DISSENTING OPINION OF SIR HERSCH LAUTERPACHT

In its Judgment, after rejecting three preliminary objections of the United States of America, the Court has declared the Application of the Government of Switzerland to be inadmissible on account of non-exhaustion of local remedies in the courts of the United States. By doing so the Court has assumed jurisdiction both in the present case and in any future case connected with the present proceedings after the local remedies have been exhausted. In my view, there being before the Court no valid declaration of acceptance of its jurisdiction and no voluntary submission to it, the Court is not in a position to exercise any kind of jurisdiction over this case, including that of declaring the claim to be inadmissible. The same—subject to one exception—applies to its jurisdiction to decide on any of the preliminary objections. That exception arises from the objection based on the so-called automatic reservation which peremptorily and decisively rules out any jurisdiction of the Court with regard to a crucial aspect of the dispute and which renders the other objections irrelevant. That objection also necessarily involves the question of the validity of the Declaration of Acceptance of the defendant State.

* * *

In its Application of October 2nd, 1957, instituting proceedings in the present case the Government of Switzerland asked the Court to adjudge and declare that

> "(1) the Government of the United States of America is under an obligation to restore the assets of the *Société internationale pour participations industrielles et commerciales S. A.* (Interhandel) to that company;
>
> (2) in the alternative, that the dispute is one which is fit for submission for judicial settlement, arbitration or conciliation under the conditions which it will be for the Court to determine."

In its Memorial and its Observations on the Preliminary Objections of the United States the Government of Switzerland elaborated and amplified the above principal requests formulated in the Application. However, the substance of the Application—namely, the restitution of the assets of Interhandel and the obligation of the Government of the United States to submit the dispute to arbitration or conciliation—has remained unchanged. The successive formulations of the Swiss Conclusions are reproduced in the Judgment of the Court.

The Government of Switzerland has invoked the jurisdiction of the Court in reliance upon the Declaration of Acceptance, which

took effect on August 26th, 1946, of the jurisdiction of the Court on the part of the United States, as well as upon its own Declaration of Acceptance of July 28th, 1948. Paragraph 2 *(b)* of the Declaration of Acceptance of the United States provided that the Declaration shall not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America".

In its Preliminary Objections the Government of the United States invoked the reservation thus formulated. It stated there, in Part *(a)* of the Fourth Preliminary Objection, as follows:

> "*(a)* The sale or disposition by the Government of the United States of America of the stock in General Aniline & Film Corporation, vested as enemy assets under the United States Trading with the Enemy Act, has been determined by the United States of America, pursuant to paragraph *(b)* of the Conditions attached to this country's acceptance of the Court's compulsory jurisdiction to be a matter essentially within the domestic jurisdiction of the United States. Accordingly, pursuant to paragraph *(b)* of the said Conditions, the United States of America respectfully declines to submit to the jurisdiction of the Court the matter of the sale or disposition of such shares, including the passing of good and clear title to any person or entity. Such determination by the United States of America that the sale or disposition by the Government of the United States of the stock in General Aniline & Film Corporation is a matter essentially within its domestic jurisdiction applies to all the issues raised in the Swiss Application and Memorial, including, but not limited to, the Swiss-United States Treaty of Arbitration and Conciliation of 1931 and the Washington Accord of 1946."

In the course of the Oral Hearing the Agent of the United States of America formally maintained that preliminary objection both in his opening statement and in his Reply. However, while doing so, he drew the attention of the Court to the fact that according to the law of the United States the Government of the United States could not dispose of the assets of Interhandel so long as the case was pending before the courts of the United States. For that reason he suggested that, at the present stage of the proceedings before this Court, that preliminary objection was "moot"—i.e., apparently, without practical importance. Nevertheless, in his Reply, while insisting that that objection "is somewhat moot in the case at this time", he formally reiterated that objection and asked the Court "to judge and decide as there requested". He had previously said:

> "Our use of the automatic reservation limited to the sale or disposition of the G.A.F. vested shares is not arbitrary; the Court has never examined and we assume will not examine into the motives which lead nations to exercise the automatic reservation."

It may be added that the Government of the United States had, on a previous occasion, invoked that reservation in connection with—and as a reason of its opposition to—the request submitted by the Government of Switzerland for an indication of provisional measures of protection. The Court, in its Order of October 24th, 1957, declined—for reasons not connected with that reservation—to indicate preliminary measures there requested (*I.C.J. Reports 1957*, p. 105).

* * *

In the case now before the Court the Government of the United States has invoked the automatic reservation only in the matter of the sale and disposition of the assets of Interhandel, but not with regard to certain other aspects of the dispute, in particular the legality of the original seizure of the assets of the Company. The Government of the United States has, in repeated statements, attached importance to that limitation of its reliance on the "automatic reservation". However, it does not appear that any such differentiation corresponds to the terms or objects of the application of the Swiss Government or that it is of decisive practical or legal importance. The Swiss Application asks the Court to declare and adjudicate that the "Government of the United States of America is under an obligation to restore the assets of Interhandel". Now it is clear that if the Government of the United States, in reliance upon the automatic reservation, proceeds to sell or otherwise to dispose of the assets of Interhandel, notwithstanding any judgment of or proceedings before this Court, it will not be in the position "to restore the assets" of Interhandel. It may, in pursuance of any judgment of the Court, offer to pay compensation in place of the assets to be restored. Yet that is not the object of the Swiss Application which asks for the restoration of the assets—with the concomitant and, in the estimation of the Swiss Government, essential rights of control over the affairs of Interhandel.

