THE MAVROMMATIS CASE ON READAPTATION OF THE JERUSALEM CONCESSIONS

In order to understand the full purport of the decision of the Permanent Court of the International Justice on the readaptation of the Mavrommatis Jerusalem concessions (Judgment No. 10, October 10, 1927) it is necessary to recur to the court's previous judgments. The grant of the conflicting Rutenberg concession in 1921 was held, in Judgment No. 5, to be contrary to the obligations contracted by the British Government as mandatory for Palestine under Protocol XII of the Treaty of Lausanne in conjunction with Article 11 of the mandate. The question then remained whether Mavrommatis had suffered loss entitling him to compensation. The Greek Government maintained that the execution of the concessions had already been rendered impossible by the grant of the Rutenberg concession. The court held, however, that while the Mavrommatis concession was valid, and one for which Great Britain as mandatory was bound to ensure respect under Article 11 of the mandate, it was not liable for compensation, but was obliged under the protocol to grant a "readaptation" of the concession to the new economic conditions prevailing since the war (Judgment No. 5, p. 51).

In accordance with this decision, Mavrommatis received a new concessionary contract on February 25, 1926, as a readaptation of his previous concession. The British Government, through the High Commissioner, undertook to approve, not later than August, 1926, the plans deposited in May, 1926, but did not in fact do so until December. The Greek Government claimed that by reason of this delay and by the hostility displayed by certain British authorities due to the action of the competing concessionaire, "it was rendered materially and morally impossible for M. Mavrommatis to obtain the financing of his concessions and that he has thus unjustly suffered damage" (Judgment No. 10, p. 6).

Under the new contract, Mavrommatis had been obliged to surrender "absolutely and irrevocably" all rights and benefits under the concession of 1914. He undertook to form companies for carrying out the new concessions and to obtain subscriptions for fixed portions of the share capital and to submit plans for the works which the High Commissioner was to approve or disapprove within three months. The receipt of the plans was acknowledged May 5th and therefore it was claimed that they should have been acted on by August 5th. In the meantime, Mavrommatis was notified that his assignment of the concessions to Lord Gisborough was deemed unwarranted by the terms of the concessions and he thereupon terminated the agreement with the assignee and requested the High Commissioner (September 4, 1926) to regard the plans as deposited on his, Mavrommatis', behalf. The plans were not approved until September 23rd and December 2nd, 1926, respectively, and the ensuing damage was charged against the British Government (Judgment No. 10, pp. 10–12).

The question in issue was whether the terms of the new concessions were

violated by Great Britain; because, if they were, the readaptation decreed by Judgment No. 5 had never been accomplished and the international obligations assumed by the mandatory under Article 11 had not been complied with (p. 12). The court considered only the question of its jurisdiction, and the merits were not involved.

Article 11 of the mandate provides in part as follows:

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

The jurisdiction of the court is predicated under Article 26 of the mandate which contains the following:

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

Reading these texts together, the jurisdiction of the court would seem to be fairly contemplated; yet the court held that it was concluded by its previous decisions to take jurisdiction only if "the facts alleged by the Greek Government in support of its claim constitute an exercise of the 'full power to provide for . . . public control' under Article 11 of the Mandate" (p. 19). The court under its previous decision held that the grant of a competing concession constitutes an exercise of "public control" as these words are used in the mandate. On the other hand, it was held that the right reserved in a grant of a concession for a public utility "to exercise powers of advice and supervision" either by the authorities of government, or by means of administrative regulations, does *not* come within the conception of "public control" (p. 17). A claim had indeed been made by the later concessionaire, Rutenberg, that the readapted concession of Mavrommatis was competing in regard to the use of the waters of the river El-Audja, but as the court determined that there was in fact no incompatibility, the acts complained of were held not to come within the category of an exercise of "public control," but only of the power reserved for "advice and supervision." While an international tribunal will ordinarily construe strictly the clauses upon which its jurisdiction is based, the reasoning seems somewhat strained when it is observed that the clause referring to "public ownership and control" is a specific grant of power and is preceded in both the English and the French texts by the *general* reservation: "subject to any international obligations accepted by the Mandatory."

Even assuming that the interpretation as to the court's jurisdiction is a logical result of the reasoning in Judgments Nos. 2 and 5, there is still another ground upon which the court might reasonably have assumed jurisdiction. If the alleged breach were under consideration for the first time, a different question would have been presented. But the alleged breach concerned and placed in issue *the completion of the readaptation ordered by Judgment No. 5.* In other words, the refusal to take jurisdiction seems to have rendered futile the carefully considered judgments rendered on the previous submissions. Let us analyze the results reached. The court has held that Great Britain had violated its international obligations in respect to the Mavrommatis concessions in certain particulars (Judgment No. 5). The court was properly seized of jurisdiction to so decree (Judgment No. 2). The proper remedy was held to consist in a readaptation of the concession thus violated (Judgment No. 5). In consideration of such readaptation, the concessionaire was compelled to surrender all rights under the earlier concessions. *And yet* the mandatory, by failing to take the necessary steps to make the new concession definite, could annul both the old and the new concession without right of redress through the Permanent Court (Judgment No. 10). As Judge Nyholm puts it in his dissenting opinion: "It follows that by the choice of his *own line of action*, a Mandatory may abolish the jurisdiction of the Court, an inadmissible proposition" (p. 31). An American lawyer might say that under the principles of novation, the redress to which the concessionaire was concededly entitled under the old contract could not be deemed accomplished until the new concession came definitely into effect.

It should be noted that of the judges who constituted the majority of the court in Judgment No. 10, Lord Finlay, Judge Moore and Judge Oda, having dissented from Judgment No. 2, were opposed to the assumption of jurisdiction by the court from the beginning. Judges Nyholm, Altamira and Caloyanni (the national judge) dissented from the present judgment.

The importance of the decision lies not so much in the questions of private rights which were involved (the claim exceeded an equivalent of one million dollars), but in the seeming emasculation of the control which it was believed the Permanent Court would possess over the exercise of the mandate. The jurisdiction in respect to the interpretation and application of the mandate, which many believed to be *general* in scope, subject to specific exceptions, now appears to be available only *as an exception.*

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INTERNATIONAL PROTECTION OF PROPERTY IN NEWS

For some years efforts have been made to secure international legislation for the protection of a so-called "property in news." The national legislation of several countries is often referred to as having recognized the existence