SEPARATE OPINION OF M. BADAWI, VICE-PRESIDENT OF THE COURT

[Translation]

The Court has found that it is without jurisdiction on the ground of the reservation attached by the French Government to its Declaration of March 1st, 1949, on which the Norwegian Government relied by virtue of the reciprocity provided for in its own Declaration of November 16th, 1946.

By its nature, the first Objection, in the form of the reservation concerning national jurisdiction, is conclusive when invoked by the Respondent against an Applicant which has made its declaration subject thereto. It has a formal and direct character which precludes any argument.

The reservation constitutes, however, a subsidiary formulation of the first Objection which, as conceived and presented by the Norwegian Government throughout the proceedings, was that the dispute falls within the domain of municipal law. The reservation is relied on by the Norwegian Government only in the event of any doubt remaining as to the character of the dispute being that of a dispute within the domain of municipal law. In that event, it would be considered that this character had not been established and the Objection would consequently be rejected. It was in order to obviate this consequence that the reservation was invoked by the Norwegian Government which considered it more conclusive than the Objection relating to municipal law.

Now, the characteristic feature of a subsidiary request is indeed that it denotes a degree of certainty that the main request does not evoke.

Further, notwithstanding certain elements that are common to the Objection relating to municipal law and the reservation, the latter is subjective in character, whereas the Objection is, by its very nature, objective. They are therefore different in nature.

In point of fact, the reservation was not taken up again by the Norwegian Government either in the pleadings or in the oral prodeecings.

I am therefore of opinion that the Court should not base its judgment on the reservation unless it considers that the objection relating to municipal law is not an adequate ground for finding that the Court has no jurisdiction—unless, that is, doubts remain as to the validity of that objection.

In its Judgment, however, the Court did not think it necessary to undertake an examination of the municipal law character of the dispute. As I consider that the dispute does possess that character, I feel it necessary to give my reasons for this conclusion.

The subject of the proceedings, as defined by the Application of the French Government and maintained by that Government in the pleadings and in the subsequent hearings—apart from the additional Submissions which are concerned with the rejection of the Objections put forward by the Norwegian Government—relates to the construction to be placed on the loan contracts and the determination of the substance of the debt. Now, according to the generally recognized rules of private international law, these questions are governed by the law of the debtor (in this case, Norwegian law).

The Permanent Court of International Justice has already so stated in the Serbian and Brazilian Loans cases. It found beyond any possible doubt that these questions fall within the domain of municipal law.

Quite apart from the considerations upon which the Permanent Court relied in finding that it had jurisdiction and in applying French law as interpreted by French jurisprudence, it is thus obvious that, for the Court to have jurisdiction, it must be seised of a claim relating to international law. The French Government itself has recognized this requirement. Not only does it not dispute it, but it seeks to prove that the claim falls within the provisions of Article 36 of the Statute on two grounds, namely, that it comes within categories *(b)* and *(c)* of that Article, i.e. *(b)* any question of international law and *(c)* the existence of any fact which, if established, would constitute a breach of an international obligation.

In order to show that the case brought before the Court constitutes a dispute under international law, the French Government claims that it possesses that character by virtue of the Second Hague Convention, of October 18th, 1907, relating to arbitration. But it is difficult to follow its reasoning in this connection. At times, the argument based on the Convention is directed towards showing that the action of Norway constitutes a breach of the obligation that country accepted in respect of compulsory arbitration. At other times, it is the very matter of the recovery of contractual debts by a State taking up the case of its nationals which is claimed to be, by its nature, a matter falling within the domain of international law.

> "The refusal of arbitration is an act contrary to law. It relates to the payment of the international loans of Norway, that is to say, to the question which the Second Convention brought within the sphere of international questions and within those matters which, *by their nature*, fall under *international jurisdiction*."
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> "The French Government holds that the policy adopted by the Norwegian Government in regard to the payment of these international loans raises a problem of international law, namely, the recovery of contractual debts, which is governed by the Second Convention of 1907." (Oral argument of May 14th, 1957.)

It may at once be noted that the contention that the question of the recovery of the debts constitutes, by its nature, an inter-

national dispute is a gratuitous assertion. There remains to be considered whether the 1907 Convention established compulsory arbitration in the matter of debts, and whether the refusal to arbitrate in the dispute between France and Norway constitutes a violation of an international undertaking such as would authorize the French Government to bring the question of the debts before the Court by means of an Application.

In the first place, is there compulsory arbitration in respect of the recovery of debts?

The second paragraph of Article 1 of the 1907 Convention does indeed refer to arbitration, but not for the purpose of imposing upon the State charged as a debtor an obligation to arbitrate; its purpose is merely to limit the undertaking not to resort to force.

Even if it be conceded that the 1907 Convention gives rise to compulsory arbitration for the recovery of debts, the obligation thereby established cannot have by way of sanction, in the event of a refusal to arbitrate, the effect of changing the nature of the original dispute itself by transforming it from a dispute subject to settlement by arbitration to a dispute subject to judicial settlement. Were such a transformation possible, all disputes in respect of which arbitration is compulsory would, merely by reason of a refusal to arbitrate, fall *ipso facto* within the compulsory jurisdiction of the Court.

