrepancies in wording, the intention of the Contracting Parties was not the same in each case.

The Commission cannot, therefore, accept the argument that the Treaties concluded by the United Kingdom in the seventeenth century with Denmark, Spain and Sweden give the Greek Government the right to claim for Mr. Ambatielos treatment in accordance with "justice", "right" and "equity" in the ideal sense of those words and independently of the rules of English law.

As for the Treaties which were concluded after the seventeenth century and to which reference is made by the Greek Government, they obviously cannot be relied upon to support this argument because they are limited to guaranteeing equality of treatment with the signatories’ own nationals in the matter of the administration of justice.

* *

To sum up, the Commission is of opinion:

(1) that the Treaty concluded on 1st August, 1911, by the United Kingdom with Bolivia cannot have the effect of incorporating in the Anglo-Greek Treaty of 1886 the "principles of international law", by the application of the most-favoured-nation clause;

(2) that the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as concerns the protection by the courts of the rights of persons engaged in trade and navigation;

(3) that none of the provisions concerning the administration of justice which are contained in the Treaties relied upon by the Greek Government can be
interpreted as assuring to the beneficiaries of the most-favoured-nation clause a system of "justice", "right" and "equity" different from that for which the municipal law of the State concerned provides;

(4) that the object of these provisions corresponds with that of Article XV of the Anglo-Greek Treaty of 1886, and that the only question which arises is, accordingly, whether they include more extensive "privileges", "favours" and "immunities" than those resulting from the said Article XV;

(5) that it follows from the decision summarised in (3) above that Article X of the Treaty does not give to its beneficiaries any remedy based on "unjust enrichment" different from that for which the municipal law of the State provides.

As will be shown below, the Commission is of opinion that "free access to the Courts", which is vouchsafed to Greek nationals in the United Kingdom by Article XV of the Treaty of 1886 includes the right to use the Courts fully and to avail themselves of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

The Commission is therefore of opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any "privileges, favours or immunities" more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute. In view of this decision as to the proper interpretation of Article X the Commission finds it unnecessary to consider expressly whether any of the 11 allegations of fact which, in their totality, are alleged to constitute a breach of Article X, have been established. Some of the allegations are however disposed of, when relevant, in other parts of this award.

THE INTERPRETATION OF ARTICLE XV OF THE TREATY OF 1886

The submissions relative to breaches of Article XV of the Anglo-Greek Treaty of 1886 will now be examined.

Article XV provides as follows:

The dwellings, manufactories, warehouses and shops of the subjects of each of the Contracting Parties in the dominions and possessions of the other, and all premises appertaining thereto destined for purposes of residence or commerce shall be respected.

It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and premises, or to examine and inspect books, papers, or accounts, except under the conditions and with the form prescribed by the laws for subjects of the country.

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

For the purposes of this arbitration the Commission is solely concerned with the third paragraph of this Article and its decision must necessarily hinge upon the interpretation to be given to the phrase "free access to the [English] Courts of Justice", which is used by the Parties to the Treaty.

The Greek Government contends (paragraph 81, Greek Case), that "access to the Courts for the prosecution and defence of their rights is not limited to
allowing a foreign national to go to Court and plead his cause but includes the obligation to make it possible for him to avail himself of all the documents necessary for the defence of his rights. Construed in its natural meaning, the term does not apply only to a material access to the Court, but an access ensuring all rights of defence”.

The United Kingdom Government, on the other hand, maintains (paragraph 223, United Kingdom Counter-Case) that “even if the third paragraph of Article XV were given the extended meaning contended for by the Greek Government there would still be no breach of this provision because in fact the claimant had all the facilities necessary...”

In the submission at the end of the oral proceedings referred to above, as formulated by Counsel for the Greek Government at the 8th meeting of the Commission, the following concrete facts were asserted as constituting violations of Article XV of the Treaty of 1886:

1. The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.

2. The British Government withheld those documents, thereby preventing Mr. Ambatielos knowing that they were putting forward a case of that kind, namely a case known to be false.

3. The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, they having the right to refuse to disclose them.

The submission therefore is that Mr. Ambatielos was denied “access to the English Courts” by reason of the three facts stated above. Before entering into a separate analysis of the charges implied in the three facts asserted by the Greek Government, the Commission deems it advisable to state its views on the meaning of the term “free access”, as used in the Treaty of 1886.

The modern concept of “free access to the Courts” represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a practice which existed in former times and in certain countries, and which constituted an unjust discrimination against foreigners. Hence, the essence of “free access” is adherence to and effectiveness of the principle of nondiscrimination against foreigners who are in need of seeking justice before the courts of the land for the protection and defence of their rights. Thus, when “free access to the Courts” is covenanted by a State in favour of the subjects or citizens of another State, the covenant is that the foreigner shall enjoy full freedom to appear before the courts for the protection or defence of his rights, whether as plaintiff or defendant; to bring any action provided or authorised by law; to deliver any pleading by way of defence, set off or counterclaim; to engage Counsel; to adduce evidence, whether documentary or oral or of any other kind; to apply for bail; to lodge appeals and, in short, to use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality with nationals of the country.

