DISSENTING OPINION OF JUDGE READ

I regret that I am unable to concur in the decision of the Court, in this case, and that it has become necessary for me to indicate the reasons which have prevented me from concurring with the majority. As I am of the opinion that the Court should reject all the Preliminary Objections, and deal with the merits, I must examine all aspects of the case, and, in doing this, shall consider the following questions:

First Question—The nature and scope of the dispute, as it *now* presents itself to the Court.

Second Question—The Norwegian contention that "The subject of the dispute as defined in the Application is within the domain of municipal law and not of international law, whereas the compulsory jurisdiction of the Court in relation to the Parties involved is restricted, by their Declarations of November 16th, 1946, and March 1st, 1949, to disputes concerning international law;".

Third Question—The Norwegian contention that "*As to that part of the claim which relates to the bond certificates issued by the Mortgage Bank of Norway and the Small Holding and Workers' Housing Bank of Norway,* these two Banks have a legal personality separate from that of the Norwegian State; the action cannot therefore be brought against that State as a borrower; whereas moreover the jurisdiction of the Court is limited to disputes between States;".

Fourth Question—The Norwegian contention that "The holders of bond certificates for whose protection the French Government considers itself entitled to institute international proceedings have not first exhausted the local remedies."

Fifth Question—The Norwegian request that the Court should "adjudge and declare that the claim put forward by the Application of the French Government of July 6th, 1955, is not admissible".

* * *

First Question—The nature and scope of the dispute as it *now* presents itself to the Court.

This is the fundamental question, because the conclusions reached with regard to the matters in dispute depend almost entirely on whether the controversy is looked at as it was in the earlier stages of the case, or in the form which it has taken in the course of the Written and Oral Proceedings.

In the Application, the French Agent asked the Court to adjudge:

(1) that there was a real gold clause;

(2) that the borrower can only discharge the substance of his debt by payment of the gold value both of the coupons and of the principal payments.

The Norwegian Agent considered that these requests related solely to issues of Norwegian national law which the Court is incompetent to adjudge in a case commenced by Application. But, during the Oral Proceedings, the Final Submissions of the French Government "On the Merits" put forward three claims which involved:

In paragraph 1

request for judgment by the Court that payment to foreign holders of the bonds must be made without any discrimination; and

In paragraph 3

request for judgment by the Court that Norway cannot by unilateral extraterritorial legislation modify the rights of the French bondholders, without negotiation or arbitration; and

In paragraphs 2, 4 and 5

request for judgment based on the gold clause.

(It may be convenient to refer to the first two of these issues as discrimination and extraterritoriality, respectively.)

It is obviously impossible to suggest that the Final Submissions, raising these issues, relate to matters which are either exclusively or essentially within the national jurisdiction of Norway. To meet this position, the Norwegian Agent has urged the Court to reject the Final French Conclusions. They have been attacked on the ground that they give rise to a new claim.

The French Agent replied by citing the Chorzow judgment, and by contending that "The intentions of the Statute are therefore perfectly clear: it is possible to amend Submissions any time up to the end of the proceedings."

It is true that it has been the established practice of this Court, and of the Permanent Court, to permit the Parties to modify their Submissions up to the end of the Oral Proceedings. Indeed, the President asked the Parties to file their Final Submissions before terminating the Oral Proceedings; and, in so doing, he was following a practice of long standing. Thus it was open to France to amend the Submissions at that stage. But the right is subject to two limitations. The first limitation is that, when there is an appreciable

change, the other Party must have a fair opportunity to comment on the amended Submissions. In this case, the amendment was made at the close of the French opening statement, and Norway has had two opportunities to reply, of which full advantage has been taken.

The second condition is that the amendment must be an amendment. It must not consist of an attempt by the Applicant Government to bring a new and different dispute before the Court. If so, the amended Submissions are not admissible, unless the new elements have been incorporated in the dispute either by the Respondent Government or by the two Governments in the course of the Written and Oral Proceedings.

Accordingly, it is necessary to consider whether the allegedly new elements—discrimination and extraterritoriality—raise a new dispute, or whether they define the issues in the dispute which was brought to the Court by the Application.

The Statute, by Article 40, imposes on the Applicant Government the requirement that "the subject of the dispute and the Parties shall be indicated". It does not require that the issues shall be defined; and, indeed, it makes it abundantly clear, by Article 48, that the definition of the issues by Submissions is to be done in the course of the Written and Oral Proceedings. (In this regard, the French text of Article 48 shows that this is so, while the English text is obscure.) Applications have usually contained statements of the issues involved; but these have been treated by this Court and the Permanent Court as indications of the nature of the case.

It is in this light that the Application must be examined. Did it sufficiently indicate the dispute as it has developed in the course of the Written and Oral Proceedings, and as it has been formulated in the French Final Submissions? In particular, did it sufficiently indicate a dispute involving the two contested elements: discrimination and extraterritoriality?

The Application gives particulars with regard to the different issues of bonds involved. It sets forth, in a general way, the emergence of the controversy between the French bondholders, represented by the National Association of French Security Holders, and the Borrowers, the Norwegian State and the two Banks. It mentions the formal intervention by the French Government on behalf of its nationals in May, 1953, and subsequent negotiations between the Governments, which did not lead to a settlement. It ends with the indication of the claim, as stated above.

