WORLD LAW

In 1946, the Senate passed a resolution proposing that the United States accept the compulsory jurisdiction of the International Court of Justice in a limited category of legal disputes.[1] Acceptance of the Court's compulsory jurisdiction had received the support of many organizations, including the American Bar Association. The House of Delegates of the Association considered a proposal favoring acceptance in December, 1945, and adopted it unanimously.[2] "The ultimate purpose of the resolution," according to the report of the Senate Foreign Relations Committee, was "to lead to general world-wide acceptance of the jurisdiction" of the Court and, thus, "in a substantial sense, place international relations on a legal basis, in contrast to the present situation, in which states may be their own judge of the law."[3]

As finally adopted, however, the resolution recommended that the United States reserve from its acceptance of compulsory jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States.*"[4] The italicized phrase did not appear in the original resolution introduced by Senator Wayne Morse. In fact, the Foreign Relations Committee had considered and unanimously rejected such an amendment to the resolution on the ground that "the question of what is properly a matter of international law is . . . appropriate for decision by the Court itself, since, if it were left to the decision of each individual state, it would be possible to withhold any case from adjudication on the plea that it is a matter of domestic jurisdiction."[5] The amendment was, nevertheless, introduced during the Senate debate by Senator Tom Connally, then Chairman of the Foreign Relations Committee, and was added to the Morse resolution by a vote of fifty-one to twelve.[6]

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[1] The resolution was adopted by a vote of 60 to 2. 92 CONG. REC. 10706 (1946). The categories of legal disputes to which the compulsory jurisdiction of the World Court is limited are those enumerated in STAT. INT'L CT. JUST. art. 36, para. 2.

[2] *Hearings on S. Res. 196 Before a Subcommittee of the Senate Committee on Foreign Relations,* 79th Cong., 2d Sess. 47 (1946).

[3] S. REP. No. 1835, 79th Cong., 2d Sess. 3 (1946).

[4] 92 CONG. REC. 10706 (1946) (Emphasis added).

[5] S. REP. No. 1835, 79th Cong., 2d Sess. 5 (1946).

[6] 92 CONG. REC. 10697 (1946).

The Connally Amendment was subsequently incorporated in the United States's declaration of acceptance of the Court's compulsory jurisdiction issued by the President on August 14, 1946.[7] It has since become known as the "self-judging reservation." The reservation has recently been called the cause of "a general devaluation of the idea of compulsory jurisdiction."[8] It has also been assigned by Charles S. Rhyne as the reason for "the empty courtroom" of the World Court.[9] Since its organization in 1946, only four cases that the Court has decided on the merits were instituted by invoking its compulsory jurisdiction.[10]

In only one case has the judgment of the Court turned upon a self-judging reservation. That was the *Norwegian Loans Case*, decided in 1957, in which the Court held that Norway, which had no self-judging reservation, could invoke the French reservation and thereby preclude the Court from taking jurisdiction of the suit brought by France against Norway. The importance of the decision is therefore clear.

The self-judging reservation has again become the subject of public and senatorial attention in the United States. In 1959, Senator Hubert Humphrey introduced a resolution[11] in the Senate to authorize submission of a new American declaration of acceptance of compulsory jurisdiction that would omit the phrase "as determined by the United States." This bipartisan proposal has received the support of President Eisenhower and other high government officials. Again, the American Bar Association has declared its support of the Court and of the world rule of law by urging the revision of the United States' acceptance of compulsory jurisdiction.[12] Moreover, it has now been recognized that

[7] 61 Stat. 1218, 1 U.N.T.S. 9 (1946).

[8] Sohn, *International Tribunals: Past, Present and Future*, 46 A.B.A.J. 23, 25 (1960).

[9] 105 CONG. REC. 4511 (daily ed. Mar. 24, 1959) (Address by Mr. Rhyne, Chairman, Committee on World Peace through Law, American Bar Association, before the ninth annual conference of national organizations called by American Association for the United Nations, Statler Hotel, Washington, D.C., March 10, 1959.)

[10] Until April 12, 1960, the Court had decided only three compulsory jurisdiction cases on the merits. Liacouras, Contentious Proceedings Before the International Court of Justice, Dec. 11, 1959, p. 66 (unpublished memorandum in Dnke Law School World Rule of Law Center). On the former date, the fourth such case was decided. Case Concerning Right of Passage Over Indian Territory (merits), [1960] I.C.J. Rep. 6.

[11] S. Res. 94, 86th Cong. 1st Sess. (1959). Hearings were held on the resolution on January 27th and February 17th, 1960. *Hearings on S. Res. 94 Before the Senate Committee on Foreign Relations*, 86th Cong., 2d Sess. (1960). On March 29, 1960, the Senate Committee on Foreign Relations decided, by a vote of 9 to 7, to postpone further action on the resolution. 106 CONG. REC. D247 (daily ed. Mar. 29, 1960). See N. Y. Times, Mar. 30, 1960, p. 17, col. 5.

[12] N.Y. Times, Feb. 24, 1960, p. 15, col. 1.

the self-judging reservation is a serious obstacle to protection of American investments abroad, for so long as the reservation remains, the United States has no hope of successfully invoking the Court's compulsory jurisdiction against other countries.[13] The editors believe that a report of the judgment of the International Court of Justice in the *Norwegian Loans Case* will provide the practitioner with an authoritative legal background for this timely and important issue.