In fact, if the international dispute is constituted by Norway's refusal to comply with an obligation to accept arbitration on the question of the construction to be placed on the loan contracts, the breach of that international obligation, not the question to be arbitrated, would be the only subject-matter of the international dispute. The proceedings to be instituted before the Court by means of an Application could be designed only to obtain from the Court a decision to the effect that Norway was under an obligation to accept arbitration and to proceed to the drafting of the special agreement and to the appointment of arbitrators. Reference is made in this connection to the *Ambatielos* case.

But the French Government, in order to establish the jurisdiction of the Court, does not rely only on sub-paragraph *(b)* of Article 36. It relies also on sub-paragraph *(c)* which relates to the existence of any fact which, if established, would constitute a breach of an international obligation. It does not, however, explain its meaning on this point. It has raised it in its Reply and repeated it in its final Submissions whithout, at any time, making it clear what was the fact involved.

But since the present case has been presented by the French Government as a reproduction of the two cases on the *Serbian and Brazilian Loans*, it is necessary to note that the Permanent Court upheld its jurisdiction in those cases by assimilating to disputes of pure fact, disputes which had to be decided by the application of national law.

The Permanent Court had already held in its Judgment No. 7 that from the standpoint of international law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States. It regarded them as such in the cases under reference, itself applying those laws.

Sub-paragraph *(c)* of Article 36 of the Statute relates to the special case where the Parties are in agreement as to the rule of international law or, more precisely, as to the international obligation, but are in disagreement as to the facts constituting a breach thereof. For, if they are in disagreement as to the international obligation itself, the case would fall within sub-paragraph *(b)*, and sub-paragraph *(c)* would merely be an unnecessary repetition.

Thus, if the application of a system of law were to be regarded as a fact, as would seem to be envisaged in the present case, the Parties would be deemed to be in agreement that international law contains a rule to the effect that the cancellation of the gold clause is not applicable to international payments, but not to be in agreement as to the interpretation of Norwegian law. France, basing herself on sub-paragraph *(c)*, would then have instituted these proceedings to obtain from the Court an interpretation of Norwegian law to this effect.

However, Norway disputes the alleged rule of international law. This is the very basis of the present case. This is therefore not the case covered by sub-paragraph *(c)*.

Obviously, it is still possible for France to hold that, if the Norwegian law does not adopt this rule of international law, then Norwegian law would itself constitute a case of denial of justice. In that event, however, it would not be sub-paragraph *(c)* that could be the ground for the Court's jurisdiction, but sub-paragraph *(d)* of Article 36.

Now, whilst postulating the denial of justice, the French Government did not take that as its basis. According to its final Submissions the international character of the dispute would, by virtue of sub-paragraphs *(b)* and *(c)* of paragraph 2 of Article 36 of the Statute, derive from the Second Hague Convention of 1907. But neither of these sub-paragraphs, taken in conjunction with the Convention of 1907, justifies this classification.

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It was asserted, however, that the case falls within the domain of international law because the French Government has adopted the cause of its nationals and is exercising diplomatic protection on their behalf, thereby conferring an international character on the case. It is hardly necessary to point out that this begs the question, since the contention put forward in this Objection is, in fact, that there were no grounds for the exercise of this protection.

It has also been asserted that the case comes both within the domain of national law and within the domain of international law, or that the question is doubtful.

Questions concerning *inter alia* equality of treatment as between aliens and nationals, the distinction between resident aliens and non-resident aliens, discrimination as between different categories of foreign creditors[1] —these questions are said to be raised by this case and they are all said to be questions of international law.

But if these questions, apart from that of discrimination, were raised, this was not done originally by the French Government, whose Application and Memorial go no farther than to ask the Court to interpret the loan contracts in the sense set forth in its Submissions, relying on the doctrine of international payments and on the gold clause.

In point of fact, they were raised as a means of defence by the Norwegian Government. After seeking to establish the national character of the law governing the loan contracts, it led the way in showing that its own interpretation does not constitute a denial of justice—and, in this particular case, that would be the only ground for claiming that there was a breach of an international obligation justifying proceedings before the Court. In the subsequent proceedings, the French Government felt it had to follow the Norwegian Government in this line of argument in order to controvert its contentions. But it would be very strange, and even paradoxical, to consider that the denial of the international character of a question of municipal law and the discussion entered into in that connection confer on that very question an international character.

The question of which the Court is seised is thus one which, by its very nature, comes within the domain of municipal law. For my part, I consider that, quite apart from the reservation, the Court could and should have upheld the first Objection.

(Signed) A. BADAWI.

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[1] The question of discrimination between Swedish and Danish creditors, on the one hand, and other foreign creditors, on the other hand, was introduced by the French Government in the concluding phases of the proceedings and was invoked at one time as giving the dispute an international character on the ground that it constitutes a breach of international obligations, and at another time, in the final Submissions, as a substantive claim.

It is clear, however, that, so far as the merits are concerned, this discrimination in no way effects the construction to be placed on the gold clause and that, further, the French Government does not deduce the proper consequences from it since it does not claim that the French creditors should be paid in Swedish crowns or Danish crowns.

If this discrimination, which is alleged to be a breach of international obligations, were to be regarded as giving the dispute an international character, this would conflict with the claim that there has been a breach of the obligation imposed by the Second Convention of 1907. As the determination of the obligation the breach of which gives rise to an international dispute is the very basis for international proceedings, it would be impossible to admit for the same proceedings two bases that are essentially incompatible.