It thus appears that the Application sufficiently indicated that the case was intended to relate to the dispute which had been at issue between the French Government and bondholders and the Norwegian borrowers and Government for thirty years and twenty days.

That dispute had certainly been based on the three elements: discrimination, extraterritoriality, and the existence and obligation

of the gold clause in the bonds. Nevertheless, the part of the Application which purported to indicate the subject of the dispute was obscure.

Norway takes the position that the words used in the Application to indicate the subject of the dispute confined it to the existence of the gold clause and the obligation of the bonds. France contends that the two contested issues had been in controversy for more than thirty years as essential elements of the dispute, and that the actual claim as stated in the Application is broad enough to include them. The claim reads:

> "And that the borrower can only discharge the substance of his debt by the payment of the gold value of the coupons on the date of payment and of the gold value of the redeemed bonds on the date of repayment."

The obligation of the bonds depended on three things—the contract, the law and the relevant legislation. The relevant statute which had been under consideration by the two Governments was the law of December 15, 1923. The two issues under consideration—discrimination and extraterritoriality—were inseparably related to that law. That this was so understood by Norway is plainly indicated by the the fact that the text of the law was set forth in the third paragraph of the Preliminary Objections, and subsequently treated as the cornerstone of the Norwegian case.

In these circumstances, I am compelled to accept the French contention, and to reach the conclusion that the French Final Submissions should not be rejected.

But, even if it is assumed that the claim, as stated in the Application, is confined to the existence of the gold clause and the obligation of the bonds, and that it did not include the contested elements (discrimination and extraterritorial legislation), it does not follow that the French Final Submissions must necessarily be rejected. If the contested elements were incorporated into the dispute by Norway alone, or by the two Governments, in the course of the Written and Oral Proceedings, it would not be open to Norway to complain at this late stage. In order to examine this aspect of the matter, it is necessary to assume that the claim, as stated above, must be construed as confined to the gold clause and the obligation of the bonds, and as excluding the contested elements.

Accordingly, and with that assumption in mind, I must examine the way in which the allegedly new elements were brought into the case. It will be seen that, from the beginning of the proceedings in the Court, France based its pleadings and oral arguments on the view that they had already been included in the Application. But it will also appear that Norway understood that these contested elements were an integral part of the merits of the dispute before the Court. It will emerge that the request for rejection of the French

Final Submissions is based on the extremely technical point that the indication of the issues, as set forth in the Application, was so badly drafted that it failed to disclose the real scope and extent of the dispute as understood and developed by both France and Norway. It will appear that Norway took such a dominant part in the enlargement of the dispute in the course of the Written and Oral Proceedings that it is not open to Norway to complain now by raising the extremely technical point referred to above.

The actual dispute, on the governmental level, commenced with the first French Note, dated 16 June, 1925, and included, together with all the rest of the diplomatic correspondence, in the Memorial. This Note, which was concerned with the claims of French holders of bonds of the Mortgage Bank of Norway, raised the two issues: discrimination and extraterritoriality. The Norwegian reply took the form of the Note, dated 9 December 1925, transmitting a letter from the Mortgage Bank defending its position. This letter questioned the gold clause. It admitted the fact of discrimination in favour of Swedish bondholders and against the French, defending it as being based on good will. It dealt with extraterritoriality as follows:

> "The question has in all cases been determined by reference to the Law of December 15th, 1923. In accordance with this Law, if the creditor refuses to accept payment in Bank of Norway banknotes at their nominal gold value, the debtor may claim postponement of the payment for as long as the Bank is exempt from redeeming its notes in gold at their nominal value."
>
> "The French Note states that a law of this kind can only apply to nationals and not to foreign bondholders. This, however, is a view which cannot be maintained. In any event the question would naturally fall to be decided by a Norwegian Court in accordance with Norwegian legislation and in accordance with Norwegian law and it is quite clear that the decision would be binding on all concerned."

Accordingly, for more than thirty years, the controversy was based on the three main elements: discrimination, extraterritoriality and the problem of interpretation and obligation arising out of the gold clause.

Then came the Application, which is being considered upon the assumption that it must be construed as cutting down the controversy to a single issue. I am reluctant to adopt a narrow and restrictive interpretation of the words used in the Application, in aid of a highly technical argument designed for the sole purpose of preventing justice from being done. Nevertheless, I must proceed on the assumption that the narrow and restrictive interpretation is right, and consider what happened in the course of the treatment of the issues by the Parties.

As might have been expected, France proceeded to deal with the case as if the controversy had continued, uncurtailed by the Application and including the contested elements. The case was dealt with in the Memorial by raising and discussing the issues which are now embodied in paragraphs 2, 3, 4 and 5 of the French Final Submissions. As regards paragraph 3, the extraterritorial point, it was summed up in a sentence:

> "The question which arises may therefore be simply put in the following way: can a debtor State, by means of an internal law providing for the currency of unconvertible banknotes, alter the substance of its external debt?"

The issue dealt with in paragraph 1 of the Final Submissions, discrimination, was mentioned in the Memorial, and fully argued in the Observations and Submissions. All of the issues, as set forth in the Final Submissions, were fully argued in the Reply and in the course of the Oral Proceedings.