—The Editors

THE NORWEGIAN LOANS CASE*

BETWEEN 1885 and 1909, the Norwegian government and two Norwegian state banks[1] issued several series of public bonds, many of which were purchased by French citizens. During the unsettled years of World War I and the world-wide depression a decade later, Norway several times suspended the convertibility to gold of the Norwegian bank notes issued to pay interest and to redeem the bonds, and, in 1931, Norway abandoned the gold standard for an indefinite period.[2] The French bondholders refused to accept payment in the nonconvertible Norwegian bank notes, and, in 1925, the French government, on behalf of its nationals, insisted to the government of Norway that it was obligated to pay the interest and to redeem the bonds in gold. The Norwegian government consistently maintained, during ensuing protracted diplomatic negotiations, that its law forbade payment in gold.[3] More-

[13] "As matters pertaining to the treatment of American investments in foreign countries can easily be considered as being essentially within the jurisdiction of those countries, any claims brought by the United States on behalf of injured American investors are likely to founder on a rock of our own making [the self-judging reservation]." Sohn, *International Tribunals: Past, Present and Future*, 46 A.B.A.J. 23, 25 (1960).

* Case of Certain Norwegian Loans, [1957] I.C.J. Rep. 9.

[1] The state banks were the Mortgage Bank of the Kingdom of Norway and the Norwegian Small Holding and Workers' Housing Bank.

[2] The convertibility of the banknotes to gold was still suspended in 1955 when France made its application to the Court.

[3] The following Norwegian law came into force on December 15, 1923:

"Where a debtor has lawfully agreed to pay in gold a pecuniary debt in kroner and where the creditor refuses to accept payment in Bank of Norway notes on the basis of their nominal gold value, the debtor may request a postponement of payment for such period as the Bank is exempted from its obligation to redeem its notes in accordance with their nominal value. Where a creditor withdraws his refusal he shall be entitled to require such payment only after the giving of three months' notice. During the period of postponement interest shall be paid at the rate of four per cent per annum. Interest shall be paid in banknotes in accordance with their nominal value.

"Prior notice of waiver of the right to request postponement may be given only by

over, Norway rejected the repeated suggestions of France that the dispute be submitted to international arbitration or judicial settlement on the ground that the dispute was governed by Norwegian national law rather than international law.

In 1955, France applied to the International Court of Justice for a determination of the rights of its nationals. The application[4] requested judgment that Norway was obligated to pay gold on the bond coupons and the bonds. In its preliminary objections, Norway challenged the jurisdiction of the Court on three grounds:[5] (1) that the subject matter of the dispute was in the domain of Norwegian national law rather than international law; (2) that, with respect to bonds issued by the state banks, those banks had separate legal personalities from the Norwegian state, and that suit could not be instituted against Norway on those bonds, and that the jurisdiction of the Court was limited to disputes between states;[6] and (3) that the French bondholders had not exhausted local remedies available to them in the Norwegian courts. After hearings on Norway's preliminary objections and on the merits, the Inter-

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the State, municipalities, the Bank of Norway and the Banks which are fully guaranteed by the State (the Mortgage Bank, the Small Holding and Workers' Housing Bank and the Fishery Bank)." Case of Certain Norwegian Loans, [1957] I. C. J. Rep. 9, 19.

[4] An application is the first document submitted by the complaining, or applicant, state and it serves to institute the proceedings. It must indicate the subject of the dispute and the parties. STAT. INT'L CT. JUST. art. 40, para. 1. The application may be thought of as the approximate equivalent of the complaint submitted to a federal district court. FED. R. CIV. P. 3.

[5] The grounds of the Norwegian challenge to the Court's jurisdiction, numbered one, two, and three in the text, were submitted by Norway in its first, third, and fourth preliminary objections, respectively. Norway's second preliminary objection, which was abandoned before the oral proceedings, maintained that the facts out of which the dispute arose had occurred prior to the French acceptance of the Court's compulsory jurisdiction. Because such disputes had been reserved from the French acceptance, Norway claimed that, by virtue of the principle of reciprocity, the present dispute was not within the Court's jurisdiction.

[6] This objection was discussed by only two of the Judges. Judge Read, dissenting, rejected the objection because the record showed clearly that the Norwegian state had completely identified itself with the banks. In particular, Norway, in a suit instituted in a French court by the bondholders against the Mortgage Bank, had submitted a certificate that the bank was an instrumentality of the Norwegian government. Judge Read said,

"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 the proceedings before the French court, for the purpose of preventing this Court from ajudicating upon the matter." [1957] I.C.J. Rep. at 96.

Judge Lauterpacht, in his separate opinion, was content to observe that the objection was not "well founded." *Id.* at 36.

national Court of Justice held that it lacked jurisdiction to hear the dispute and dismissed the French application.[7]

The French Self-Judging Reservation

The Court rested its judgment on Norway's first preliminary objection.[8] Among the disputes which the Court may hear are those involving questions of international law,[9] and it was on this basis that France had submitted its application. In its first preliminary objection, however, Norway maintained that the dispute pertained to questions which were solely within the domain of national law. The Norwegian government, therefore, invoked against France the following reservation to the French declaration of acceptance of the compulsory jurisdiction of the court:[10]

> 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.

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[7] Judgment of July 6, 1957. The Judges stood 12 to 3. The Court consisted of President Hackworth; Vice President Badawi; Judges Guerrero, Basdevant, Winiarski, Zoričić, Klaestad, Read, Armand-Ugon, Kojevnikov, Sir Muhammad Zafrulla Khan, Sir Hersch Lauterpacht, Moreno Quintana, Córdova, and Wellington Koo. Of the majority, one Judge submitted a separate declaration and two others appended separate opinions. Three dissenting opinions were also appended.