The Commission is of opinion that this is what was agreed upon in paragraph 3 of Article XV of the Anglo-Greek Treaty of 1886. This clause in effect provides, for the benefit of Greek subjects in the United Kingdom, that they “shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions or taxes beyond those imposed on native subjects and shall be at liberty to employ, in all causes, their advocates, attorneys or agents...”

Therefore, there would be a breach of this clause in the present case if it could be proved that when an action was brought against Mr. Ambatielos by
the Board of Trade he was prevented from exercising any procedural right or remedy; or that in some way he was not treated in accordance with English law and practice; or that he was not permitted to employ advocates, attorneys or agents; or that conditions, restrictions or taxes beyond those imposed on British subjects were imposed on him; or that he was in some other way denied access to the English Courts.

In order to determine the existence or non-existence of the facts referred to above, the Commission will examine separately each of the charges preferred by the Greek Government against the United Kingdom Government in the submissions of the former at the end of the hearing. The first is that:

*The British Government put forward a case before Mr. Justice Hill contrary to documents in their possession.*

In the first place the Commission must determine what is meant by the phrase *a case contrary to documents in the possession* of the United Kingdom Government. The "case", of course, is the "case" put forward by the Board of Trade in a series of actions tried before Mr. Justice Hill in November, 1922, in the Admiralty Division of the High Court of Justice. In this arbitration these actions are generally referred to as "the proceedings before Mr. Justice Hill". These proceedings were brought by the Board of Trade, as successors to the Shipping Controller as Mortgagees under mortgages dated 4th November, 1920, and placed on seven ships purchased by Mr. Nicholas E. Ambatielos, to secure the payment of moneys due on the purchase price. The Board of Trade claimed possession of the ships under the mortgage deeds and under the terms of a certain Indenture or Deed of Covenant executed on the same date.

The action was resisted by the Defendant on several grounds, the principal ground being that the Shipping Controller had agreed to deliver the ships which had been sold, on certain fixed dates, that the ships had not been delivered on these dates and that by reason of the delay the Defendant had suffered damage. The Defence in the *Cephalonia* case (Annex 1A, United Kingdom Counter-Case) alleges the following:

4. In addition to the written terms embodied in the said contract, it was verbally agreed at or about the time at which the said contract was entered into, that the said steamships should be delivered to the Defendant on dates certain. The said verbal agreement was made between Major Bryan Laing on behalf of the Shipping Controller and Mr. G. E. Ambatielos on behalf of the Defendant. The said verbal term of the contract was subsequently confirmed in writing by letters of the 2nd May, 1921, from the Defendant to the said Major Bryan Laing and of the 11th May, 1921, from the said Major Laing to the Defendant.

The essence of the controversy which has led to this arbitration — as the arguments, both written and oral, fully show — is whether the United Kingdom Government, represented by the Shipping Controller, agreed with Mr. Ambatielos to deliver on dates certain the ships which had been sold to him, and the basis of the claim for damages is that the contract was broken by a failure to deliver the ships on the dates alleged to have been agreed upon. The Commission, therefore, must assume that by documents contrary to the claim which was put forward by the United Kingdom Government, the Greek Government means documents which show that fixed dates were agreed upon between the Government and Mr. Ambatielos for the delivery of the ships.

In the opinion of the Commission it cannot be contended successfully that documents known to the advisers of Mr. Ambatielos at the time of the proceedings in 1922 and produced to Mr. Justice Hill were sufficient in themselves to
show so clearly that fixed dates were agreed upon as to establish that the United Kingdom Government was putting forward a case contrary to documents in its possession.

According to the evidence before the Commission, the documents in the possession of the United Kingdom Government at the time when the action was before Mr. Justice Hill (apart from those which were shown to the advisers of Mr. Ambatielos or produced before Mr. Justice Hill) must be divided into two categories, namely:

(a) Documents, the existence of which is assumed, but the contents of which are unknown to the Commission such as the minutes, jackets, interdepartmental communications, files, etc., which are supposed to have been produced in or received by the Ministry of Shipping in connection with the purchase of the ships by Mr. Ambatielos or in connection with his subsequent claim; and

(b) Documents which were in existence when the trial of 1922 was proceeding and which were made known subsequently and are contained in the Exhibits or Annexes filed with the Greek Case and the United Kingdom Counter-Case.