In view of this, no decisive importance attaches to the fact that the Government of the United States has refrained from invoking the reservation in question with regard to the original seizure and subsequent retention of the stock of Interhandel—an aspect of the question which does not appear in the application of the Swiss Government; with regard to that question the United States, in Objection 4 *(b)*, challenges the jurisdiction of the Court as being a matter which according to international law—though not according to the determination of the United States—is within its domestic jurisdiction. The more relevant fact is that the automatic reservation invoked in Objection 4 *(a)* has been invoked with regard to the exclusive subject-matter of the Application and the principal Conclusion advanced by the applicant Government.

Moreover, in so far as there arises in the present case the question of the validity of the automatic reservation and of the Declaration as a whole—and it is these questions which inevitably call for an answer before the Court can in any way assume jurisdiction in the matter, even to the extent of deciding on the other preliminary objections—it seems immaterial whether the automatic reservation covers all or merely one aspect of the case.

The same considerations apply to the alternative request and conclusion of the Swiss Government, namely, that relating to the obligation of the United States to submit the dispute to the procedures of arbitration or conciliation. As the Preliminary Objection 4 *(a)*—the objection which invokes the automatic reservation—of the United States is specifically stated to apply also to the question of arbitration and conciliation, it is impossible for the Court to declare itself competent to decide on that aspect of the Swiss Application without assuming a position in relation to the validity of the automatic reservation and of the Declaration of Acceptance as such. If that reservation is effective then it is impossible for the Court to declare that the United States is bound to submit the entire dispute to arbitration or conciliation for in that case—that is to say, if the automatic reservation is valid—an arbitration tribunal or conciliation commission has no power to decide or to make recommendations on the main Swiss Application and Conclusion, namely, the obligation of the United States to restore the assets of Interhandel. The Court can assume jurisdiction with regard to the obligation of arbitration or conciliation only on the assumption that the reservation in question is ineffective and invalid or that it has been unreasonably invoked and must therefore be disregarded for these reasons or at least that it is within the power of the arbitration tribunal or conciliation commission to disregard that reservation on these grounds. The same applies, for reasons which will be stated presently, to the request to join this aspect of the dispute to the merits. The Court cannot, at any stage of the proceedings, act without regard to the instrument which purports to confer jurisdiction upon it or, for reasons outside the realm of legal considerations, postpone a decision on the subject.

Neither can the Court consider itself to be relieved of that duty for the reason that the Government which has made the automatic reservation part of its Declaration of Acceptance and which formally maintains it, as does the defendant Government in the present case, finds it opportune at a particular stage of the proceedings to describe it as being of no practical importance—as being "moot". This is so for reasons more cogent than that a Government cannot formally maintain an objection and at the same time invite the Court to treat it as being of no importance. If that objection is maintained and if it is not dismissed by the

Court, it can subsequently be acted upon by the interested Government whenever it deems it convenient to do so. In the present case it has been submitted on behalf of the Government of the United States that it is prevented by the law of the United States from selling or otherwise disposing of the assets of Interhandel so long as a final decision of an American court has not declared these assets to be validly vested in the United States of America. Yet there is room for the possibility that, unless the automatic reservation has been withdrawn by the United States, or declared invalid by the Court, the Government of the United States may be at liberty, subsequent to any such final decision of its courts in its favour, to proceed to sell or otherwise dispose of the assets of Interhandel notwithstanding any judgment of the Court declaring itself competent with regard either to the principal request or the subsidiary request relating to arbitration or merely declaring the application inadmissible pending the exhaustion of local remedies before American courts. It is not certain to what extent the Government of the United States of America could be prevented from doing so as the result of any indication of provisional measures of protection—assuming that the sale had not been accomplished with utmost expedition prior to any request for interim measures—seeing that the United States has invoked the automatic reservation as applying to all aspects and stages of the dispute. The possibility cannot be ruled out, although it cannot fittingly be anticipated, of a change in the law of the United States which at present prevents the Government from selling the assets of Interhandel prior to a final decision of American courts.

For these reasons, whatever may be the accuracy of the suggestion advanced on behalf of the United States of America that the question of the automatic reservation "had become moot" at the present stage of the proceedings, a proper administration of justice requires that its validity—as well as, in that connection, that of the Declaration of Acceptance as a whole—must be decided at the very first stage of the proceedings before the Court. The automatic reservation has been invoked by the defendant State; it has been maintained by it; it has been challenged by the applicant State; it is of immediate legal relevance. There is, therefore, no room for accepting the submission of the Government of the United States of America that the question of the automatic reservation, having somehow become "moot", should be postponed to a further stage of the proceedings.