[8] "Whereas:

1. The subject of the dispute, as defined in the Application of the French Government of July 6th, 1955, is within the domain of muncipal [national] 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; . . ." [1957] I.C.J. Rep. at 13.

[9] The "legal disputes" which may be brought before the Court under its compulsory jurisdiction are limited to:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

Stat. Int'l Ct. Just. art. 36, para. 2. The Court may also hear other cases which the parties refer to it by special agreement and any other matters specially provided for in the United Nations Charter or in treaties or conventions in force. *Id.* art. 36, para. 1.

[10] [1957] I.C.J. Rep. at 23. On July 10, 1959, France submitted a new declaration of acceptance which substituted the following for the self-judging reservation: "(2) disputes relating to questions which by international law fall exclusively within the domestic jurisdiction, . . ." [1958-1959] I.C.J.Y.B. 212; *New Declarations of Acceptance by France and India of the Jurisdiction of the World Court under Article 36(2) of Its Statute*, 1960 Duke L.J. 84, 85.

Thus, for the first time,[11] the Court was presented with the significant question whether a respondent state, which has made no self-judging reservation in its declaration of acceptance of the Court's compulsory jurisdiction, may, nevertheless, invoke the self-judging reservation of the applicant state and thereby preclude the Court from taking jurisdiction of the case. The Court answered this question affirmatively.

The opinion of the majority pointed out that the basis of the Court's jurisdiction was article 36, paragraph 2, of the Statute of the Court and the unilateral declarations of states accepting its compulsory jurisdiction.[12] Norway had accepted the compulsory jurisdiction of the Court in relation to any other state on condition of reciprocity; that is, it had accepted jurisdiction only to the same extent as any other state which might become a party to a case in which Norway was involved. Thus, because France had reserved from its acceptance all matters essentially within its national jurisdiction, as understood by the French government, the Court concluded that the extent of its jurisdiction in a dispute between Norway and France was bounded by the narrower limits of the French declaration of acceptance.[13] In accordance with the principle of reciprocity, the Court ruled that Norway could invoke the self-judging

[11] [1957] I.C.J. Rep. at 60.

[12] The Norwegian declaration, dated November 16, 1946, stated:

"I [Lange, Minister for Foreign Affairs] declare on behalf of the Norwegian Government that Norway recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the International Court of Justice in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years as from 3rd October 1946."

The French declaration, dated March 1, 1949, stated:

"On behalf of the Government of the French Republic, and subject to ratification, I [Bidault, Foreign Minister] declare that I recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, that is on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2, of the Statute of the said Court, for all disputes which may arise in respect of facts or situations subsequent to the ratification of the present declaration, with the exception of those with regard to which the parties may have agreed or may agree to have recourse to another method of peaceful settlement.

"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 present declaration has been made for five years from the date of the deposit of the instrument of ratification. It shall continue in force thereafter until notice to the contrary is given by the French Government." *Id.* at 21.

[13] The Court relied on Anglo-Iranian Oil Co. Case, [1952] I.C.J. Rep. 93, 103; Electricity Co. of Sofia and Bulgaria, P.C.I.J., ser. A/B, No. 77, at 81 (1939); Phosphates in Morocco, P.C.I.J., ser. A/B, No. 74, at 22 (1938).

reservation which France could have invoked if it had been the respondent state. Thus, Norway's invocation of the French self-judging reservation prevented the Court from assuming jurisdiction of the case.

The members of the majority who submitted separate opinions and the three dissenting judges took issue with the Court's conclusion as to jurisdiction. Judge Sir Hersch Lauterpacht[14] and Judge Guerrero[15] conceived that the Court lacked jurisdiction of the dispute because the French declaration of acceptance of the Court's compulsory jurisdiction was invalid. Vice President Badawi[16] and Judges Lauterpacht and Basdevant[17] were of the opinion that Norway's invocation of the self-judging reservation was subsidiary to its primary objection that the dispute was governed by national law rather than international law and concluded that the Court should not have reached a decision on the subsidiary objection without first considering the primary objection. Judge Read[18] felt that, although Norway was entitled to invoke the French reservation, the Court should not have considered the question because Norway had failed to maintain that position throughout the proceeding.

Validity of the French Declaration

Matters essentially within its national jurisdiction as understood by its government were excepted by France from its declaration of acceptance of the compulsory jurisdiction of the Court. "The great defect of this reservation," said Judge Guerrero, "is that it does not conform either to the spirit of the Statute of the Court . . . ."[19] or to its letter. The majority of the Court, however, declined to consider the validity of the French declaration because that had not been an issue in the proceedings.[20]

[14] [1957] I.C.J. Rep. at 34-66 (separate opinion). Article 57 of the Statute of the Court provides that, "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." The Court Reports, however, label as "separate opinions" only those opinions which express agreement with the operative part of the judgment. Other opinions are labelled "dissenting opinions." In addition, a Judge may make a "declaration" of his position, which usually consists of one or two paragraphs only.

[15] *Id.* at 67-70 (dissenting opinion).

[16] *Id.* at 29-33 (separate opinion).

[17] *Id.* at 71-78 (dissenting opinion).

[18] *Id.* at 79-100 (dissenting opinion).

[19] *Id.* at 68.

[20] The Court stated that the self-judging reservation was "a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court." *Id.* at 27. Inasmuch as the validity of the French

Judge Guerrero agreed with the majority that the extent of the Court's jurisdiction was determined by the declarations of the parties to the dispute and particularly by the more restrictive limits of the French declaration containing the self-judging reservation. But, he pointed out, this made it necessary for the Court to consider the validity of the French declaration. Upon the authority of the *Free Zones Case*,[21] Judge Guerrero decided that the consensus of the parties to the instant case as to jurisdiction was binding upon the Court only so far as that consensus was compatible with the Statute of the Court.