With regard to documents in the first category, it is obvious that they do not constitute evidence on which the Commission can base a decision, inasmuch as they are not specified or identified and inasmuch as their contents are purely hypothetical. The Greek Government assumes that these unknown documents contain evidence of its main allegation that fixed dates for the delivery of the ships were agreed upon between the Ministry of Shipping and Mr. Ambatielos. As stated above, however, this Commission cannot possibly determine whether or not documents the contents of which are unknown are contrary to proceedings instituted on the basis of documents that are known. In other words, the Commission is unable to reach the conclusion that documents which it has not seen are contrary to the case put forward by the United Kingdom Government against Mr. Ambatielos.

With regard to documents belonging to the second category, it is necessary to examine their contents and determine whether the United Kingdom Government and its legal advisers must have realised that in fact they were contrary to the case put forward by the United Kingdom Government, i.e., whether they were documents showing clearly that that Government, represented by the Shipping Controller, did in fact agree with Mr. Ambatielos to deliver on dates certain the ships which it has sold to him.

The Commission does not find among the documents in the second category and reproduced in the Exhibits and Annexes filed by the Parties to this arbitration any document of a date prior to 24th November, 1922, which would furnish positive evidence that the United Kingdom Government entered into a binding agreement which provided for fixed delivery dates. Only such evidence would enable the Commission to hold that the United Kingdom Government or its advisers put forward a case which they knew to be contrary to documents in their possession.

The contract of sale of 17th July, 1919, does not, in any of its clauses, expressly provide for fixed dates. Article 7 thereof refers to delivery “within the time agreed”. Article 3 stipulates that “the steamers shall be deemed ready for delivery immediately after they have been accepted by the Vendor from the Contractors.” Finally, article 9 contemplates the case of default in delivery as between the Contractors (i.e. the builders of the ships) and the Vendor (i.e. the Shipping Controller).

The phrase “within the time agreed” in article 7 of the contract leads to the
The inference that a time certain was agreed upon somewhere, in some manner, by the Contracting Parties. The Commission, however, does not find in the evidence before it any document distinct from the written contract which contains proof of the verbal agreement said to have been made with regard to fixed delivery dates, and which would thus prove that the United Kingdom Government put forward a case contrary to documents in its possession. As the pleadings of Mr. Ambatielos in the proceedings before Mr. Justice Hill, paragraph 4 of which is set out above, show, his defence was that in addition to the written terms of the contract, “it was verbally agreed... that the said steamships should be delivered to the Defendant on dates certain,” and that “the said verbal agreement was made between Major Bryan Laing on behalf of the Shipping Controller and Mr. G. E. Ambatielos on behalf of the Defendant.” It was further alleged in the Defence that “the said verbal agreement was subsequently confirmed in writing by letters of the 2nd May, 1921, from the Defendant to the said Major Laing and of the 11th May, 1921, from the said Major Laing to the Defendant.” These letters read as follows:

2nd May, 1921.

Dear Major Laing,

You may remember calling on me in Paris about the end of August 1919 regarding the purchase of nine boats, negotiated by my brother from the Ministry of Shipping. In the course of conversation we had, I remember emphasizing to you that I attached the utmost importance to the dates of delivery which you had given to my brother and which appear in my letter to him of the 3rd July, and those dates you assured me you were satisfied could be relied upon.

You explained to me that I was justified in paying the apparently high figures I had paid because you were selling and I was buying the then position, deliveries and freights in connection with the steamers rather than the steamers alone.

I should be much obliged if you would let me know whether your recollection of our interview coincides with mine.

73, St. James’s Street, London, S.W.

11th May, 1921. Dear Mr. Ambatielos,

I am in receipt of your letter of the 2nd May. I understand you have been away for some little time, otherwise I would have replied earlier.

I have read your letter through very carefully and so far as I can recollect your letter states what took place at the interview to which you refer.

Yours faithfully, Bryan Laing

Nicolas Ambatielos, Esq.

18, Cavendish Square, London, W.

The Commission is of opinion that these two letters fail to constitute evidence confirming the alleged verbal agreement, inasmuch as the statement made by Mr. Ambatielos was: “... those dates you assured me could be relied upon.” And Major Laing in his reply agreed to the statement, saying: “so far as I can recollect”. The language of the two letters expresses an expectation, not an agreement.

The principal document, the contents of which are known to the Commission and which was in the possession of the Government at the time when the proceedings were before Mr. Justice Hill, and which dealt with the question of fixed delivery dates and which was not disclosed to the advisers of Mr.
los or produced to Mr. Justice Hill, was the letter addressed by Major Laing to Sir Joseph Maclay, the former Shipping Controller, on 20th July, 1922.