The same considerations render it impossible to accede to the submission of the Government of Switzerland that that objection be joined to the merits. The objection based on the automatic reservation cannot be properly joined to merits for the reason that being of a formal and peremptory character, namely, being depen-

dent solely upon the determination by the United States, it cannot by definition be examined upon its merits in relation to the substance of the dispute. For it operates automatically, irrespective of the merits of the dispute, by its own propulsion—as it were—as the result of the physical act of having been invoked. This is so unless the Court decides, at the very first stage of the proceedings, that the question of the reasonableness and good faith of the reliance on the automatic reservation must in any case be within the jurisdiction of the Court. For these reasons, the Court has, in my view, no power to declare itself competent to consider, either directly or by joining it to the merits, the subsidiary request of the Swiss Government relating to the obligation of the United States of America in the matter of arbitration or conciliation until it has decided that the automatic reservation is invalid, and cannot be acted upon, or that, if valid, the Court has the power to pass in every individual case upon the propriety of the action of the Government which invokes it. For, as noted, the Government of the United States has expressly declared that the objection based on the automatic reservation applies also to the question of arbitration and conciliation. The Court cannot properly declare itself competent or, by joining the objection to the merits, envisage such competence, without examining the principal and fundamental questions decisive for the very possibility of its competence.

These considerations are also relevant to the preliminary objection of the Government of the United States relating to the non-exhaustion of local remedies. Any decision of the Court allowing that objection implies an assumption of the jurisdiction of the Court both at the present stage and for the future in the event if, after the local remedies have been unsuccessfully exhausted, Switzerland once more submits her application to the Court. A Judgment of the Court, based on the fact of non-exhaustion of local remedies, implies the assurance to the applicant State that, once it has done its best to exhaust local remedies, the Court will proceed to the adjudication of the dispute on the merits—unhampered by any other objections to its jurisdiction. There would otherwise be no point in requiring the injured party to exhaust local remedies—only, once it had done so, to see its claim defeated on account of some other preliminary objection. It is largely for that reason that according to the established practice of the Court preliminary objections must be examined—and rejected—before the plea of admissibility is examined. If this is so, then the very decision of the Court declaring the application to be non-admissible on account of non-exhaustion of local remedies calls for—it implies —a previous decision as to the validity of the automatic reservation and of the manner in which it has been invoked.

* * *

Moreover—and this is the crucial aspect of the jurisdictional issue before the Court—the automatic reservation now invoked by the United States of America and contained in its Declaration of Acceptance raises, for reasons to be outlined presently, the question of the effectiveness and validity of that Declaration of Acceptance as a whole. Upon the answer to that question depends whether it is possible for the Court to enquire into any preliminary objection other than that based on the automatic reservation. If the Court is not confronted with an effective and valid Declaration of Acceptance, there is no object in examining any other preliminary objections.

In my judgment, there is not before the Court a legally effective and valid Declaration of Acceptance by reference to which it is in the position to assume jurisdiction with regard to any aspect of the dispute or by reference to which it is incumbent upon it—or permissible for it—to examine any preliminary objection other than that relying upon the automatic reservation. In my view, the Government of the United States, having in its Declaration of Acceptance of August 26th, 1946, purported to accept the jurisdiction of the Court subject to the reservation of matters essentially within the domestic jurisdiction of the United States as determined by the Government of the United States, did not, in legal effect, become a party to an instrument which confers upon it rights and which imposes upon it obligations. This is so for the following reasons:

(a) the reservation in question, while constituting an essential part of the Declaration of Acceptance, is contrary to paragraph 6 of Article 36 of the Statute of the Court; it cannot, accordingly, be acted upon by the Court; which means that it is invalid;

(b) that, irrespective of its inconsistency with the Statute, that reservation by effectively conferring upon the Government of the United States the right to determine with finality whether in any particular case it is under an obligation to accept the jurisdiction of the Court, deprives the Declaration of Acceptance of the character of a legal instrument, cognizable before a judicial tribunal, expressing legal rights and obligations;

(c) that reservation, being an essential part of the Declaration of Acceptance, cannot be separated from it so as to remove from the Declaration the vitiating element of inconsistency with the Statute and of the absence of a legal obligation. The Government of the United States, not having in law become a party, through the purported Declaration of Acceptance, to the system of the Optional Clause of Article 36 (2) of the Statute, cannot invoke it as an applicant; neither can it be cited before the Court as defendant by reference to its Declaration of Acceptance. Accordingly, there being

before the Court no valid Declaration of Acceptance, the Court cannot act upon it in any way—even to the extent of examining objections to admissibility and jurisdiction other than that expressed in the automatic reservation.

In some, but not all, respects, the position in the case now before the Court is the same as in the case of *Certain Norwegian Loans* in which, however, it was the defendant State which, availing itself of the operation of the principle of reciprocity, invoked the automatic reservation incorporated in the Declaration of Acceptance of the applicant Government. In that case the Court in refraining from entering into the question of the validity of the automatic reservation and of the Declaration of Acceptance attached importance to the fact that these questions were not put in issue by either Party. In my Separate Opinion in that case I expressed the view that the validity of the instrument invoked as a basis of the jurisdiction of the Court must be a matter for the decision of the Court *proprio motu* regardless of whether that issue has been raised by the parties (*I.C.J. Reports 1957*, p. 61). In the present case both the validity of the automatic reservation and the manner of its exercise have been challenged by the applicant State. Upon the answer to these challenges depends the decision of the Court upon one of the vital aspects of its jurisdiction. Moreover, the answer of the Court to the challenge to the validity of the automatic reservation inevitably raises the issue of the effectiveness and the validity of the Declaration of Acceptance as a basis of any pronouncement of the Court on any aspect either of jurisdiction or of the merits. Whatever may be the inconvenience and the difficulties, from various points of view, of a decision on these questions, it is not possible for a judicial tribunal to postpone it.