Judge Guerrero also believed that the French self-judging reservation was incompatible with the second paragraph of article 36 of the Statute of the Court, which provides for acceptance of compulsory jurisdiction by the parties to the Statute.

> By the fact that France reserves her right to determine herself the limit between her own national jurisdiction and the jurisdiction of the Court, France renders void her main undertaking, for the latter ceases to be compulsory if it is France and not the Court that holds the power to determine the limit between their respective jurisdictions.[22]

Judge Guerrero felt that the self-judging reservation was also incompatible with article 36, paragraph 6, of the Statute, which provides that the Court shall be the judge of its own jurisdiction.

Judge Lauterpacht agreed on the latter point and noted that, although the declarations of acceptance of the various states might limit the Court's jurisdiction "in a drastic manner,"[23] only the Court should judge whether a dispute fell within whatever modicum of jurisdiction remained. Because the Court could not act in any manner inconsistent with its Statute, and because the French declaration of acceptance was incompatible with the Statute, Judge Lauterpacht concluded that the

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declaration was not questioned by either party, neither because of the self-judging reservation nor on any other ground, the Court did not consider it necessary to examine the reservation.

[21] P.C.I.J., ser. A, No. 22, at 13 (1929). The parties to that case had agreed that the Court should unofficially communicate to them the result of its deliberations without waiting for a formal judgment to be pronounced in open court. On its own motion, however, the Court found that it could not act in accordance with the parties' agreement because to do so would necessitate a departure from the Statute of the Court. Stat. Perm. Ct. Int'l Just. art. 58 (now STAT. INT'L CT. JUST. art. 58). See also, South-West Africa—Voting Procedure, [1955] I.C.J. Rep. 67, 76, in which the Court held that it was legally impossible for the United Nations General Assembly to employ a voting system "entirely alien to that prescribed by the Charter."

[22] [1957] I.C.J. Rep. at 68.

[23] *Id.* at 46.

Court had no choice but to hold the French declaration completely invalid.[24] The Court would thus lack any jurisdiction over the dispute. The Judge thought his conclusion was analogous to the general principle of national law that a condition of a contract or other legal instrument that "is contrary to a fundamental principle of judicial organization is invalid."[25] He rejected the notion that those governments which had appended self-judging reservations to their declarations of acceptance[26] had been unfamiliar with the terms of the Statute and that their

[24] Judge Lauterpacht observed that, although "early writers considered that every single provision of a treaty is indissolubly linked with the fate of the entire instrument," it is not the modern international judicial practice to regard treaties as necessarily indivisible. *Id.* at 56. Free Zones Case, P.C.I.J., ser. A, No. 22, at 140 (1929); Competence of the International Labour Organisation, ser. B, No. 2, at 23, 24, and No. 3, at 18 (1926); Reservations to the Convention on Genocide, [1951] I.C.J. Rep. 15. He also noted that it would be consistent for the Court to uphold its jurisdiction if it were at all possible to do so by treating the invalid self-judging reservation as severable from the rest of the French declaration of acceptance. However, Judge Lauterpacht concluded that such a course was not open to the Court since he regarded the reservation as the essence of the French undertaking. He pointed out that the rapporteur of the Committee for Foreign Affairs of the French Chamber had stated in relation to the self-judging reservation that "the French sovereingty [*sic*] is not put in issue and its rights are safeguarded in all spheres and in all circumstances." [1957] I.C.J. Rep. at 58.
The Judge also said,
"As is well known, that particular limitation is, substantially a repetition of the formula adopted, after considerable discussion, by the Senate of the United States of America in giving its consent and advice to the acceptance, in 1946, of the Optional Clause [article 36, paragraph 2, of the Statute of the Court] by that country. That instrument is not before the Court and it would not be proper for me to comment upon it except to the extent of noting that the reservation in question was included therein having regard to the decisive importance attached to it and not withstanding the doubts, expressed in various quarters, as to its consistency with the Statute." [1957] I.C.J. Rep. 57.
Judge Lauterpacht took substantially the same position in the later Interhandel Case, [1959] I.C.J. Rep. 6, 1960 DUKE L.J. 73. That case was a suit by Switzerland against the United States, and the American government invoked its self-judging reservation. The Court, however, found that the objection was "without object at the present stage of the proceedings." *Id.* at 26, 1960 DUKE L.J. at 80. However, Judge Klaestad, by then President of the Court, took the view in his dissent that, although the Court might be prevented from acting upon the part of the United States' declaration which was in conflict with the Statute of the Court, that is, upon the self-judging reservation, it would not be impossible for the Court to give effect to the other parts of the declaration which conformed to the Statute. *Id.* at 78, 1960 DUKE L.J. at 82-83.

[25] [1957] I.C.J. Rep. at 46.