This letter was written in reply to one in which Sir Joseph Maclay had asked Major Laing for information concerning the sale of ships to Mr. Ambatielos, and Sir Joseph wrote in this connection:

At the time the sale was being negotiated you will remember you were in constant touch with me, but so far as I remember, nothing was ever said about guaranteeing dates of delivery, which, of course, it was impossible to do. I presume you told purchaser that the Ministry would do anything it could to hasten delivery and hoped-for dates might be mentioned, but nothing beyond this.

The pertinent paragraphs of the answer by Major Laing were the following:

I was of the opinion that it was most essential to dispose of the ships building at Hong Kong, and I had cables sent to our agents who were responsible for the building and completion, and they cabled back dates which they considered quite safe, and it was on this information that I was enabled to put forward a proposition to you.

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

It will be seen that this letter was not sufficiently concrete and to the point to constitute evidence strong enough to convince the United Kingdom Government and its advisers of the fact that a legally binding agreement obliging the Government to adhere to fixed delivery dates was concluded by Major Laing, on behalf of the Government, with Mr. Ambatielos. It is worthy of note that Major Laing in his letter does not refer to an agreement with Mr. Ambatielos or even to a promise made to him, but an “argument” by means of which he Induced him to purchase the ships. The overall context of the letter and especially the two paragraphs quoted above are evidence of Major Laing’s primary purpose, viz. to “reduce the liability against the Ministry of Shipping as rapidly as possible” and to secure a purchaser for the ships then building at Hong Kong. In furtherance of this purpose, by emphasising the economic advantages of the location of the ships and of a “free charter-party”, and evidently convincing Mr. G. Ambatielos that the delivery dates given by the builders could be depended upon, Major Laing, as the letter states, induced him to purchase the ships on behalf of his brother.

The letter has to be considered in connection with the evidence, chiefly the testimony of Mr. G. Ambatielos, that Major Laing invariably refused to insert fixed dates in the written contract. The Commission is of opinion that this attitude of Major Laing could be regarded by the United Kingdom Government as corroborating its case that there was no binding agreement for fixed dates. The Commission is unable to understand why the two parties, having agreed on a transaction which was to take the form of a written contract, should have made a vital and essential condition of that transaction the subject of a verbal agreement operating concurrently with the written contract.

The lack of evidential value of the Laing letter is corroborated by the affidavit of Mr. N. E. Ambatielos read in the Court of Appeal on 5th March, 1923, wherein he said:

Before the trial of this action I had a conversation with Major Laing concerning matters in question in this action.... Major Laing mentioned the existence of
certain confidential letters.... Mr. Laing read me a part of the contents of the letters, but refused to show me the letters or to give me copies thereof.... I did not receive from the extracts read to me or from the conversation which I held with Major Laing a correct impression as to the meaning of the letters. In particular, I did not understand that they confirmed my case as to the delivery of the vessels on dates certain.

A similar statement was made in another affidavit read on the same occasion viz. an affidavit by Mr. F. P. D. Gaspar, a member of the law firm of William A. Crump & Son, solicitors for Mr. Nicholas E. Ambatielos. In paragraph 3 of his affidavit Mr. Gaspar said:

The defendant contended that in addition to the written terms embodied in the said contract it was verbally agreed by the said Major Laing at the time at which the said contract was entered into, that the said steamships should be delivered to the defendant on dates certain.

Then in the final paragraph the deponent declares: "Major Laing refused to give me any statement or proof at any time either before or during the trial."

Why Major Laing refused to make clear his position prior to the proceedings before Mr. Justice Hill, with the result that he awakened fear or suspicion as to what he would say in evidence, particularly in cross-examination, and consequently was not called as a witness by Mr. Ambatielos, is something which, in the opinion of the Commission, can easily be explained. He would have found it very difficult to tell the Court why he had refused to put dates into the written contract (as testified by Mr. G. Ambatielos and other witnesses) and had at the same time said that he was binding the United Kingdom Government to deliver ships on fixed dates. He also would have found it very difficult to explain why he had pretended (as Mr. Nicholas Ambatielos testified) to make an agreement on behalf of the Ministry of Shipping in August, 1919, about sharing losses on freights.

Another document in the possession of the United Kingdom Government and one to which the Greek Government attached great weight is the cablegram relative to the S.S. War Trooper, renamed Ambatielos, referred to as having been sent by Sir John Esplen, a member of the Committee of the Ministry of Shipping on 31st October, 1919. According to the Greek Case this ship was to be delivered on or before 30th September, 1919. (Greek Case, paragraph 24.) The cablegram reads as follows:

From Esplen, Shipminder to Britannia, Hong Kong. Following for Dodwell, War Trooper. As the steamer was sold to buyers for delivery not later than November it is of utmost importance that she should be completed by that date stop Cable immediately progress of construction.

(Signed) M. J. Straker.

