DISSENTING OPINION OF JUDGE BASDEVANT

[Translation]

I regret that I am unable to concur in the Judgment of the Court that it is without jurisdiction in the present case and I believe I must indicate briefly the reasons for my dissent.

In order to appraise the value of the Preliminary Objection raised by the Norwegian Government to the jurisdiction of the Court, the Court has placed itself on the ground on which the Parties chose to argue the matter, namely, Article 36, paragraph 2, of the Statute of the Court and the Declarations of the Governments of the Kingdom of Norway and of the French Republic accepting the compulsory jurisdiction of the Court in accordance with that Article. I do not dispute this point of departure.

The Court has concentrated its attention on the reservation which is contained in the French Declaration and which provides that "this declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic". The Court has pointed out that by virtue of the condition of reciprocity embodied in the two Declarations and provided for in Article 36, paragraph 3, Norway is entitled to rely on that reservation. I interpret the reciprocity clause in the same manner.

Nor do I consider it necessary, any more than the Court does, to deal with the question of the initial validity of that reservation with regard to the present case.

It is less the reservation considered by itself and so to speak *in abstracto* than the manner in which Norway's attitude should be interpreted when she invoked the reservation on the basis of reciprocity, which is at the source of my dissent. In other words I confine myself strictly to the present case: a dispute between France and Norway, a jurisdictional objection raised by Norway to the Application presented by France.

The Judgment of the Court upholds this objection to the jurisdiction on the ground that Norway, invoking the French reservation on the basis of reciprocity, has declared that the present matter was essentially within its national jurisdiction as understood by the Norwegian Government. The position thus adopted by the Norwegian Government was regarded by the Court as sufficient to preclude the compulsory jurisdiction of the Court which was in principle accepted under the Declarations of the two Governments.

It is with regard to the interpretation thus placed upon the position adopted by the Norwegian Government that I feel the most serious doubts.

It is possible to imagine that a State invoking the reservation should intend to put it forward as categorical in character so that the opinion expressed by that State with regard to the character of the dispute would be sufficient to preclude the jurisdiction of the Court, without further consideration by the Court: it is not my

intention to prejudge in any way the question of the validity of the reservation, interpreted as having such a scope. I merely observe that that State would have to manifest that that is the scope which it gives to the opinion it expresses, that its will to assume responsibility for such an attitude would have to be sufficiently apparent. However, I find it difficult to ascribe to Norway such an intention, or such an attitude which would scarcely be consistent with Norway's traditional attitude in the matter of arbitration and international jurisdiction; I find it difficult to consider that Norway intended to assume such a responsibility, political and moral, not only *vis-à-vis* the other Party and before the Court in the present dispute but in a more general manner and by such a precedent, before the United Nations and finally, by reason of the subject-matter of the proceedings, with regard to her own financial credit.

For the terms in which Norway has referred to the reservation are most moderate. They do not confer upon the reservation a categorical character signifying that the Court ought to confine itself to the reservation and not consider the matter further.

The reference to the reservation appears in paragraph 23 of the Preliminary Objections but it appears there only in a hypothetical form. On the basis of considerations which are fully developed, the Preliminary Objections first state this conclusion: "It is clear, therefore, that in bringing before the Court the dispute set out in its Application ... the French Government is asking the Court to adjudicate upon questions of municipal law and not upon questions of international law, i.e. upon questions which do not fall within the jurisdiction conferred upon the Court by the Declarations made by the Parties under Article 36, paragraph 2, of the Statute." Immediately following this passage, the Preliminary Objections add: "There can be no possible doubt on this point. If, however, there should still be some doubt, the Norwegian Government would rely upon the reservations made by the French Government in its Declaration of March 1st, 1949."

The Norwegian Government thus begins by stating very strongly the contention that the dispute relates to questions of municipal law and does not, therefore, fall within the jurisdiction of the Court. The soundness of this contention and the value of the arguments put forward in support of it are clearly submitted to the consideration of the Court. The Norwegian Government claims that its contention is irrebuttable and that there can be no possible doubt on this point. It does refer, however, to a hypothetical situation, a situation in which there should still be some doubt, and it is only with regard to that hypothetical situation that the Norwegian Government refers to the French reservation.