There was, at first, some difference in the course followed by Norway. I have already pointed out that Norway, in paragraph 3 of the Preliminary Objections, set forth the text of the Law of December 15, 1923, which became the cornerstone of its case. Later, in paragraph 29, in discussing the legal basis of the course followed by Norway, it was stated that "it was the Law of December 15, 1923, which was applied". But in taking the "First Objection", Norway limited that objection to "the dispute, as defined in the said Application", and put forward arguments which could have no relevancy except on the assumption that the actual controversy had been curtailed by the Application so as to exclude the contested elements, discrimination and extraterritoriality.

It was the Counter-Memorial, the Rejoinder and the oral arguments by Norway that brought about the fundamental change in the scope of the dispute. For, assuming the curtailment of the controversy by the wording of the Application, its enlargement so as to include the contested elements was indeed a fundamental change.

The Counter-Memorial devoted nearly three pages to a discussion of the legal aspects of discrimination; and eleven pages to a much more important issue. Norway put forward the argument that the action of the Norwegian legislature in enacting the Law of December 15, 1923, and other relevant laws was justified by the historical background. That background was one of world-wide economic catastrophe: a sort of universal bankruptcy. The argument was that Norway, in the special circumstances, was justified in suspending gold payments, or the payment of gold equivalents. That justification necessarily involved a correlative obligation to give equal treatment to all creditors involved.

The Rejoinder carried the arguments bearing directly on the questions of discrimination and extraterritoriality even further. It developed the argument based on the practice of States in dealing with economic catastrophe by fiscal measures. It brought into the case entirely new considerations: the principles of international law concerning "national treatment" of aliens, and the system of the "minimum" or "international standard". As in the case of the argument based on State practice, these principles necessarily involve the problem of discrimination and bear directly on the extent of the Norwegian legislative power. The extent to which the Rejoinder goes in enlarging the scope of the issues is indicated by the fact that one hundred and thirty-four pages of the two volumes are devoted to these aspects of the case.

In the Oral Proceedings, the same trend was observed. The Norwegian Agent and Counsel devoted a very large proportion of their time to the discussion of the two issues which the Agent now asks the Courts to strike out of the case. One of the Counsel went so far as to devote the whole of his time to one of them.

In these circumstances, I am of the opinion that the French Final Conclusions do not go beyond the limits of the dispute in the form which it took in the course of the Written and Oral Proceedings; and that the responsibility for any enlargement of the dispute which may have taken place since the Application is mainly due to Norway. At any rate, Norway certainly shared that responsibility with France. It is not open to Norway, at this stage, to complain about this enlargement.

* * *

Second Question—The Norwegian contention that "The subject of the dispute as defined in the Application is within the domain of municipal law and not of international law, whereas the compulsory jurisdiction of the Court in relation to the Parties involved is restricted, by their Declarations of November 16th, 1946, and March 1st, 1949, to disputes concerning international law;".

This question was dealt with in two parts by Norway. In the first part it was discussed upon the assumption that it was being put to the Court for its decision. The second part deals with a subsidiary aspect of the question in which the Court is being asked to deal with it not on the basis of its own decision, but by merely registering a decision of the Norwegian Government automatically ousting the jurisdiction of the Court.

First Part

This question is confined to "the dispute as defined in the Application". It does not relate to the controversy as it existed between the two Governments in the thirty years preceding the Application or to the issues as discussed and dealt with by France and Norway in the course of the Written and Oral Proceedings. It has nothing to do with the subject-matter of the dispute as set forth in the French Final Submissions. It is not in any sense relevant to the actual case which is now before the Court. It is included in the Norwegian Final Submissions and it represents a position which has been maintained at all stages by Norway, in which the arguments have been qualified and restricted to the dispute as defined in the Application.

In dealing with the First Question I have taken the position that the French Final Conclusions should not be rejected, and it necessarily follows that I am of the opinion that the Second Question, the point which was raised in the first Preliminary Objection, has no relevancy at the present stage. The actual question as it existed when the point was first taken was of a substantial character, but the objection that the dispute was within the domain of municipal law and not of international law has been maintained in relation to the present position of the case.

The objection involves the very nature of the case and cannot be considered effectively without touching upon the merits. I do not propose to give my views with regard to the merits, but it is necessary for me to look at the merits in order to determine the sort of issues which they raise—i.e. whether they are issues of national law or of international law or both. I must consider the problem presented by this objection from three different aspects:

First Aspect: That the issue submitted by the Application is purely a matter of national law and does not raise any issue of international law.

This is the heart of the first Preliminary Objection. If the bond contracts operated under international law, or if, either originally or at a later stage, they gave rise to international obligations due from Norway to France, it would no longer be possible to suggest that the dispute was based solely on municipal law.

At the early stages of the transaction, the position is reasonably clear. When the French bondholder bought a Norwegian bond, there were only two parties to the executory contract which came

into being—the bondholder and the Norwegian borrower, either the State or one of the two Banks. The Government of France had no part in the transaction. It was made under national law and there was possible conflict between the different laws involved, French, English and Norwegian. The determination of which law controlled any particular aspect of the matter was a problem to be resolved by the law of the forum in which the suit was brought. The court would apply the rules of private international law which governs the choice of law, and then apply the chosen law to the issues before it. Those rules and the chosen law would both be national, and not international, law.