In the Statutory Declaration made by Major Laing on 19th January, 1934, he said with regard to this telegram:

This was sent because the Committee was becoming worried at the continual delay and they foresaw either cancellation of the contract or a claim being made against them.

The story of how that cable message was produced is told in a different manner by Mr. G. E. Ambatielos in his evidence before Mr. Justice Hill. His version was that the cablegram was not sent by order of either Sir John Esplen or the Committee, but on the personal instructions of Major Laing. Here is the relevant part of the evidence:
Q. Were you there when he gave the instructions?

A. Yes; I was there when the instructions were given; but I was not there when the telegram was sent.

Q. What instructions did he give? Did he call in a clerk?

A. He called this Miss Straker, who was acting as his secretary as well as the secretary to Sir John Esplen.

Q. What did he say to her?

A. He said: "You must immediately wire that definite date has been agreed in respect to the steamer War Trooper, and that steamer must be delivered by that date", and he turned round to me and said: "I cannot make it any stronger", and he left.

In conformity with the facts and considerations set forth above, the Commission finds that none of the documents which are known to have been in the possession of the United Kingdom Government at the time of the 1922 proceedings and which were not shown to the advisers of Mr. Ambatielos or produced to Mr. Justice Hill (i.e. documents in category (6)) was necessarily inconsistent with the case put forward by the United Kingdom Government. It is the view of the Commission that none of the said documents constituted evidence strong enough to satisfy the United Kingdom Government and its legal advisers that a binding oral agreement had been entered into guaranteeing fixed dates for the delivery of the vessels and supplementing the written contract of 17th July, 1919.

After this finding of fact the Commission will consider the point of law involved in the first submission of the Greek Government hereinbefore examined, to wit: whether a Government which institutes an action contrary to documents in its possession does thereby deny "free access to the Courts" to an alien defendant. The Commission is of opinion that "free access" is something entirely different from the question whether cases put forward in Courts by Governments are right or wrong, and that denial of "free access" can only be established by proving concrete facts which constitute a violation of that right as understood and defined in this award. The Commission finds, therefore, that in putting forward the case herein referred to, the United Kingdom Government did not deprive Mr. Nicholas E. Ambatielos of his right of free access to the Courts afforded to him by Article XV of the Treaty of 1886.

The second submission is that:

The British Government withheld those documents, thereby preventing Mr. Ambatielos knowing that they were putting forward a case of that kind, namely, a case known to be false.

The line of reasoning developed in connection with the first submission is applicable to the second. The notion of "free access to the Courts" does not comprise an obligation on the part of Governments to disclose to an opponent in litigation, before or during the trial, all documents in its possession. If it were held, as intimated at the hearing, that considerations of equity and fairness impose upon the State an obligation to make known to an alien opponent all documents that have or may have a bearing on the case, even if they are favourable to the alien, such considerations would be of no avail in the present controversy, which can only be decided on legal grounds. No provision in Article XV of the Treaty of 1886 imposes such an obligation on the Contracting Parties. The non-disclosure here alleged would constitute a denial of "free access" if it could be shown that the act of non-disclosure does not conform with English law or that that law gives to British subjects, and not to foreigners, a right to discovery, thereby establishing a discrimination between nationals and foreigners. No evidence to that effect has been produced in the present case.
Accordingly, the Commission finds that the withholding of certain documents in the action brought against Mr. Nicholas E. Ambatielos by the United Kingdom Government did not prevent the defendant from exercising his right of free access to the Courts guaranteed to him by Article XV of the Treaty of 1886.

The third submission is that:

*The British Government did so in circumstances in which they knew that Mr. Ambatielos had no power to compel them to disclose those documents, they having the right to refuse to disclose them.*

This submission, as set out, virtually decides by itself the question raised. Once it is recognised that the Government had a right to refuse to disclose the documents, and hence, that the non-disclosure was in conformity with English law and practice, the fact stated above does not constitute a violation of the right of free access to the Courts. Moreover, if the Government knew that Mr. Ambatielos had no power to compel it to disclose the documents because the Government was entitled to refuse discovery, such a knowledge was a natural consequence of the exercise of the right to refuse, and not a wrongful act. The Commission, therefore, finds that the fact set out in the third submission was not a violation of the right of Mr. Nicholas E. Ambatielos to have free access to the English Courts as defendant in the action brought against him by the Government of the United Kingdom. The Commission thinks it right to add that the reason for the words “they having the right to refuse to disclose them”, which are used by the Greek Government in the third submission quoted above, was that the Maclay-Laing letters clearly fell within the class of documents privileged from disclosure or production in English law as documents coming into existence solely for the purpose of enabling legal advisers to prepare a case for trial. The departmental minutes and files fall within a class of documents which, if and when expressly called for in the appropriate manner, may, under English law, be withheld on the ground that the production of that class of document is contrary to the public interest.