The whole Norwegian argument with regard to the reservation appears in the Preliminary Objections, but quite apart from the fact that the argument is there presented only hypothetically, Norway has not interpreted the reservation as constituting a categorical means whereby a State may preclude the jurisdiction

of the Court. Such an interpretation is possible: Norway has not put it forward. Whilst not stating exactly what her view was, Norway puts forward a more moderate interpretation to the effect that "such a reservation must be interpreted in good faith and should a Government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a 'matter which is essentially within the national jurisdiction' it would be committing an *abus de droit* which would not prevent the Court from acting".

Norway thereby acknowledges the Court's power to control the exercise by a State of its right to invoke the reservation. What is the extent of this power? The words quoted above do not define the extent of this power, but some indication has been supplied by the statement appearing at the end of the argument on the First Preliminary Objection and at the end of what was said regarding the reservation invoked by Norway. The Norwegian Government begins by asserting its right to rely upon the French reservation but does not stop there. It considers it appropriate to justify the use it makes of that right and in this connection adds the following words: "Convinced that the dispute ... is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right." It would have been unnecessary for the Norwegian Government to state its conviction on this point if it had purported to confer upon its own understanding of the nature of the dispute a decisive character taking it outside the control of the Court. If it says that it is convinced that the dispute is within the domestic jurisdiction, it is because it derives this conviction from the considerations relied upon to prove that the dispute is within the domain of Norwegian law and not of international law. And, "accordingly", in other words as a result of the conviction thus acquired, it "requests the Court to decline, on grounds that it lacks jurisdiction, the function which the French Government would have it assume".

If this passage is compared with the importance of the position occupied in the Preliminary Objections by the argument on the character of the dispute as determined by the character of the law which is applicable to it, one is led to the view that, in the mind of the Norwegian Government, the two grounds upon which it relies in support of its first Preliminary Objection converge and that in the present case the determination of the character of the matter will depend upon the law to be applied.

This interpretation is confirmed by the fact in the subsequent written and oral proceedings, the Norwegian Government carefully concentrated on the character of the applicable law in support of its objection to the jurisdiction. Only one allusion was made on behalf of the Norwegian Government to the French reservation, with indirect and very brief reference to the condition of reciprocity at the hearing of May 20th, 1957. And indeed Counsel for the Norwegian Government merely made the allusion in support of his conclusion that the undertakings binding the two States in the

matter of jurisdiction "only relate to disputes of international law". This confirms the interpretation given above of the intentions of the Norwegian Government and this interpretation is in harmony with the frequently repeated assertion that the Norwegian Government does not reject the jurisdiction of the Court absolutely, because it so chooses, but on grounds which have been carefully set out, thus showing that it was intended that the Court should adjudicate upon them.

It would have been in the interests of Norway to confer a categorical character upon the defence provided by the French reservation. She has not done so for a highly commendable reason, because she was anxious to respect her international obligations.

In the matter of compulsory jurisdiction, France and Norway are not bound only by the Declarations to which they subscribed on the basis of Article 36, paragraph 2, of the Statute of the Court. They are bound also by the General Act of September 26th, 1928, to which they have both acceded. This Act is, so far as they are concerned, one of those "treaties and conventions in force" which establish the jurisdiction of the Court and which are referred to in Article 36, paragraph 1, of the Statute. For the purposes of the application of this Act, Article 37 of the Statute has substituted the International Court of Justice for the Permanent Court of International Justice. This Act was mentioned in the Observations of the French Government and was subsequently invoked explicitly at the hearing of May 14th by the Agent of that Government. It was mentioned, at the hearing of May 21st, by Counsel for the Norwegian Government. At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway.

There is no reason to think that this General Act should not receive the attention of the Court. At no time did it appear that the French Government had abandoned its right to rely on it. Even if it had maintained silence with regard to it, the Court "whose function it is to decide in accordance with international law such disputes as are submitted to it" could not ignore it. When it is a matter of determining its jurisdiction and, above all, of determining the effect of an objection to its compulsory jurisdiction, the principle of which has been admitted as between the Parties, the Court must, of itself, seek with all the means at its disposal to ascertain what is the law. In a matter in which such research was less imperatively necessary, the Permanent Court did not hesitate to undertake it, stating that "in the fulfilment of its task of itself ascertaining what the international law is, it ... has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement". (P.C.I.J. Judgment No. 9, p. 31.)