[26] In 1957, when the judgment in this case was rendered, six states other than France had made self-judging reservations to their acceptances of the Court's compulsory jurisdiction. These were the United States, 61 Stat. 1218 (1946), [1946-1947] I.C.J.Y.B. 217; Mexico, [1947-1948] I.C.J.Y.B. 129; Liberia, [1951-1952] I.C.J.Y.B. 185; Union of South Africa, [1955-1956] I.C.J.Y.B. 184; India, [1955-1956] I.C.J.Y.B. 186; and Pakistan, [1956-1957] I.C.J.Y.B. 219. After judgment in this case was rendered, the Sudan accepted compulsory jurisdiction but appended a self-judging reserva-

inclusion of the reservations was inadvertent. On the contrary, he believed that the authors of the self-judging reservations had the Statute clearly before them and had deliberately disregarded it. He thus rejected any interpretation of the French declaration which would bring it within "the four corners of conformity with the Statute."[27]

Apart from the incompatibility of the French reservation and article 36 of the Statute of the Court, Judge Lauterpacht found a more general reason for concluding that the declaration was invalid. He judged that because the French government had reserved to itself the determination of jurisdiction in a declaration that purported to accept compulsory jurisdiction, it had in effect reserved to itself the determination of the very existence and extent of its obligation. Therefore, the declaration lacked a condition essential to the validity of any legal obligation. Although a declaration of acceptance is in fact a unilateral instrument, Judge Lauterpacht reasoned that it was still necessary that it manifest an intent to create respective rights and obligations if it was to be treated as a legal text upon which the Court could base its jurisdiction. The declaration might thus be regarded as an instrument of accession to a multilateral treaty. In assuming this position, Judge Lauterpacht resorted to a source of law which article 38 of the Statute denominates as "the general principles of law recognized by civilized nations."[28] Thus, he referred not only to the national law of France and Norway, but also to American law when he declared that "the freedom of a party to determine the object of its obligation is represented [by the American commentator, Williston][29] as negativing the legal nature of the agree-

tion. [1957-1958] I.C.J.Y.B. 208. In 1959, France, [1958-1959] I.C.J.Y.B. 212, and India, 1960 DUKE L.J. 86, submitted new declarations of acceptance from which both countries omitted the self-judging reservation.

[27] [1957] I.C.J. Rep. at 47.

[28] "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59 [that the decisions of the Court are not subject to the principal of *stare decisis*], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto." STAT. INT'L CT. JUST. art. 38.

[29] "One of the commonest kind of promises too indefinite for legal enforcement is where the promisor retains an unlimited right to decide later the nature or extent of his performance. This unlimited choice in effect destroys the promise and makes it merely illusory." 1 WILLISTON, CONTRACTS 123-24 (rev. ed. 1936).

ment."[30] This, the Judge felt, was no more than a principle of common sense.

> Applied to the present case, that principle signifies that if the element of legal obligation is non-existent or negligible it must follow that the instrument is not a legal instrument upon which a State can rely as a matter of right for the purpose of invoking the jurisdiction of the Court.[31]

Having concluded that the French declaration was invalid, both Judge Guerrero and Judge Lauterpacht expressed their desire to reverse the trend toward self-judging reservations which was initiated by the United States' declaration of acceptance in 1946. Judge Guerrero said that the construction of article 36 which allowed reservations to be made to the acceptance of compulsory jurisdiction was made under the influence of former members of the League of Nations which were concerned with extending the movement toward international compulsory jurisdiction that had developed before World War II.[32] He concluded that the self-judging reservation was contrary to the spirit and purpose of the Statute of the Court and the Charter of the United Nations. He thus summarized his position:[33]

> It has rightly been said already that it is not possible to establish a system of law if each State reserves to itself the power to decide itself what the law is.
> . . . .
> The problem to be solved is, however, a simple one. It is, in fact, the problem whether the unilateral will of one State or the common will of the Parties before the Court can have priority over the collective will expressed in an instrument as important as the Statute of the Court.

Norway's Purpose in Invoking the Self-Judging Reservation

In invoking the French self-judging reservation, Norway asserted, "There can be no possible doubt on this point [that the subject of the dispute was a matter of national rather than international law]. *If,*

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[30] [1957] I.C.J. Rep. at 50.

[31] *Ibid.*

[32] Of the over 200 treaties considered in *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948,* (U.N. Pub. Sales No. 1949. V. 3), not more than six contain a right of unilateral determination of jurisdictional questions. [1957] I.C.J. Rep. at 63. By way of contrast, Judge Lauterpacht pointed out that, following the adoption of the self-judging reservation by the United States, similar reservations have been made to other treaties which include provisions for international judicial settlement of disputes. See, *e.g.*, Economic Aid Agreement with the Republic of China, July 3, 1948, art. XI, 62 Stat. 2945, T.I.A.S. No. 1837, 17 U.N.T.S. 119; American Treaty on Pacific Settlement (Pact of Bogatá), April 30, 1948, [1951] 2 U.S.T. & O.I.A. 2394, T.I.A.S. No. 2361, 30 U.N.T.S. 55.

[33] [1957] I.C.J. Rep. at 69.

however, there should still be some doubt, the Norwegian Government would rely upon the reservations made by the French Government . . . ."[34] Except for this, the French reservation was not again discussed by Norway in either the pleadings or the oral proceedings. This led four of the Judges[35] to conclude that Norway's invocation of the self-judging reservation was subsidiary to the primary ground of its first preliminary objection concerning the national character of the dispute. Therefore, the Court should not have reached the subsidiary ground of objection until it had disposed of the primary ground.

Vice President Badawi pointed out that it is characteristic of a subsidiary request for judgment that it carries a greater degree of certainty than the main request. Here, Norway maintained that the dispute was a matter of national rather than international law, which is a question for the Court. Following this, Norway invoked the French self-judging reservation, which called for a determination of the jurisdictional question by Norway alone, and was, therefore, certain to produce a result favorable to Norway.