If any contention that any documents were withheld contrary to English law, had been made and persisted in, which was not the case, the Commission would have had to consider the effect of that circumstance on the application of the rule of non-exhaustion of legal remedies.

**Non-Exhaustion of Local Remedies**

In countering the claim of the Greek Government the Government of the United Kingdom relies on the non-exhaustion by Mr. Ambatielos of the legal remedies which English law put at his disposal.

One of the questions which the Commission is requested to determine is “The question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty.” The Commission notes that the question raised by the United Kingdom Government covers all the acts alleged to constitute breaches of the Treaty.

The Commission will therefore examine the validity of the United Kingdom objection independently of the conclusions it has reached concerning the validity of the Ambatielos claim under the Treaty of 1886.

The rule thus invoked by the United Kingdom Government is well established in international law. Nor is its existence contested by the Greek Government. It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if
the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals.

In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of internal law, of remedies which have not been used. The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.

The Greek Government contends that in the present case the remedies which English law offered to Mr. Ambatielos were ineffective and that, accordingly, the rule is not applicable.

The ineffectiveness of local remedies may result clearly from the municipal law itself. That is the case, for example, when a Court of Appeal is not competent to reconsider the judgment given by a Court of first instance on matters of fact, and when, failing such reconsideration, no redress can be obtained. In such a case there is no doubt that local remedies are ineffective.

Furthermore, however, it is generally considered that the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies. But in a case of that kind it is essential that such remedies, if they had been resorted to, would have proved to be obviously futile.

Here a question of considerable practical importance arises.

If the rule of exhaustion of local remedies is relied upon against the action of the claimant State, what is the test to be applied by an international tribunal for the purpose of determining the applicability of the rule?

As the arbitrator ruled in the Finnish Vessels Case of 9th May, 1934, the only possible test is to assume the truth of the facts on which the claimant State bases its claim. As will be shown below, any departure from this assumption would lead to inadmissible results.

In the Finnish Vessels Case the issue was whether a means of appeal which had not been used by the claimants ought to be regarded as ineffective.

In the Ambatielos Case, failure to use certain means of appeal is likewise relied upon by the United Kingdom Government, but reliance is also placed on the failure of Mr. Ambatielos to adduce before Mr. Justice Hill evidence which it is now said would have been essential to establish his claims. There is no doubt that the exhaustion of local remedies requires the use of the means of procedure which are essential to redress the situation complained of by the person who is alleged to have been injured.

In paragraph 109 of its Counter-Case, the United Kingdom Government says the following concerning this point:

The "local remedies" rule... finds its principal field of application in the two requirements (a) that the complainant should have availed himself of any right given him by the local law to take legal proceedings in the local courts; and (b) that having done so, he should have exhausted the possibilities of appealing to a higher court against any adverse decision of a lower one. The application of the rule is not, however, confined to these two cases. It also requires that during the progress, and for the purposes of any particular proceedings in one of the local courts, the complainant should have availed himself of all such
procedural facilities in the way of calling witnesses, procuring documentation, etc., as the local system provides.
The Commission shares this view in principle. At the same time it feels that it must add some clarifications and reservations to it. Although this question has hardly been studied by writers and although it does not seem, hitherto, to have been the subject of judicial decisions, it is hardly possible to limit the scope of the rule of prior exhaustion of local remedies to recourse to local courts.

The rule requires that "local remedies" shall have been exhausted before an international action can be brought. These "local remedies" include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals. It is the whole system of legal protection, as provided by municipal law, which must have been put to the test before a State, as the protector of its nationals, can prosecute the claim on the international plane. In this sense the statement in paragraph 109 of the Counter-Case seems to be sound.

It is clear, however, that it cannot be strained too far. Taken literally, it would imply that the fact of having neglected to make use of some means of procedure — even one which is not important to the defence of the action — would suffice to allow a defendant State to claim that local remedies have not been exhausted, and that, therefore, an international action cannot be brought. This would confer on the rule of the prior exhaustion of local remedies a scope which is unacceptable.

In the view of the Commission the non-utilisation of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies only if the use of these means of procedure were essential to establish the claimant's case before the municipal courts.

It is on the assumption that the statements of the claimant Government are correct that the international tribunal will be able to say whether the nonutilisation of this or that method of procedure makes it possible to raise against a claim a plea of inadmissibility on the ground of non-exhaustion of local remedies.

*Have the local remedies been exhausted with regard to Claim A?*

Claim A is a claim for compensation for breach of the contract of sale by the United Kingdom Government. The breach alleged is that the vessels which Mr. Ambatielos bought at an agreed price and on condition that they were to be delivered to him on certain fixed dates, which had been agreed upon between the Parties, were not in fact delivered on those dates. Compensation is claimed for the damage caused to Mr. Ambatielos as a result of this breach of contract.