* * *

My view as to the validity of the automatic reservation and of the Declaration of Acceptance which incorporates it, is the same as that expressed in my Separate Opinion in the case of *Certain Norwegian Loans*. In order to avoid repetition I must refer generally to that Opinion for a more detailed exposition of some of the grounds on which my conclusions in the present case are based. However, the present case is concerned with different parties, one of which is the United States of America—a party which has invoked and maintained the automatic reservation incorporated in its Declaration of Acceptance. Having regard to the long association of the United States of America with this type of reservation and to the availability of evidence surrounding the circumstances of its adoption by that State in its Declaration of Acceptance, it is necessary to review some aspects of that Opinion in the light of the above circumstance. On page 57 of that Opinion I stated as follows:

"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 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 notwithstanding the doubts, expressed in various quarters, as to its consistency with the Statute."

No such considerations obtain in the present case. On the contrary, the historic antecedents surrounding the adoption of that Declaration of Acceptance are directly relevant to its interpretation.

It is convenient, before proceeding, to state the meaning of the expression "automatic reservation". That expression is intended to convey that once that reservation has been invoked by the Government in question the part of the Court is limited to the automatic function of registering the fact that the reservation has been invoked and that the Court is bound to hold, without examining its merits, that it is without jurisdiction.

* * *

In the Separate Opinion in the *Norwegian Loans* case I stated (on p. 43) as follows my view that it was not open to the Court to act upon the "automatic" reservation:

"I consider it legally impossible for the Court to act in disregard of its Statute which imposes upon it the duty and confers upon it the right to determine its jurisdiction. That right cannot be exercised by a party to the dispute. The Court cannot, in any circumstances, treat as admissible the claim that the parties have accepted its jurisdiction subject to the condition that they, and not the Court, will decide on its jurisdiction. To do so is in my view contrary to Article 36 (6) of the Statute which, without any qualification, confers upon the Court the right and imposes upon it the duty to determine its jurisdiction. Moreover, it is also contrary to Article 1 of the Statute of the Court and Article 92 of the Charter of the United Nations which lay down that the Court shall function in accordance with the provisions of its Statute."

It is not necessary to reiterate here in detail the reasons formulated in that Opinion and substantiating the view that the automatic reservation is contrary to the Statute. They include some such considerations as that if the Court must treat as binding the determination by one of the parties to the effect that the Court is without jurisdiction then the Court cannot exercise the duty imposed upon it by Article 36 (6) of the Statute (except for registering,

by way of a necessarily automatic act, the fact that it is without jurisdiction for the reason that a party to the dispute has so determined); that the Court, as shown by its practice and as indicated by compelling legal principle, cannot act otherwise than in accordance with its Statute, of which it is the guardian; that while governments are free not to accept the jurisdiction of the Court at all or to accept it subject to reservations and limitations, they cannot do so in derogation of express provisions of the Statute; and that that applies with special force to a provision of the Statute relating to an indispensable—and, indeed, obvious—safeguard of such compulsory jurisdiction as may, by their own free will, be accepted by the parties to the Statute.

> "Article 36 (2) speaks of the recognition by the parties to the Statute of the 'compulsory' jurisdiction of the Court. But there is no question of compulsory jurisdiction if, after the dispute has arisen and after it has been brought before the Court, the defendant State is entitled to decide whether the Court has jurisdiction." (*I.C.J. Reports 1957*, at p. 47.)

The Court is the guardian of its Statute. It is not within its power to abandon, in deference to a reservation made by a party, a function which by virtue of an express provision of the Statute is an essential safeguard of its compulsory jurisdiction. This is so in particular in view of the fact that the principle enshrined in Article 36 (6) of the Statute is declaratory of one of the most firmly established principles of international arbitral and judicial practice. That principle is that, in the matter of its jurisdiction, an international tribunal, and not the interested party, has the power of decision whether the dispute before it is covered by the instrument creating its jurisdiction.

What is the legal meaning of the fact that the Court is unable to act upon—that it is by its Statute precluded from acting upon—the "automatic" reservation? The legal meaning of that fact is that the reservation in question is invalid, that is to say, that the Court being bound by its Statute is not in a position to apply it; that that reservation is therefore without force and legal effect. There is no element of disapproval or adverse moral or legal judgment, offensive to the dignity of a sovereign State, in a proposition of that nature. Invalidity, in the contemplation of the law, is nothing else than inherent incapacity to produce legal results. Sovereign States are free to append to their Acceptance any kind of reservation or limitation—subject only to the qualification that reservations and limitations which are contrary to the Statute cannot be acted upon by the Court. There is otherwise no element of illegality in an Acceptance of that character. The Court is not concerned with the political implications of, and possible objections to, a Declaration which, while in law incapable of achieving that object, purports to give expression and support to the principle of

obligatory judicial settlement of disputes between nations. Neither is the Court called upon to examine in detail arguments of some dialectical complexion intended to infuse into such Declaration an element of consistency with the Statute—such as that by performing the automatic function of registering the determination made by the State in question that a matter is essentially within its domestic jurisdiction the Court in law exercises the substantive and decisive function entrusted to it by Article 36 (6) of the Statute.