At this stage the transaction came solely within the plane of national law. It would therefore be a matter in which the Court was incompetent to adjudicate, and in which it would be necessary if dealing with the Merits to say that there were no rules of international law governing the transaction. It would not be open to this Court to decide upon the issues of choice of law, of interpretation of the contract, or of the extent of its obligation.

The next stage was when France undertook diplomatic action as a result of the suspension by Norway of payment in gold or in gold equivalents in pursuance of the provisions of the law of 1923. There is a difference between France and Norway as to the date of the adoption of the dispute by the French Government, but that is unimportant.

France claims that the adoption of the position of the French bondholders by the French Government—the assertion by France to Norway of the French views as to the obligation of the bonds, and the refusal by Norway to concur and act accordingly—transformed this dispute from one between private individuals and the Norwegian borrowers into one between France and Norway, but something more is needed than the mere adoption of a dispute under the national law to give rise to a "question of international law" within the meaning of the expression as used in Article 36, paragraph 2, clause *(b)*. There must have been a breach by Norway of an obligation under international law due to France.

Norway contends that the dispute as set forth in the Application remained a dispute under the national law of Norway with which this Court cannot deal. But I have already suggested that the Application, properly construed, was broad enough in its terms to raise those aspects of the problem which consist solely of questions of international law, and I have also indicated that in my opinion the issues are now settled, not by the wording of the Application but by the wording of the Final Submissions of the Government

of the French Republic.

In the French Final Submissions, "On the Merits", the first paragraph clearly raises the question of discrimination, and the third paragraph raises the question of whether Norway could, in conformity with the principles of international law, by legislative action unilaterally modify the substance of the contracts between Norwegian borrowers and French bondholders.

In these circumstances, there can be no doubt that questions of international law are involved and that the Court is competent to deal with the claim submitted to it. At any rate, there can be no serious question as to its competence as regards the claim based on discrimination and as regards the claim based on the law of December 15th, 1923.

Second Aspect: That Norway discriminated against the French bondholders and in favour of the Danish and Swedish bondholders.

I have already referred to this question in dealing with the First Question, and have mentioned it in discussing the First Aspect above. It is, however, necessary to develop it further and to examine the grounds on which Norway has sought to justify the discrimination.

The fact of discrimination is beyond question, but Norway argues that there were times when the French bondholders were more favourably treated than the Danes and Swedes. But two wrongs do not make a right, and in my opinion the question of balance of advantage is irrelevant.

Further, I cannot help thinking that the payment in Swedish crowns involved very substantial discrimination. One thing is certain, and that is that on the 23rd December, 1946, a proposal was submitted by France for a settlement of the case, which had then been a sore spot in Franco-Norwegian relations for twenty-one years. This proposal was in the nature of a compromise, asking that the French bondholders should be paid in Swedish crowns on their capital payments, and that the coupons should be paid in Norwegian crowns. The Norwegian Government did not even answer this proposal.

Norway also questions the existence of a rule of international law requiring equality of treatment, but that is a matter of merits. What must be borne in mind now is that the question as to whether such a rule of international law existed was certainly a "question of international law" within the meaning of Article 36.

Norway relies strongly on the argument that discrimination was justified because it was based on good-will. It is not clear whether it was good-will towards the Danish or Swedish investors or towards Denmark and Sweden. This question of good-will has been repeat-

edly raised and discussed by Norway, commencing on the 9th December, 1925, but its meaning and significance are still obscure. There is no suggestion that the refusal to accord the same sort of treatment to France or to the French investors was based on ill-will, and I cannot believe that the argument intends to suggest that international law considers that discrimination, if based on either good-will or ill-will, ceases in some mysterious manner to be discriminatory. At any rate, the question whether good-will can justify discrimination is a matter of international law and not of the national law of the respondent State.

Norway also argues that the payments to the Swedish bondholders were *ex gratia*, and therefore not a proper subject for complaint by France. This argument is based upon the assumption that the French bondholders had no legal right to get anything better than Norwegian crowns (or sterling or francs), and that they had no right to receive gold or gold equivalents. But that is begging the question, and the objections to the jurisdiction must be dealt with upon the assumption that the Applicant's contentions with regard to the merits are justified and that the Respondent's contentions with regard to the merits are wrong. The case must be considered on the assumption that the bonds contained a real gold clause binding on Norway.

It is, of course, true that this question of discrimination has been an important element in the controversy for thirty-two years, but it has been imported into dispute before this Court largely by reason of the justification on which Norway relies for its action in enacting the law of December 15th, 1923, and in establishing the *cours forcé* and impairing the obligation of the bonds. That is a point which I shall deal with more fully in discussing the Third Aspect. But the Norwegian action has been justified on the basis of world-wide economic catastrophe in which Norway and other States were compelled to take legislative measures impairing the obligations of debtors within the country as regards both resident and non-resident creditors. Such a justification obviously raises the question as to whether international law, if it sanctions such a course, permits it where the State in question is discriminating between different classes of creditors.

I do not need now to express any opinion on this question of justification, but I have no doubt that it involves questions of international rather than of national law.