On acceding to the General Act, on May 31st, 1931, the French Government, in so far as it was explicitly authorized to do so by Article 39, sub-paragraph *(b)*, and by Article 41 of that Act, declared

that its accession, involving *inter alia* the acceptance of the compulsory jurisdiction of the Court, applied to disputes "other than those which the Permanent Court of International Justice may recognize as bearing on a question left by international law to the exclusive competence of the State". As this reservation was formulated by France, Norway may, as stated in Article 39, paragraph 3, of the General Act, rely upon it as against France.

Such was the law in force between France and Norway concerning the compulsory jurisdiction of the Court at the time when France accepted afresh the compulsory jurisdiction of the Court by her Declaration of March 1st, 1949, on the basis of Article 36, paragraph 2, of the Statute. The law thus in force embodied the reservation concerning the exclusive competence of the State, but, on the one hand, there was the qualification of that reservation regarding what is recognized by international law and, on the other hand, the Court was given the power to verify, when the reservation should come to be pleaded, whether it was rightly or wrongly invoked.

The Declaration by which the French Government accepted compulsory jurisdiction on the basis of Article 36, paragraph 2, of the Statute contains a reservation of wider scope, since it refers not to what is recognized by international law, but to the understanding of the Government which invokes the reservation and, further, since it does not submit that understanding to the verification of the Court. At all events, it does not do so expressly. The Declaration thus limits the sphere of compulsory jurisdiction more than did the General Act in relations between France and Norway. Now, it is clear that this unilateral Declaration by the French Government could not modify, in this limitative sense, the law that was then in force between France and Norway.

In a case in which it had been contended that not a unilateral declaration but a treaty between two States had limited the scope as between them of their previous declarations accepting compulsory jurisdiction, the Permanent Court rejected this contention and said in this connection:

"The multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain." (P.C.I.J., Series A/B, No. 77, p. 76.) A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh acceptance of compulsory jurisdiction stated in its Declaration of 1949. This restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the juridical system existing between them on this point. It cannot close the way of

access to the Court that was formerly open, or cancel it out with the result that no jurisdiction would remain.

Between France and Norway, on the point now under consideration, the acceptance of compulsory jurisdiction is, therefore, to-day as prior to the French Declaration of March 1st, 1949, set aside only in respect of such disputes as the Court may recognize as bearing on a question left by international law to the exclusive competence of the State.

This presentation of the state of the law existing between France and Norway explains the sense attached by Norway to her reliance on the French reservation. She relied on it, and could only rely on it, in the sense that this reservation has in relations between France and Norway, that is to say, not as a reservation the application of which depends on the discretionary judgment of the State wich relies on it, but as a reservation the scope of which depends on what is recognized by international law as found by the Court. I cannot suppose that Norway intended to give the reservation a more absolute sense which would be in conflict with the law existing in this matter between the two countries.

This interpretation, involving a reference to what is recognized by international law as found by the Court, is in complete harmony with the moderate interpretation which Norway gave to the reservation and with the small place it occupies in her reasoning which, on the other hand, went to great lengths to show that the dispute relates to questions of Norwegian law and not to questions of international law and, on that ground, does not come within the jurisdiction of the Court.

In view of all this reasoning—and even from the mere perusal of the Preliminary Objections—I cannot believe that it was the Norwegian Government's intention to prove to the satisfaction of the Court that the dispute relates only to questions of Norwegian law, to ask the Court to find that it agrees with this view and then to add immediately that the Court's opinion on this point is of no importance and that it is only the Norwegian Government's opinion that counts.

The Norwegian Government's intention seems to me to be quite different. In invoking the French reservation, its intention was that its bearing on the present case should be considered in the light of the elements of the case: the subject of the claim and the law applicable. It is on this footing that the appeal to the reservation must be judged and that the discussion between the Parties in fact developed.

The Norwegian Government might have followed another course. When it invoked the French reservation, it might have relied, in this connection, on the fact that this case is concerned with public loans, with measures affecting the monetary system of Norway. I do not prejudge the validity of such considerations. That was the course followed in the case of the nationality decrees in Tunis and Morocco and it led the Permanent Court to find that questions of nationality are amongst those which international law

leaves to the jurisdiction of the State but that it is otherwise when the application of treaties is involved in regard to them. The Norwegian Government did not take this course. The only grounds which it advanced and which, if accepted, would be such as to prove that the present dispute brings before the Court questions which international law leaves to the exclusive jurisdiction of Norway, are those relating to the nature of the law to be applied for the settlement of this dispute, namely, Norwegian law and not international law.