It is impossible for the Court to attach importance to the argument that as Governments are free to accept or not to accept the obligations of the Optional Clause of Article 36 of the Statute, they are free to do so subject to reservations of their unlimited free choice. A person or a State may be free to join an association or to accede to a treaty. This does not mean that they are entitled to join or accede on their own terms in disregard of the rules of the association or of the provisions of the treaty. Governments possess no unlimited right to make reservations. In the Advisory Opinion on the *Reservations to the Genocide Convention* the Court rejected the contention that the unanimous consent of all parties to the treaty is necessary to enable the State to become a party to the treaty subject to a reservation. But the Court equally declined to accept the view that the right to append reservations is unlimited. On the contrary, it made "the compatibility of a reservation with the object and purpose of the Convention" the decisive test of their admissibility (*I.C.J. Reports 1951*, p. 24). It said: "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them" (at p. 24). It is for that reason that while most of the recent conventions allow reservations to their articles, they expressly exclude them with regard to some of the essential articles of the Convention. Of that practice, the Conventions of 1958 relating to the law of the sea provide an instructive example. This applies also to conventions regulating subjects of limited scope such as the Convention of July 28th, 1951, relating to the Status of Refugees (Article 42 of the Convention).

It must be noted that, unlike in the case of some other States which adhered to the system of the Optional Clause subject to the automatic reservation, in the case of the United States of America the question of the conformity of that reservation with the Statute of the Court was clearly present to the minds of, and discussed by, the members of the legislative organ responsible for that reservation. In fact that question constituted the main and most prominent subject of the discussion in the Senate (see *Congressional Record*, Vol. 92 (1946), p. 10763 (Senator Donnell); *ibid.* (Senator Connally); pp. 10764 and 10770 (Senator Morse); p. 10837 (Senator Pepper); pp. 10837-10839 (a general discussion); p. 10840 (Senator Donnell)).

There is thus no question here of a State being confronted with the consequences of an action the legal import of which was not clear to the organ responsible for it. This is so quite apart from the fact, to which detailed reference is made elsewhere in the present Opinion, that that action—approved by a very substantial majority of fifty-one votes to twelve—was in keeping with the continuous attitude of the legislative organ in question to obligatory arbitral and judicial settlement in so far as it concerns the United States of America.

* * *

The second ground why, apart from its inconsistency with the Statute, it is impossible for the Court to apply the reservation in question is that, in consequence thereof, the instrument in which it is contained is not an instrument conferring legal rights and creating legal obligations. This is so for the reason that a purported undertaking in which one party reserves for itself the exclusive right to determine the extent or the very existence of its obligation is not a legal undertaking and that the instrument embodying it is not a legal instrument cognizable before a court of law. That aspect of the question is elaborated on pages 43-48 of my Separate Opinion in the case of *Certain Norwegian Loans* and it is not therefore necessary to repeat here the views there expressed, in particular those derived from general principles of law applicable alike to all instruments, whether bilateral or unilateral, intended to create legal rights and obligations. The only elaboration that is required in this connection of that view is that dictated by the fact that the automatic reservation now before the Court is one incorporated in the Declaration of Acceptance of the United States of America.

The insistence on the right of unilateral determination of the existence of a legal obligation to submit a dispute to arbitral or judicial settlement has been the unvarying feature of the practice of the United States and, in particular, of the branch of the Government of the United States endowed by the Constitution with the power of decisive participation in the process of ratification of treaties. Although occasionally, in treaties other than treaties providing generally for compulsory arbitral or judicial settlement, the United States of America has accepted in advance the jurisdiction of international tribunals in the matter of the interpretation and the application of those treaties, including necessarily those relating to the jurisdiction of those tribunals to determine their competence when acting in that capacity, it has been unwilling to do so with regard to treaties providing generally for obligatory arbitral or judicial settlement. With regard to those treaties the consistent attitude of the legislative body entrusted by the Con-

stitution with advising and consenting to ratification has been to reserve the right, for itself or the United States generally, to determine with regard to any particular dispute whether there rested upon the United States the obligation of arbitral or judicial settlement as generally provided for in the instrument.

As already stated, any such condition must be considered to constitute, in terms of law, a denial of the legal obligation of compulsory judicial or arbitral settlement. However, that has been the attitude of the United States both generally and in relation to the particular instrument now before the Court, namely, the Declaration of Acceptance of August 26th, 1946. The United States of America has accepted the obligations of Article 36 (2) of the Statute on condition that in any particular case it is for the Government of the United States of America, and not for the International Court of Justice, to determine whether a matter is essentially within the domestic jurisdiction of the United States of America. That condition, covering as it does a potentially all-comprehensive category of disputes relating to matters essentially within domestic jurisdiction, has replaced—in addition to another wide reservation in the American Declaration of Acceptance relating to the interpretation of multilateral treaties—the traditional formula requiring the consent of the Senate, or of the Government of the United States of America, to the submission of any particular dispute to the international tribunal. This Court, whose jurisdiction is grounded solely and exclusively in the consent of the defendant State, must respect that essential condition of the Declaration of Acceptance.

* * *

It is of importance, as showing both the consistency of the determination of the United States of America to preserve the ultimate power of decision with regard to its commitments on the subject and the absolute character of that condition, to review some of the principal events in the history of the attempts, since the beginning of the modern practice of compulsory arbitration at the end of the nineteenth century, to associate the United States of America with the practice of compulsory judicial and arbitral settlement.