Third Aspect: The French contention that the enactment by Norway of extraterritorial legislation purporting to impair the obligations

due to foreign bondholders resident in France was contrary to international law.

This contention was raised in the French Final Submissions "On the Merits", paragraph 3. In the course of the controversy, and throughout the written and oral proceedings, France has developed two main arguments along these lines. The first argument is based upon the view that international law treats the obligations arising from the marketing of bonds abroad as being something more than obligations arising under national law. Where, as in this case, the bonds have been:

(1) marketed abroad;

(2) expressed in several currencies;

(3) payable abroad;

(4) expressed in several languages;

it is argued that they cannot be repudiated without giving rise to a breach of international law.

France contends that this position is supported by the practice of States as indicated by the arbitrations in such matters, especially in the closing years of the last century and the early years of this century, and reliance is also placed on Article 1 of the Hague Convention of 1907. The terms of this Convention were at first put forward as establishing a legal obligation to submit to arbitration in the matter of the recovery of contract debts. But this position has been abandoned, and in the later stages France was relying on the Convention as establishing the nature and character of the obligation arising out of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

The French position was contested in all its phases by Norway.

The second French contention arises out of what has been referred to as the special French doctrine with regard to governmental action within a State impairing the obligation of debts due to non-resident aliens. It is contended by France that this doctrine expresses a broad principle of international law which would prevent a State from enacting extraterritorial legislation impairing the contractual rights of non-resident aliens. The French argument is based largely on this being a general principle of law recognized by civilized nations, and it is countered by the argument put forward on behalf of Norway, which is of a two-fold character—Norway relies largely on the practice of States, and also on the rule of the minimum standard.

It will thus be seen that the French claim and the Norwegian justification in this aspect of the question are both based upon considerations of international law and have nothing whatever to do with national law.

It is, of course, impossible for me at the present stage to indicate my views as to whether France or Norway is right, whether the matter is considered from the point of view of discrimination or of extraterritoriality. On the other hand, I find insuperable difficulty in reaching the conclusion that a case involving these issues can be treated as being solely one of national law; and I am forced to the conclusion that the first Preliminary Objection should be rejected.

Second Part

In the Preliminary Objections, after arguing that the subject of the dispute as defined in the Application was within the domain of municipal law and not of international law, Norway considered that there could be no possible doubt on this point. If, however, there should still be some doubt, the Norwegian Government intimated that it would rely upon the reservation made by the French Government in its Declaration of March 1st, 1949. After discussing this Declaration, it was stated that "convinced that the dispute which has been brought before the Court by the Application of July 6th, 1955, is within the domestic jurisdiction, the Norwegian Government considers itself fully entitled to rely on this right".

In invoking the provision contained in the reservation to the French Declaration, which provided for the automatic ouster of the jurisdiction by the unilateral action of the respondent Government, Norway was exercising a right of a highly technical character, and the question naturally arises whether there was complete compliance with all of the provisions of the Declaration. The reservation reads as follows:

> "This Declaration does not apply to disputes relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic." (The translation of the French original has been changed by substituting the word "disputes" for "differences" in order to bring the English text into harmony with the French text.)

Norway, in putting forward this highly technical objection, did not make any statement or give any evidence indicating that this dispute related to matters which are *essentially* within the national jurisdiction as understood by the Norwegian Government. It made a bald statement that it was convinced that the dispute was "within the domestic jurisdiction", which is quite a different matter. There

never at any time has been any question about the dispute being within the domestic jurisdiction of Norway. The real question has been whether the dispute was not also and primarily a matter to be determined not by the Norwegian law but by international law. However, Norway made it plain enough that it desired to invoke the French Declaration.

I have refused to apply any rigid and purely literal interpretation to the Application and have insisted that it should be interpreted so as to give effect to what obviously was the intention of France and the understanding of Norway. It would be completely inconsistent for me to seek to apply a rigid and purely literal interpretation to the words used by Norway when it sought to invoke the French Declaration. Accordingly, I am compelled to reach the conclusion that Norway did effectively invoke the French Declaration when the point was taken in the Preliminary Objections.

On the other hand, I do not think that Norway has maintained its position in this regard.

Having purported to invoke in the Preliminary Objections the reservation contained in the French Declaration, Norway did not incorporate this subsidiary point in its actual Submission. Indeed, the actual Submission relating to the first Preliminary Objection was inconsistent with the notion embodied in the Declaration. It asked the Court to find that the subject of the dispute was within the sphere of municipal law and not of international law, while the reservation envisaged a position in which that was not to be decided by the Court, but by the understanding of the Norwegian Government.

The point was not mentioned by Norway in the Counter-Memorial, in the Rejoinder or in the Oral Proceedings. Further, in the Norwegian Final Submissions of May 23rd—"On the Preliminary Objections"—the Court is asked to make a finding that "1. The subject of the dispute, as defined in the Application, is within the domain of municipal law and not of international law." This actual Submission by Norway is inconsistent with the maintenance of the position taken in the Preliminary Objections when the French Declaration was invoked. Here again, the formal request that the Court should make this finding is utterly inconsistent with the idea the decision should be made by Norway and not by the Court.