Judge Lauterpacht, however, felt that the majority had misinterpreted the intent of Norway's first preliminary objection. He characterized Norway's contention that the dispute was a matter of national law as "principal" and "substantive," as opposed to its invocation of the self-judging reservation which was "subsidiary" and "formal."[36] Because Norway's principal purpose in the proceedings before the Court had been to establish the correctness of its primary ground of objection, Judge Lauterpacht reasoned that the Court should have considered that objection because "a Party to proceedings before the Court is entitled to expect that its Judgment shall give as accurate a picture as possible of the basic aspects of the legal position adopted by that Party."[37] The question whether the dispute was governed by national or international law was one which had divided the parties for years and was of "considerable interest for international law."[38] The function of the Court, therefore, was to answer that question rather than to select the ground which the majority regarded as "more direct and conclusive."[39]

[34] *Id.* at 72. (Emphasis added.)

[35] They were Vice President Badawi and Judges Basdevant, Lauterpacht, and Read.

[36] *Id.* at 35.

[37] *Id.* at 36.

[38] *Ibid.*

[39] "The Court's competence is challenged on both grounds and the Court is free to base its decision on the ground which in its judgment is more direct and conclusive." *Id.* at 25.

While Judges Basdevant and Read agreed with Vice President Badawi and Judge Lauterpacht that the Norwegian invocation of the self-judging reservation was a subsidiary objection, they also concluded that the majority had misconstrued the import of Norway's objection. Judge Basdevant presumed that a government could invoke the reservation in so categorical a fashion that that government's opinion as to the domestic character of the dispute would preclude the Court's jurisdiction even without the Court's considering the issue, but he was hesitant to ascribe to Norway "such a responsibility, political and moral, not only *vis-á-vis* the other Party before the Court in the present dispute but in a more general manner and by such a precedent, before the United Nations . . . ."[40] Norway's true position, as conceived by Judge Basdevant, was more "moderate"[41] in that the reservation had been invoked only in the event that the Court was reluctant to accept what Norway regarded as its irrefutable contention that the dispute was solely a matter of national law. Moreover, Norway had contended that,[42]

> 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.

This, Judge Basdevant apprehended, was a recognition by Norway of the Court's power to control the invocation of the self-judging reservation, a conclusion which he found to be supported by the careful attention which Norway gave to buttressing its primary contention that the dispute was national rather than international in character.

Finally, Judge Basdevant determined that Norway could not have intended its invocation of the French reservation as a categorical denial of the Court's jurisdiction because of the existing international law between Norway and France. Both countries had acceded to the compulsory jurisdiction of the Permanent Court of International Justice, for which the International Court of Justice was substituted by article 37 of the Statute.[43] The French declaration of accession to the juris-

[40] *Id.* at 72.

[41] *Ibid.*

[42] *Id.* at 73.

[43] "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice." STAT. INT'L CT. JUST. art. 37.

diction of the old Court applied to disputes "other than those which the Permanent Court of International Justice may recognize as bearing on a question left by the international law to the exclusive competence of the State."[44] As in the instant case, Norway was entitled to rely upon the French accession to the jurisdiction of the old Court by virtue of the principle of reciprocity. Under that accession, disputes within the exclusive competence of the state were reserved from the Court's jurisdiction. That reservation, however, was qualified by the requirement that such disputes were to be defined by the old Court according to the principles of international law. The French self-judging reservation to the jurisdiction of the present Court was, of course, broader in scope than the former reservation, but, because the present declaration was unilateral, it could not serve to modify the law already in force between France and Norway.

> 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. The restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway.[45]

Thus, Judge Basdevant concluded, Norway could have invoked the French reservation only in the light of the law existing between the two states—that is, only as to a dispute recognized by international law as one within the domestic jurisdiction of the state as adjudged by the Court. It was in this sense that Norway invoked the self-judging reservation. Although it would have been in Norway's interest to confer a categorical character upon the self-judging reservation, Judge Basdevant thought that she had not done so "because she was anxious to respect her international obligations."[46]

Judge Read concurred with Judge Basdevant's view that, although Norway had invoked the self-judging reservation, it had done so only in the belief that the Court could control the exercise of the reservation by examining the good faith of the invoking party. He observed, however, that it would be impractical for the Court to examine a dispute on the basis of the good or bad faith of the parties. The basic principle of the Norwegian position was correct, but the true meaning of the French

[44] [1957] I.C.J. Rep. at 75.

[45] *Ibid.* Judge Basdevant relied on Electricity Co. of Sofia and Bulgaria, P.C.I.J., ser. A/B, No. 77, at 76 (1939).

[46] [1957] I.C.J. Rep. at 74.

reservation was that a government, by invoking the self-judging reservation, *"understands,"* and not merely *"pretends to understand"* or *"declares that it understands,"* that the dispute was essentially within its national jurisdiction.[47] The reservation, then, properly construed, means that the invoking state "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."[48] The question whether these circumstances exist is for the Court. Any construction of the self-judging reservation that gave to a respondent state an arbitrary power to settle any jurisdictional question would lead to an absurdity, according to Judge Read, because such a power would, of course, be contrary to article 36, paragraph 6, of the Statute of the Court.[49] According to accepted canons of interpretation,[50] such a result must be avoided if the words in their context can be construed to avoid it. Here, the majority of the Court, in Judge Read's opinion, failed to recognize that the words "as understood" in the French reservation, "connote a real understanding, and not a fictitious understanding unrelated to the facts."[51]

WAS THE DISPUTE SUBJECT TO NATIONAL OR INTERNATIONAL LAW?

The French application to the Court requested judgment that Norway was obligated to discharge its debt on the loan contracts in gold rather than in the existing Norwegian currency. In its final submissions, France also requested judgment that Norway pay foreign bondholders without discrimination as to their nationality and that Norway could not,

[47] *Id.* at 94.