On January 11th, 1897, a general treaty of arbitration was signed between the United States of America and Great Britain containing provisions for the adjudication of disputes concerning pecuniary claims against either Party and controversies involving the determination of "territorial claims". Provisions of some stringency surrounded both groups of disputes. Thus with regard to territorial claims it was laid down that disputes shall be submitted to a tribunal composed of six members, three of whom were to be judges of the Supreme Court of the United States or of the circuit courts

and the other three were to be judges of the British Supreme Court of Judicature or members of the Judicial Committee of the Privy Council. It was laid down that only an award given by a majority of not less than five to one was to be final (unless within three months either party protested against it). Moreover, it was provided that, in case one of the tribunals, constituted for the decision of matters not involving the determination of territorial claims, should decide that the determination of the case before it necessarily involved "the decision of a disputed question of principle of grave general importance affecting the national rights of such party as distinguished from the private rights whereof it is merely the international representative", the jurisdiction of the tribunal should cease and the case should "be dealt with in the same manner as if it involved the determination of a territorial claim" (Moore, *A Digest of International Law*, Vol. VII (1906), p. 77). Notwithstanding these safeguards the Senate declined to give its consent to the treaty.

In 1904 and 1905 the Government of the United States, following the pattern of the arbitration treaty concluded in 1903 between Great Britain and France, negotiated arbitration treaties with a number of States, including France, Switzerland, Great Britain, Italy, and Mexico. The treaties contained the then customary reservations of vital interests, independence and national honour. The Senate amended these treaties by stipulating that the "special agreement" therein provided in respect of any particular dispute should be in the form of a treaty requiring the consent and advice of two-thirds of the Senate (*Congressional Record*, February 13th, 1905, p. 2477).

When in 1907 the United States signed the Hague Convention on Pacific Settlement of International Disputes, the "advice and consent" in respect of ratification was given by the Senate subject to the "understanding" in the matter of Article 53 of the Convention relating to the formulation of the "compromis" by the tribunal in case the parties are unable to agree on the subject; the "understanding" expressly excluded from the competence of the Permanent Court of Arbitration the power to frame the "compromis" (Malloy, *Treaties between the United States and Other Powers*, Vol. II (1910), pp. 2247, 2248).

On August 3rd, 1913, the Government of the United States, in an effort to achieve a measure of obligatory arbitration, signed two bilateral general arbitration treaties—commonly known as the Taft-Knox treaties—providing for submission to arbitration of disputes involving a "claim of right" made by one party against another and "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity". The treaties, which in each case provided for a special agreement, laid down that should the parties disagree as to whether a dispute

is justiciable the question of justiciability should be submitted to a Joint High Commission of Enquiry and that the dispute should proceed to arbitration only if all but one members of the Commission reported that the dispute was justiciable. The Senate amended the treaties but substituted the term "treaty"—requiring the consent of two-thirds of the Senate—for "agreement" in relation to the requirement of special agreement; it struck out the provisions relating to determination of the matter by the Joint Commission. Thereupon the Government of the United States abstained from proceeding with the ratification of those treaties (S. Doc. 476; 62nd Congress, 1st and 2nd Sessions).

On occasions the power of final decision on the part of the Senate has been reserved even in bilateral treaties limited to arbitral settlement of pecuniary claims. This was the case in the Special Agreement of August 18th, 1910, between the United States of America and Great Britain providing for the submission to arbitration of pecuniary claims between the two countries. Article 1 of that Agreement provided that the claims submitted to arbitration "shall be grouped in one or more schedules which, on the part of the United States, shall be agreed on by and with the advice and consent of the Senate" (*International Arbitral Awards*, Vol. VI, p. 9).

At the close of the First World War the insistence on the right of final determination with regard to matters of domestic jurisdiction showed itself, in a different sphere, in the fifth reservation of the "Lodge reservations" approved by the Senate on November 13th, 1919, in connection with the Treaty of Versailles and the Covenant of the League of Nations. The Senate reserved to the United States "exclusively the right to decide what questions are within its domestic jurisdiction".

Similar considerations, as shown by a study of the record of the discussions in the Senate, underlay the principal reservation of the United States when on January 27th, 1926, the Senate passed a Resolution consenting to the adherence of the United States to the Statute of the Permanent Court of International Justice. That reservation provided that the Court shall not entertain without the consent of the United States a request for an advisory opinion touching any dispute or question in which the United States had *or claimed* to have an interest. Members of the League of Nations were not in a position to accept the reservation in that form and, in consequence, the United States did not become a party to the Statute (*League of Nations, Official Journal*, Suppl. 75, p. 122; *Official Journal*, 1929, p. 1857).

The insistence on the part of the United States, in the matter of treaties of obligatory arbitration and judicial settlement, that it must reserve for itself the ultimate right to determine the existence of the obligation to submit a particular dispute to arbi-

tration or judicial settlement continued to manifest itself in the period preceding and following the Second World War. Between 1928 and 1931 the United States concluded a large number of arbitration treaties—nearly thirty of them, including the Treaty with Switzerland of February 16th, 1931—which, while invariably incorporating the reservation of matters which are "within the domestic jurisdiction of either of the Contracting Parties", provided at the same time for the necessity of a special agreement in each case. Such agreement was "in each case [to] be made on the part of the United States of America by the President thereof, by and with the advice and consent of Senate".