It might be thought that, notwithstanding the omission of this point from the Norwegian Final Submissions, it was maintained in the closing statements made on behalf of Norway during the Oral Proceedings.

At the beginning it was said, on behalf of Norway:

> "In these circumstances, I should not like to take advantage of the Court's patience by repeating what we have already had the honour to set forth in our oral arguments. We maintain our positions in their entirety both as regards the merits and as regards the Preliminary Objections."

It is clear that Norway here was maintaining the position which had been taken in the course of the oral arguments and that no reference was intended to any matter touched upon in the Written Pleadings but not dealt with in the course of the Oral Proceedings.

Later, in dealing with the fourth Objection, which concerned exhaustion of local remedies, it was stated:

> "All that we have written and all that we have submitted orally to the Court in regard to our fourth Objection therefore still stands."

In this instance it was clearly intended, as regards the fourth Objection, to maintain all positions which had been taken during the Written Proceedings whether or not they had been maintained in the course of the Oral Proceedings.

The final position was taken towards the end when it was said:

> "The Norwegian Government maintains its Submissions in their entirety as I presented them at the sitting on May 23rd..."

I have no doubt in my own mind that the Norwegian Agent and Counsel realized that it was no longer proper to rely upon the French Declaration. In view of the form which the dispute had taken in the course of the Written and Oral Proceedings and especially having in mind that Norway had used 134 pages in the Rejoinder in arguing the international questions involved in the merits of the dispute, it was no longer possible seriously to suggest that Norway understood that the actual dispute before the Court related "to matters which are essentially within the national jurisdiction as understood by the" Norwegian Government.

It is true that Norway has not formally abandoned the course which it adopted when it purported to invoke the reservation contained in the French Declaration. Nevertheless, I am compelled to reach the conclusion that Norway has not maintained that position and that it is necessary to comply with Norway's request to deal with the case on the basis of the Norwegian Final Submissions of May 23rd.

But even if I thought that Norway had maintained its Objection based on the reservation to the French Declaration, I should still have difficulty in accepting an objection to the jurisdiction of the Court based upon the Second Part of the first Preliminary Objection.

My first difficulty relates to the text of the Declaration. It is necessary, for Norway to succeed, to establish that the Norwegian Government *understands* that the dispute relates to matters which are essentially within the Norwegian national jurisdiction. It is not sufficient to establish that the Norwegian Government *pretends to understand*, or *declares that it understands* that the dispute comes essentially within the scope of Norwegian national law. The text does not use the word "pretends" or "declares" and it does use language that suggests that it had in mind a genuine understanding.

When the provisions of the reservation were invoked by Norway, it was not contended that they conferred an arbitrary power to oust the jurisdiction of the Court. Norway took the position that "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".

I am in agreement with the position taken by Norway in this regard, but I do not think that it goes quite far enough. A case might involve a matter essentially within the national jurisdiction and yet not come within the scope of "disputes relating to matters which are essentially within the national jurisdiction". Further, I should be disinclined to bring notions of "good faith" and *abus de droit* into the question. Practically speaking, it is, I think, impossible for an international tribunal to examine a dispute between two sovereign States on the basis of either good or bad faith or of abuse of law.

Nevertheless, I think that the basic principle underlying the position taken by Norway in this regard should be accepted. I think that the wording of the reservation to the Declaration properly construed means that the respondent State, in invoking the reservation, must establish that there is a genuine understanding, i.e. that the circumstances are such that it would be reasonably possible to reach the understanding that the dispute was essentially national. Whether the circumstances are such is not a matter for decision by a respondent Government, but by the Court. But, assuming that such circumstances existed, the conclusion reached by a respondent Government could not be reviewed by the Court.

I am unable to accept the view that the reservation should be interpreted as giving the respondent Government an arbitrary power to settle any question of jurisdiction which arises by the assertion that the Government understands that the matter is essentially within the national jurisdiction regardless of whether that assertion is true or false.

Such a construction of the clause would lead to something unreasonable and absurd. It would, of course, if that interpretation

is accepted, be necessary to conclude that the Declaration ran contrary to Article 36, paragraph 6, of the Statute, and was null and void.

But this interpretation runs directly contrary to the rule which was laid down by the Permanent Court in the *Polish Postal Service in Danzig* (P.C.I.J., Series B, No. 11, p. 39):

> "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd."

This rule was approved in the Advisory Opinion of this Court: *Competence of Assembly regarding admission to the United Nations, I.C.J. Reports 1950,* at page 8.

If we apply the principles of this rule to the present case we find that the relevant words in their natural and ordinary meaning make sense in their context and that, in my opinion, is an end of the matter. It is inadmissible, by a process of interpretation, to rewrite the clause in question as if it had read: "disputes relating to matters as regards which the Government of the French Republic has declared that it understands that they are essentially within the national jurisdiction". The words actually used, "as understood", if given their natural and ordinary meaning, connote a real understanding, and not a fictitious understanding unrelated to the facts.

Having these considerations in mind, it is necessary for me to examine the question whether the circumstances are such that it would be reasonably possible to reach an understanding that the dispute was essentially national.