The United Kingdom Government has raised the question of the nonexhaustion of local remedies in the English Courts in so far as concerns the acts which are alleged to constitute breaches of the Treaty of 1886.

The principal act which is alleged by the Greek Government to constitute a breach of that Treaty is the alleged breach of contract aforesaid.

As regards Claim A, the questions of the non-exhaustion of local remedies thus raised are:

(1) In the 1922 proceedings Mr. Ambatielos failed to call (as he could have done) the witnesses who, as he now says, were essential to establish his case.

With regard to Major Laing, the Greek Government has primarily contended that Mr. Ambatielos was prevented from calling Major Laing as a witness before Mr. Justice Hill because Major Laing — though not heard — had been
The Greek Government further contends that if Mr. Ambatielos had called Major Laing as a witness, the decision of Mr. Justice Hill would have been favourable to him; this is a contention which is disputed by the United Kingdom Government.

It is not possible for the Commission to decide on the evidence before it the question whether the case would have been decided in favour of Mr. Ambatielos if Major Laing had been heard as a witness. The Commission has not heard the witnesses called before Mr. Justice Hill and cannot solely on the documentary evidence put before the Commission form an opinion whether the testimony of Major Laing would have been successful in establishing the claim of Mr. Ambatielos before Mr. Justice Hill. The Commission cannot put itself in the position of Mr. Justice Hill in this respect.

The test as regards the question whether the testimony of Major Laing was essential must therefore be what the claimant Government in this respect has contended, viz. that the testimony of Major Laing would have had the effect of establishing the claim put forward by Mr. Ambatielos before Mr. Justice Hill.

Under English law Mr. Ambatielos was not precluded from calling Major Laing as a witness.

In so far as concerns Claim A, the failure of Mr. Ambatielos to call Major Laing as a witness at the hearing before Mr. Justice Hill must therefore be held to amount to non-exhaustion of the local remedy available to him in the proceedings before Mr. Justice Hill.

It may be that the decision of Mr. Ambatielos not to call Major Laing as a witness, with the result that he did not exhaust local remedies, was dictated by reasons of expediency — quite understandable in themselves — in putting his case before Mr. Justice Hill. This, however, is not the question to be determined. The Commission is not concerned with the question as to whether he was right or wrong in acting as he did. He took his decision at his own risk.

The testimony of Major Laing must be assumed to have been essential for the success of the action of Mr. Ambatielos before Mr. Justice Hill. It could have been adduced by Mr. Ambatielos but was not in fact adduced. Mr. Ambatielos has therefore not exhausted the local remedies available to him in the proceedings before Mr. Justice Hill.

The Commission, having accepted the contention of the Greek Government that the evidence adduced by Major Laing if he had been heard as a witness would have resulted in a decision of Mr. Justice Hill favourable to Mr. Ambatielos, the question whether Mr. Ambatielos was prevented by the United Kingdom Government from adducing other evidence which might have lead to the same result does not seem to be relevant to the question whether the failure of Mr. Ambatielos to call Major Laing as a witness must be considered as amounting to a non-exhaustion of the local remedy available to him in the first instance. If a man can secure help by taking course A or course B and is prevented from taking course A, he fails to exhaust his remedies if he refrains from taking course B.

(2) The second question as to non-exhaustion raised by the United Kingdom Government is the failure of Mr. Ambatielos to make use of or exhaust his appellate rights.
As the Commission has assumed, for the purposes of the test which it has accepted, that the testimony of Major Laing was essential to establish the claim of Mr. Ambatielos before Mr. Justice Hill, and as it has decided that the omission to produce that evidence constituted a failure to exhaust the remedy available to Mr. Ambatielos in the proceedings before Mr. Justice Hill, it might seem superfluous to consider the second question which has been raised.

Nevertheless it may be pertinent to state that the failure of Mr. Ambatielos to prosecute the general appeal which he had lodged against the decision of Mr. Justice Hill would ordinarily be considered a failure to exhaust local remedies. Such failure requires some excuse or explanation.

The refusal of the Court of Appeal to give leave to adduce the evidence of Major Laing did not, of course, in itself prevent this general appeal from being proceeded with.

The Greek Government argues by way of explanation that to proceed with the general appeal once the decision of the Court of Appeal not to admit the Laing evidence had been given would have been futile because the Laing evidence was essential to enable the Court to arrive at a decision favourable to Mr. Ambatielos.

The reason why Mr. Ambatielos was not allowed to call Major Laing in the Court of Appeal was, in the words of Lord Justice Scrutton, that "One of the principal rules which this Court adopts is that it will not give leave to adduce further evidence which might have been adduced with reasonable care at the trial of the action".