[48] *Ibid.* Judge Lauterpacht, however, pointed out that, "Practically every aspect of the conduct of the State may be, *prima facie*, within that category [essentially within the domestic jurisdiction] for the reason that normally the State exercises its activity within its national territory . . . . For these reasons it is possible for a State to maintain, without necessarily laying itself open to an irresistible charge of bad faith, that practically every dispute concerns a matter essentially within its domestic jurisdiction." *Id.* at 51-52. He had earlier expressed a view that, to the extent that the self-judging reservation must be invoked in good faith, a valid legal obligation is created. Lauterpacht, *Report on the Law of Treaties*, International Law Commission, U.N. Doc. No. A/CN.4/63 (1953). In his opinion in the instant case, Judge Lauterpacht expressly repudiated his earlier view. [1957] I.C.J. Rep. at 52.

[49] See *supra*, p. 423.

[50] "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." Polish Postal Service in Danzig, P.C.I.J., ser. B, No. 11, at 39 (1925). This rule was approved by the present Court in Competence of Assembly Regarding Admission to the United Nations, [1950] I.C.J. Rep. 4, 8.

[51] [1957] I.C.J. Rep. at 95.

by unilateral national legislation, modify the rights of French bondholders under the loan contracts.[52] On the other hand, as has been noted, Norway contended throughout the proceedings that the subject of the dispute was a matter of national law rather than international law and in its first preliminary objection, the government requested that the Court refuse to hear the case for this reason.

Among those Judges who wrote separate or dissenting opinions, only Vice President Badawi adopted the Norwegian contention that the dispute was governed by national law.[53] He declared that the general rule of private international law is that the construction of loan contracts is governed by the law of the debtor state. The French government maintained that the dispute fell within article 36, paragraph 2(b), of the Statute of the Court, concerning questions of international law,

[52] Norway objected to these two requests on the ground that they gave rise to a new claim. It is the practice of the Court to permit parties to modify their submissions (pleadings) up to the end of the oral proceedings. The right to do so, however, is subject to two limitations, according to Judge Read. First, "when there is an appreciable change, the other Party must have a fair opportunity to comment on the amended Submissions." *Id.* at 80-81. Since the final submissions of France were made at the close of its opening statement, he concluded that the first limitation had been satisfied.

"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." *Id.* at 81. Judge Read noted that article 40 of the Statute of the Court requires that the application set forth the "subject of the dispute and the parties. . . ." On the other hand, definition of issues by submissions is to be done in the course of the written and oral proceedings as required by article 48. Inasmuch as the application in the present case revealed that the case was intended to relate to the dispute which had been at issue between France and Norway for thirty years, and because Judge Read's review of the history of the dispute revealed that the issues of discrimination and extraterritorial legislation had been in controversy between the parties during those thirty years, he therefore concluded that the final French submissions did not give rise to a new claim. Moreover, Judge Read found that, even if the application was limited to the effect of the gold clause in the bonds, the responsibility for the introduction of the two new issues was "mainly due to Norway. [Or,] at any rate, Norway certainly shared that responsibility with France." *Id.* at 85.

Vice President Badawi pointed out that the French application raised only the question of the interpretation of the loan contracts, a question of national law. The questions concerning discrimination and extraterritorial legislation were raised only in the course of the French oral reply to the Norwegian defense that Norway's laws did not work a denial of justice. "[I]t 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." *Id.* at 33.

[53] Judge Moreno Quintana, in a one-paragraph declaration, stated that he agreed with the Court's disposition of the case but that he based his decision on the primary ground of Norway's first preliminary objection. "State loans, as being acts of sovereignty, are governed by muncipal law." *Id.* at 28.

because of the operation of the Second Hague Convention of October 18, 1907, relating to arbitration of specified disputes, including international loans.[54] The Vice President determined, however, that the convention did not make arbitration of loan disputes mandatory in all circumstances, and that, even if it did, that fact could not transform the character of the dispute from one of national to international law. Even assuming that the convention required arbitration in all cases, the question before the Court would not then be the interpretation of the loan contracts but, rather, the breach by Norway of its presumed obligation to submit to arbitration.[55] Vice President Badawi also rejected the French contention that the dispute was subsumed under article 36, paragraph 2(c), which deals with "the existence of any fact which, if established, would constitute a breach of international obligation." The underlying assumption of this provision is that the parties are agreed on the international obligation but that they disagree over the facts which constitute a breach thereof. According to international law, national laws "are merely facts which express the will and constitute the activities of States."[56] Thus, in this case, if the application of Norwegian law were treated as a question of fact, the Court would have to assume that the parties were agreed that under international law a state might not cancel a gold clause applicable to international payments. Of course, said Vice President Badawi, "Norway disputes the alleged rule of international law. This is the very basis of the present case."[57]

Judge Lauterpacht agreed with Vice President Badawi that Norwegian law governed the interpretation of the loan contracts, but he found that it was the very application of Norwegian law which France maintained was contrary to international law. Any national law may conflict with international law in its intent or effect, and the question of conflict between national legislation and international law is itself a question of international law.

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[54] Convention for the Pacific Settlement of International Disputes (Second Hague Convention), Oct. 18, 1907, 100 British and Foreign State Papers 298. Article 53 of the Convention refers to disputes "arising from contract debts claimed from one Power by another Power as due its nationals" as suitable for arbitration. "The second paragraph of Article I . . . 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." [1957] I.C.J. Rep. at 31.