At the time when Norway invoked the reservation there can be no doubt as to the propriety of the action. At that time, it was certainly reasonably possible, considering the Application alone together with any light that had been thrown upon it by the Memorial, to reach such an understanding. But, as a result of the course taken in the Written and Oral Proceedings, it is now possible to look at the dispute with full knowledge of its essential character. The dispute, in the form which it has now taken, and in which it is expressed in the French Final Submissions, involves a threefold claim based on: discrimination, extraterritoriality and the gold clause. The first two are based solely on international law while the third is based primarily on national law. I have already pointed out that throughout the Written and Oral Proceedings, the first and the second claims have been discussed at great length by France and at much greater length by Norway. In these circumstances, I find it impossible to reach the conclusion that Norway could have reasonably understood that the case was essentially within the Norwegian national jurisdiction.

Accordingly, having considered both the First Part and the Second Part, I have reached the conclusion that the first Norwegian Preliminary Objection, as embodied in the first recital to the Submissions of the Agent of the Norwegian Government on May 23rd, 1957, should be rejected.

* * *

Third Question—The Norwegian contention that *"As to that part of the claim which relates to the bond certificates issued by the Mortgage Bank of Norway and the Small Holding and Workers' Housing Bank of Norway,* these two Banks have a legal personality separate from that of the Norwegian State; the action cannot therefore be brought against that State as a borrower; whereas moreover the jurisdiction of the Court is limited to disputes between States;".

I cannot accept the Norwegian contention as regards these Banks. I agree that they have separate legal personalities distinct from that of the Norwegian State, but that does not wholly dispose of the matter.

The record shows that in 1954 a bondholder brought an action against the Mortgage Bank of Norway in a French court, the Tribunal de la Seine. The Bank objected to the jurisdiction of that Court on the ground that it was an instrumentality of the Norwegian Government, and for that purpose furnished the court with a certificate, signed by the Minister of Finance of Norway and dated 28th December, 1931, to that effect. It is established that the Bank, both in the matter of the litigation and in the course followed as regards gold payments, payments in Swedish crowns, and other matters in dispute, was not acting as a separate personality with a separate power of decision, but was acting on the basis of the advice, instruction and approval of the Minister of Justice of Norway and the Minister of Finance of Norway. This has been the case since the 9th December, 1925, as is proved by Annex V to the Memorial. The proceedings in the French court were concluded in March, 1956, by a default judgment owing to the unwillingness of the Bank to appear and contest the proceedings on the merits.

It thus appears that the Norwegian State completely identified itself with the Bank for the purpose of preventing the bondholder from obtaining a judicial determination of his rights. It is a sound doctrine that a party cannot blow both hot and cold at the same time, and Norway cannot retreat from the position of complete identification taken in 1931, and persisted in in the proceedings before the French court, for the purpose of preventing this Court from adjudicating upon the matter.

* * *

Fourth Question—The Norwegian contention that "The holders of bond certificates for whose protection the French Government considers itself entitled to institute international proceedings have not first exhausted the local remedies."

From the very commencement of the diplomatic negotiations up to the present time, Norway has consistently and persistently insisted that the bondholders should resort to the Norwegian courts for the purpose of having these courts interpret the clauses in the bonds and determine the nature and extent of the obligations to the borrowers thereunder. But, at the same time and just as consistently and persistently, Norway has asserted that the question has been governed by the law of 15th December, 1923, and that that law is applicable to and binding upon foreigners. I have quoted above the actual statement by Norway, made at the commencement of the controversy.

The rule of international law requiring the exhaustion of the local remedies is of great importance. When a State adopts the cause of its nationals as against a respondent State in a dispute which originally was one of national law, it is important to obtain the ruling of the local courts with regard to the issues of fact and law involved, before the international aspects are dealt with by an international tribunal. It is also important that the respondent State which is being charged with breach of international law should have a fair opportunity to rectify the position through its own tribunals. It is necessary to begin the consideration of the fourth Preliminary Objection with the assumption that France must establish resort to an exhaustion of local remedies before the claims of the French bondholders can be submitted to this Court.

France has put forward three reasons for not resorting to the domestic tribunals in this case.

In the first place, France suggests that the rule with regard to the necessity for exhaustion of local remedies is limited to cases in which the aggrieved individuals have taken up residence within the jurisdiction of the respondent Government and thus consented to the exercise by the tribunals of that country of jurisdiction over them.

France has not been able to put forward any persuasive authority for accepting this limitation on the application of the rule and, indeed, the weight of authority is the other way.

In the second place, France also contends that the proper law of the contract is French and that the proceedings could be undertaken in the French courts. But this is a matter of private international law on which I do not propose to express any opinion. It is not directly relevant to the application of the rule of exhaustion of local remedies which, as a rule of public international law, is

concerned with the exhaustion of remedies available in the respondent State.

In the third place, France contends that the bondholders should be excused from having undertaken proceedings in the Norwegian courts because such proceedings would offer no reasonable prospect of establishing their rights.

Here we must again draw a clear-cut line between the original dispute based on national law and the dispute before this Court which is based upon international law. In this Court, the main complaints against Norway on the international plane are:

1st—discrimination;

2nd—extraterritoriality;

3rd—the gold clause issue.

The bondholder could not possibly bring proceedings in the Norwegian courts with regard to the first or the second issues. His only course of action was a suit for breach of contract.