As the Judgment interprets the Norwegian Government's intention in a different way from that in which I have felt it proper to interpret it—and that is the source of my dissent—it was not necessary for it to consider whether the dispute brought before the Court falls exclusively within the application of Norwegian law and whether, on that ground, it falls outside the jurisdiction of the Court either by the application of Article 36, paragraph 2, of the Statute or through the effect of the French reservation invoked by Norway without further explanation. In view of the silence of the Judgment, I shall confine myself to some very brief observations on this point.

I understand that the wording adopted for the Submissions in the Application should have led the Norwegian Government to put forward its first Preliminary Objection. The same terms might have been used in the Submissions of a bondholder proceeding against his Norwegian debtor before a Norwegian tribunal. But the discussion before the Court eliminated all assimilation between these two cases and, in the course of these proceedings, it was frequently asserted, particularly on the Norwegian side, that the dispute between the French Government and the Norwegian Government was different from the dispute between bondholders and Norwegian debtors and came within the purview of a different branch of law.

The French Government is here acting in the exercise of its right under international law to protect its nationals as against a foreign State. The Judgment rightly recalls that, in its Note of January 27th, 1955, the French Government proposed to the Norwegian Government that the dispute should be referred to an international tribunal in order to determine, on the basis of the general principles of international law, whether the gold clause which, it contended, was contained in the bonds in question, had to be respected. The Judgment recalls also that, at the very outset of the diplomatic dispute, the French Legation in Oslo, in its Note dated June 16th, 1925, stated that it believed a contradiction to exist between the Norwegian law of December 15th, 1923, and the obligations which had been assumed towards the holders of the loans of the Mortgage Bank of Norway, and contended, in this connection, that it would not seem that a unilateral decision can be relied upon as against foreign creditors. In the proceedings before the Court, the French Government continually impugned this law of 1923, from this point of view, and in its final Submissions filed

on May 25th, 1957, it asked the Court to adjudge and declare that undertakings as to the amount of the debts contracted under the loans referred to in the Application cannot be unilaterally modified. The French Government placed reliance en Judgments Nos. 14 and 15 of the Permanent Court of International Justice, contending that, in the present case as previously in the cases of the Serbian loans and the Brazilian Federal loans, the loans in question are international loans. It complained that Norway was practising discrimination to the advantage of Danish and Swedish holders and to the detriment of French holders, and it claimed that this discrimination constituted a direct violation of international law. On all those grounds it sought to obtain redress through a decision of the Court which, without passing upon the financial adjustment of payments which the French Government declared itself ready to study with the Norwegian Government, would find that the debtor in the case of the loans specified in the Application cannot validly discharge his obligation except by payments as they fall due in gold value.

It is on this ground that the French Government intended to place the claim it brought against the Norwegian Government. It is not for me to prejudge the reply that should be given to it on any of the points thus raised. I confine myself to noting that adjudication upon this claim is a matter that comes within the purview not of Norwegian law but of international law.

No doubt, in order that the questions of law thus referred to, and others of the same kind raised in the proceedings, may come up for consideration, it must first be determined that the loans in dispute, or some of them, do in fact contain a gold clause. This is a question of the facts involved in the case, and these have been set out in the Memorial and Counter-Memorial. This statement of the facts may bring up certain questions of Norwegian law concerning, for instance, the initial validity of the gold clause in the loans in dispute. But, if the Court is seised of questions of international law in the dispute at present pending between France and Norway, and if, for that reason, the Court has jurisdiction to adjudicate on this dispute, it obviously follows that the Court will also have to examine the questions of fact that arise. It must include among these any questions of the interpretation of such Norwegian laws as may call for consideration. It has never been contended that the Court should refer such questions to the consideration and decision of any particular national tribunal.

Having regard to the sense I attach to the Norwegian Government's intention in invoking the French reservation, and having regard to the nature of the questions actually submitted to the Court, I do not think that Norway is justified, in this case, in declining the jurisdiction of the Court on the ground of the reservation concerning its national jurisdiction.

(Signed) BASDEVANT.