[55] Judge Badawi referred to the Ambatielos Case, [1953] I.C.J. Rep. 10.

[56] [1957] I.C.J. at 32. Judge Badawi relied on Case Concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., ser. A, No. 20 (1929), and on Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France, P.C.I.J., ser. A, No. 21 (1929).

[57] [1957] I.C.J. Rep. at 32.

The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law. It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract.[58]

Although he acquiesced in Vice President Badawi's conclusion that the question of Norway's obligation to pay the bonds in gold was one of national law, Judge Read, nevertheless, rejected Norway's first preliminary objection.[59] He noted two requests for judgment by France which did not directly relate to the interpretation of the alleged gold payment obligation. The first was that Norway could not discriminate in payments by giving preferential treatment to some non-Norwegian bondholders, and denying it to the French bondholders. Norway had favored Danish and Swedish bondholders in making payments on the bonds,[60] but it argued that this had been done as a matter of good will toward the other Scandinavian countries,[61] that, at any rate, it was a matter of grace as to which France had no right to complain, and, finally, that it was justified by the exigencies of the world-wide depression which compelled states to pass legislation impairing debtors' obli-

[58] *Id.* at 37. Judge Basdevant, who also voted to reject Norway's first preliminary objection, agreed with Judge Lauterpacht on this point. The question presented by the instant case involved such problems of international law as treatment by a state of property rights of aliens, the equality of treatment of aliens and nationals, and of resident aliens and aliens resident abroad, and discrimination between French bondholders and other non-Norwegian bondholders.

[59] France contended that the adoption by the French government of the French bondholders' claim and the refusal of Norway to permit payment of the bonds and coupons in gold "transformed this dispute from one between private individuals and the Norwegian borrowers into one between France and Norway . . . ." Judge Read rejected this contention. "[S]omething 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 . . . [article 36, paragraph 2(b) of the Statute of the Court]. There must have been a breach by Norway of an obligation under international law due to France." *Id.* at 87.

[60] The report of the judgment did not make clear just what the discriminatory practice was, but it appears that Norway had paid the Danish and Swedish bondholders in Swedish crowns while ignoring a compromise request by France that the French bondholders be paid in Swedish crowns on their capital payments and in Norwegian crowns on the coupons. *Id.* at 88.

[61] Judge Read said that the "meaning and significance [of this defence] are still obscure." *Id.* at 89.

gations. Judge Read considered that the question whether international law contained any rule forbidding discriminatory treatment of foreign creditors was obviously a question of international law and necessarily included all of the justifications which Norway had advanced. Secondly, France requested judgment that, according to international law, Norway could not by unilateral legislation modify the rights of French bondholders. France argued that the marketing of bonds on foreign markets created obligations arising under international law as well as national law and that there was a broad principle of international law forbidding a state to enact extraterritorial legislation impairing the contractual rights of nonresident aliens. Norway contested both of these arguments on the ground that they did not reflect the actual practice of states. Judge Read concluded, "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 . . . ."[62]

Exhaustion of Local Remedies

Judge Read also rejected Norway's fourth preliminary objection[63] that the French bondholders had not exhausted remedies available to them in the Norwegian courts. In his opinion, the requirement of international law that local remedies be exhausted before resort is had to international tribunals serves two functions: first, the international tribunal is provided with the ruling of local courts on the facts and local law before it deals with the international aspects of the problem; second, the respondent state, charged with a breach of international law, is allowed a fair chance to rectify its position. Judge Read was convinced, however, that resort by the French bondholders to the Norwegian courts would have been futile because the Norwegian government had repeatedly declared since 1925 that the Norwegian law of 1923 precluded payment in gold. In the oral proceedings, Norway suggested that the bondholders might have persuaded the Norwegian courts that the law was inapplicable to foreigners or that it was unconstitutional because of its retroactive character. Judge Read rejected this contention, however, on the ground that the French bondholders had no way of knowing of these possibilities in the face of the Norwegian govern-

[62] *Id.* at 91.

[63] "4. The holders of bond certificates on whose behalf the French Government considers itself entitled to institute international proceedings have not previously exhausted the local remedies, ..." *Id.* at 14. See The Interhandel Case, [1959] I.C.J. Rep. 6, 1960 DUKE L.J. 73, 80, in which the United States successfully raised a similar objection.

ment's insistence during the diplomatic negotiations that it was powerless under the law to meet the bondholders' demands.

Judge Lauterpacht felt, however, that the possibility of a Norwegian judgment in favor of the bondholders was sufficient to require that they resort to the Norwegian courts.[64] He pointed to the trend of some national courts to interpret national legislation, wherever possible, as not to impute to the local law the intention or effect to violate international law. The Judge was also concerned that France had presented no satisfactory explanation for the failure of the bondholders to resort to Norwegian courts during the several decades that the dispute had lasted. Upon these grounds, Judge Lauterpacht, "with some hesitation,"[65] decided that the fourth preliminary objection was well-founded.

[64] Judge Lauterpacht refused to attach any "decisive importance" to the view that the Norwegian government's repeated insistence that it was prevented by Norwegian law from paying in gold entitled the French bondholders to assume that they had no remedy under Norwegian law. "The Norwegian Government, being an interested party, was not for this purpose an authorised interpreter of Norwegian law. It was for the bondholders, by bringing an action before Norwegian courts, to attempt to show that the Norwegian Government was mistaken in its interpretation of Norwegian law. If the courts held that the interpretation was correct, then the road to international proceedings would no longer be blocked by the objection based on the failure to exhaust local remedies." [1957] I.C.J. Rep. at 41.

[65] *Ibid.*