The question, therefore, is whether the bringing of an action in the Norwegian courts by a French bondholder is a course which could be reasonably expected of him, or whether it would have been a procedure of obvious futility.

I have difficulty in reaching the conclusion that the bondholder could reasonably have been expected to bring proceedings in the Norwegian courts. Since 9th December, 1925, he has had the notion hammered into his head by the Norwegian Government that such a course would be futile because the matter was governed by the law of 15th December, 1923. If he had brought an action and had persuaded the Norwegian court that there was a real gold clause in his bond, he would have met an insuperable barrier in the law of 1923. It would have been in vain for him to have argued that the enactment of that law was contrary to the rules of international law.

It has been suggested in the Oral Proceedings that he might have asked the court to do one of two things—namely, to interpret the law as being inapplicable to foreigners, or to hold that the law was unconstitutional by reason of its retroactive character. But the French bondholder had never heard of these possibilities, neither of which was suggested at any time in the course of the diplomatic negotiations or in the course of the negotiations which took place between the French National Association and the Mortgage Bank.

In the fourth place, it has been argued that the rule with regard to exhaustion of local remedies has no application where the rights of the applicant national have been impaired by the direct intervention of the respondent Government or Parliament. If there ever was a case in which the respondent Government and Parliament had intervened to impair the rights of non-resident aliens, it is in the present instance. It is obvious from the terms of the Note of 9th December, 1925, that the Mortgage Bank was not acting under

its own motion but under pressure from the Minister of Justice and the Minister of Finance. Further, the Storthing, the supreme legislative authority, in enacting this law was directly intervening so as to impair the rights of the French bondholders. Here I am not suggesting that either the Minister of Justice, the Minister of Finance, the Norwegian Government or the Storthing adopted and followed any course that was improper, but when I am dealing with an objection to the jurisdiction I am compelled to assume as against Norway matters which might well be changed on consideration of the merits.

In view of these circumstances I find difficulty in upholding the fourth Norwegian objection, and am led to the view that it should be rejected.

* * *

Fifth Question—The Norwegian request that the Court should "adjudge and declare that the claim put forward by the Application of the French Government of July 6th, 1955, is not admissible".

I have already given my reasons for thinking that the claim of the French Government, with which the Court is now dealing, is the claim as set forth in the French Final Submissions. In a sense therefore, the Fifth Question is hardly relevant. But, construing the question as relating to the claim before the Court, I am of the opinion that it is not inadmissible. To appreciate the position, it is necessary to bear in mind that there are three complaints before the Court.

The first is the charge by France that Norway discriminated against the French bondholders, contrary to the rules of international law. This charge, which I have been calling "discrimination", is formulated in the first paragraph of the French Submissions on the merits.

The second is the charge by France that Norway, by unilateral action in violation of the rules of international law, enacted legislation impairing the obligation of the bonds, to the detriment of the French investors. This charge, which I have been calling "extraterritoriality", is formulated in the third paragraph of those Submissions.

These elements of the dispute are causes of action which, in my opinion, are admissible. This Court alone is competent to dispose of them. They cannot be referred to the Norwegian courts, because those courts are not competent to dispose of a dispute, under international law, between France and Norway. The complaints, as regards discrimination and extraterritoriality, do not touch the breach of any legal obligation owed by Norway to the French bondholders. They relate solely to the obligations imposed on Norway by international law *vis-à-vis* France.

The third complaint is that which concerns the existence and obligation of the gold clause. It is based on the law of contract, and the contract, in this instance, is governed by Norwegian national law and not by international law. This complaint is formulated in the second, fourth and fifth paragraphs of the French Submissions on the merits. This element of the dispute is a cause of action which, in my opinion, is inadmissible. It is a matter that is and was within the scope of the jurisdiction of the Norwegian courts, in suits by the French bondholders against the Norwegian borrowers. France could not, by adopting the claims of French nationals, change the legal nature of the claims, and transfer them from the national to the international plane.

I do not think that the jurisdiction of the Norwegian courts to deal with the contractual cause of action, the third complaint under consideration, is in any way impaired by the existence of the first and second complaints which they are not competent to adjudicate. That is so notwithstanding that the three elements are so closely related. But, at the same time, I am of the opinion that the competence of this Court to adjudge the two purely international elements is not ousted, by reason of the coexistence of a closely related, but severable, element which is within the exclusive national competence of Norway.

Accordingly, I have reached the conclusion that the Court should reject the Norwegian objections in so far as they relate to the first and third paragraphs of the French Submissions on the merits; and allow the Norwegian objections in so far as they relate to the second, fourth and fifth paragraphs thereof.

Norway has asked the Court, in the Submissions of May 23rd, 1957, to deal with the merits. This is a conditional request, which would come into operation only if the Court decided that the claim was admissible. As the Court is taking the position that it is not competent to deal with any part of the dispute, it is not desirable that I should proceed to discuss the merits, although my own view is that they should be dealt with in so far as they relate to the first and third paragraphs of the French Submissions. In dealing with the points of jurisdiction and admissibility, it has been necessary for me to look at the merits from time to time, and to make certain observations with regard to them. It was not intended in making these observations to indicate in any way what my opinion would be in the event that it became necessary to consider and dispose of the merits.

(Signed) J. E. READ.