On January 5th, 1929, the United States of America signed the General Treaty of Inter-American Arbitration—a treaty which contained the reservation relating to disputes "which are within the domestic jurisdiction of any of the Parties to the dispute and are not controlled by international law". The following "understanding" was made part of the ratification of the United States of America: "that the special agreement in each case shall be made only by the President, and then only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur" (*Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948*, p. 504).

In the period following upon its Declaration of Acceptance, of August 26th, 1946, of the compulsory jurisdiction of the Court subject to the automatic reservation, the United States have attached importance to extending the principle involved therein to other instruments, both multilateral and bilateral, of obligatory judicial or arbitral settlement to which they have become a party. They did so, for instance, in relation to the American Treaty of Pacific Settlement of April 30th, 1948 (Pact of Bogotá) which, in its Article V, provided that the procedures of pacific settlement laid down therein shall not apply "to matters which, by their nature, are within the domestic jurisdiction of the State" and that "if the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties". The United States appended to that Treaty a reservation which reads, in part, as follows:

> "The acceptance by the United States of the jurisdiction of the International Court of Justice as compulsory *ipso facto* and without special agreement, as provided in this Treaty, is limited by any jurisdictional or other limitations contained in any Declaration deposited by the United States under Article 36, paragraph 4, of the Statute of the Court, and in force at the time of the submission of any case" (*ibid.*, p. 1174).

A similar limitation has been incorporated in a number of bilateral agreements relating to specific matters, such as economic aid. Thus the Treaty of July 3rd, 1948, between the United States and China relating to economic aid provides as follows:

> "It is understood that the undertaking of each Government [relating to the jurisdiction of the Court] ... is limited by the terms and conditions of such effective recognition as it has heretofore given to the compulsory jurisdiction of the International Court of Justice under Article 36 of the Statute of the Court" (*Yearbook, I.C.J.*, 1948-1949, pp. 152-155).

* * *

In view of this consistent and persistent assertion, as here surveyed, of freedom of action in the matter of the justiciability or arbitrability of any particular dispute, notwithstanding the general obligation of arbitral or judicial settlement, and in view of the determination of the United States of America to retain the right of decision as to the existence of its obligation in any particular case, it must be abundantly clear that the Court must give full effect and weight to that attitude, so uniformly manifested, of the United States of America. As a matter of possible developments that attitude may not be enduring for all time; sovereign States, including the United States of America, have occasionally changed their historic attitude in matters equally or more fundamental. But it is not within the province of the Court to speculate on—or anticipate—these developments. Neither can it with any propriety be influenced by any speculation as to differing attitudes of the legislative and executive branches of the Government of the United States in this matter. The principle as expressed in the automatic reservation of the Declaration of the United States of America must be regarded as representing the consistent and deliberate position of that country.

The Court cannot arrogate to itself the competence to curtail that right of final determination by assuming the power to decide whether that right has been exercised reasonably or in good faith. To assume any such power would mean to deny to the United States of America the very right which it stipulated as a condition of its Declaration of Acceptance and which, if there were any doubt on the subject, is substantiated as rooted in an historic tradition of striking continuity. Of that tradition it is beyond the power of the Court to approve or to disapprove. This would be so even if there did not exist the additional and weighty reason that the greatest caution must guide the Court, in the matter of its jurisdiction, in attributing to a sovereign State bad faith, an abuse of a right, or unreasonableness in the fulfilment of its obligations.

No assistance can be derived in this respect from the suggestion that, in deciding whether a matter is essentially within the domestic jurisdiction, the Court shall assume that, unless there are obvious reasons to the contrary, the Government in question has made the determination reasonably and in good faith. Even assuming that a differentiation between a determination which is wrong, one which is obviously and unreasonably wrong, and one which, although unreasonable, is not arbitrarily and abusively so, provides a proper basis for judicial decision in a matter affecting the jurisdiction of the Court itself, the fact remains that the United States of America has not conceded to the Court—that it has expressly denied to it—the right to make any such decision, however favourably influenced in advance by a presumption that the United States has acted correctly in determining a matter to be essentially within its domestic jurisdiction. It is impossible for the Court to base its decision on the shifting sands of the proposition that a contention advanced by a party is plausible, or at least that it may be given the benefit of being held plausible, although it is in law wholly untenable. I find it juridically repugnant to acquiesce in the suggestion that in deciding whether a matter is essentially within the domestic jurisdiction of a State the Court must be guided not by the substance of the issue involved in a particular case but by a presumption—by a leaning—in favour of the rightfulness of the determination made by the Government responsible for the automatic reservation. Any such suggestion conveys a maxim of policy, not of law. Moreover, the very existence, if admitted, of any such presumption in favour of the State relying upon its automatic reservation would make particularly odious and offensive a finding of the Court to the effect that, notwithstanding that presumption, the reservation has been invoked unreasonably and in bad faith. Any such construction of the function of the Court which is calculated to put the Court in the invidious position of having to make pronouncements of that kind in the matter of its own jurisdiction is, for that additional reason, open to objection.