Accordingly, the failure of Mr. Ambatielos to exhaust the local remedy before Mr. Justice Hill, by not calling Major Laing as a witness, is the reason why it was futile for him to prosecute his appeal.

It would be wrong to hold that a party who, by failing to exhaust his opportunities in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies.

It may be added that Mr. Ambatielos did not submit to the Court of Appeal any argument suggesting, or any evidence to show, that any illegal or improper manoeuvres by his opponents had prevented him from calling Major Laing or producing any documents.

In so far as concerns the appeal to the House of Lords, it is of course unlikely that that Court would have differed from the decision of the Court of Appeal, refusing to allow Major Laing to be called as a witness in the latter Court. If it is held that such an appeal would not have been obviously futile, the failure of Mr. Ambatielos to appeal to the House of Lords must be regarded as a failure to exhaust local remedies. If, on the other hand, it is held that an appeal to the House of Lords would have been obviously futile, Mr. Ambatielos must likewise be held to have lost his hope of a successful appeal, by reason of his failure to call Major Laing.

Have the local remedies been exhausted with regard to Claim B?

It it were to be held that, contrary to the contention of the Greek Government, the contract did not contain any provision binding the United Kingdom Government regarding agreed dates for the delivery of the ships which had been sold to Mr. Ambatielos, the Greek Government claims in the alternative the return of £500,000 which, according to the contention of the Greek Government, was paid by Mr. Ambatielos in consideration of agreed dates of delivery.
The Greek Government claims this sum on the ground of “unjust enrichment”, together with all damages, interest and costs resulting therefrom.

This claim has not been before an English Court.

The Greek Government contends that it would have been futile to submit such a claim to an English Court, on the ground that English law does not recognise unjust enrichment as a valid basis for a claim.

The Commission is of opinion that it must first examine whether the claim as defined by the Greek Government can be said to constitute a claim for unjust enrichment.

The Commission finds that this is not the case. Claim B is not, as the Greek Government contends, a “quasi contractual” claim. The claimed sum of £500,000 was only part of the price which Mr. Ambatielos was to pay for the ships (together with advantages of position and “free charter-parties”) in accordance with the contract. Furthermore the full purchase price was not received by the United Kingdom Government. If however Claim B had been based on unjust enrichment, and had thus been independent of and alternative to claim A, the Commission is of opinion that Claim B would have failed, in so far as remedies were available in English law, on the ground that such remedies had not been tried — much less exhausted. The Commission has already decided that the Treaty of 1886 did not secure, for Greek subjects, remedies not available in English law.

Were the local remedies exhausted as regards Claim C?

Claim C refers to the position of Mr. Ambatielos on 4th November, 1920 (the date of the signature of the Mortgage Deeds), and rests on the argument that the sale of the Mellon and the Stathis should have been cancelled on that date, and not on the date of Mr. Justice Hill's judgment, viz. on 15th January, 1923.

According to the Greek Government this claim is an alternative claim to Claim A.

The claim was not before Mr. Justice Hill. The claim before Mr. Justice Hill concerning the Mellon and the Stathis was a claim by Mr. Ambatielos for damages for non-delivery of these two ships. Claim C is a claim for damages based on the contention that the United Kingdom Government, by not cancelling the sale of the Mellon and the Stathis on the date of the Mortgage Deeds, 4th November, 1920, but only at the trial of the action before Mr. Justice Hill, has caused Mr. Ambatielos damage in the amount stated in Claim C. It is the converse of the claim put forward before Mr. Justice Hill.

The Greek Government has never contended that there was any obstacle to a recourse to local remedies in regard to this claim. But no claim was ever put forward before the English Courts. The Commission, therefore, finds that there has been, in regard to this claim, a non-exhaustion of local remedies. For these reasons,

THE COMMISSION

rejects the United Kingdom contention that there has been undue delay in the presentation of the Greek claim on the basis of the Treaty of 1886; finds that the claim is not valid having regard to the question raised by the United Kingdom Government of the non-exhaustion of legal remedies in the English Courts in respect of the acts alleged to constitute breaches of the Treaty; finds that the claim is not valid having regard to the provisions of the Treaty of 1886.

DONE IN LONDON THIS SIXTH DAY OF MARCH, NINETEEN HUNDRED AND FIFTY SIX IN THREE COPIES ONE OF WHICH IS TRANSMITTED TO EACH OF THE GOVERNMENTS OF GREECE
and the United Kingdom of Great Britain and Northern Ireland and a third to the Archives of the
Permanent Court of Arbitration at The Hague.

**

President Alfaro did not concur in the part of the award which deals with the question of non-exhaustion
of legal remedies with regard to Claim A, and has appended to the award his individual opinion.

Professor J. Spiropoulos who is unable to concur in the award has appended to the award his dissenting
opinion.