The circumstances of the case now before the Court show clearly the delicate and wholly discretionary nature of the task with which the Court may be confronted if it were to assume the function of deciding the accuracy or propriety or good faith of the determination made by the Government of the United States that the sale and disposition of the assets of Interhandel is a matter falling essentially within the domestic jurisdiction of the United States. What are the considerations to which the Court must attach weight in this connection? Is it the fact that Interhandel is incorporated under the laws of one of the States of the United States of America; that its physical assets are located in the United States of America; that it is engaged in fields of production essential to

the defence efforts and war-time needs of the United States of America; that the law of the United States (the Trading with the Enemy Act) empowers the President to vest the property of Interhandel, to sell or liquidate it in the interests of and for the benefit of the United States; and, moreover, that it requires the President to sell that property to American citizens only—all these facts confirming, it is asserted, the contention that the matter is essentially within the domestic jurisdiction of the United States? Or shall the Court attach importance to the view that the sale and disposal of assets which have become, or may become, the subject-matter of a Judgment of this Court or of an arbitration tribunal are excluded by that very fact from the sphere of domestic jurisdiction; that, according to the firmly established jurisprudence of the Court, the fact that a matter is governed by national legislation does not prevent it from being governed at the same time by the international obligations of the State; and that the differentiation, adopted by the Government of the United States, between the seizure of the assets by virtue of the legislation of the United States (a seizure which is merely asserted to be essentially within the domestic jurisdiction of the United States of America) and the sale and disposal of the proceeds of that seizure (which sale and disposal are conclusively determined by the United States to be within its domestic jurisdiction) is solely an act of will authorized by the terms of the Declaration of Acceptance but wholly unrelated to the merits of the case? Can the Court say that such differentiation, though unreal, is not unreasonable; or that, though unreasonable, it is not wholly arbitrary; or that, if arbitrary, it is not in bad faith seeing that it relies on the unqualified terms of the Declaration of Acceptance? These questions, which it is not intended to answer in this Opinion, show the nature of the task confronting the Court, if it were to sit in judgment on the legality or good faith of the determination made by the Government of the United States of America.

In my separate opinion in the case of *Certain Norwegian Loans* I pointed to the special difficulties arising in applying the tests of good faith and reasonableness—assuming that the application of any such tests were consistent with the terms of the Declaration of Acceptance—to the elastic, indefinite and potentially all-comprehensive notion of matters essentially within the domestic jurisdiction of the State. It may comprise practically every act or omission within national territory. That comprehensiveness of the notion of matters of domestic jurisdiction renders impracticable the attempt to review the accuracy of the determination, made by a government, that a matter is essentially within domestic jurisdiction. There is no question here of ruling out altogether the abiding duty of every State to act in good faith. The decisive difficulty is that in view of the comprehensiveness of the notion of domestic jurisdiction—coupled in the case of the United States with a uniform

insistence on the right of unilateral determination—that right assumes in effect the complexion of an absolute right not subject to review by the Court. This might not necessarily be the case if, for instance, a government were to make a reservation of matters arising in the course of hostilities as determined by that government and if subsequently it were to proceed to determine as such an event which arose in time of peace undisturbed by any armed contest, whether amounting to war or not.

The above considerations apply also to the question whether, as requested by Switzerland, the Court can join to the merits the preliminary objection of the Government of the United States of America based on the automatic reservation. To join the objection to the merits is to assert the competence of the Court to decide, by reference to the merits of the case, whether the matter of the sale and disposition of the assets of Interhandel is in law essentially within the domestic jurisdiction, or whether it can reasonably and in good faith be determined that it is so. However, it is exactly the power to make a decision of this kind that has been denied to the Court by virtue of the explicit reservation of the United States. If the Court has the power to declare that the determination made by the Government of the United States is wholly devoid of legal foundation so as not to constitute a reasonable exercise of the right reserved in the Declaration then, contrary to that Declaration, it is the Court and not the United States of America that makes the decisive determination in question. The joining of that objection to the merits would arrogate to the Court the power of a decision of that nature; it could have no other purpose. It cannot aim at enabling the Court to decide on the validity of the automatic reservation or of the Declaration as a whole. For these questions cannot conceivably be answered by reference to the merits of the dispute. In fact, the joining of the objection based on the automatic reservation to the merits implies the recognition in principle of the validity of that reservation as well as of the Declaration as a whole.

Any decision of the Court which arrogates to it a competence denied to it by the express terms of the jurisdictional instrument relied upon by the parties disturbs the continuity of the established jurisprudence of the Court. That jurisprudence has been based on the accepted principle of international law that the jurisdiction of the Court is based invariably on the consent of the parties, given in advance or in relation to a particular dispute. Admittedly, once that consent has been given the Court will not allow the obligation thus undertaken, or the effectiveness of that obligation, to be defeated by technicalities or evasion. Thus the Court has assumed jurisdiction by virtue of implied consent through so-called *forum prorogatum;* on occasions, in order to make its jurisdiction effective, it has declared itself competent to award compensation in cases in

which the parties conferred upon it jurisdiction to adjudicate upon the main issue of responsibility. But the Court has not assumed jurisdiction—and cannot properly do so—if jurisdiction is expressly denied to it. The Court cannot pronounce whether a State has reasonably determined that a matter is essentially within its domestic jurisdiction if that State has expressly, deliberately and as a conspicuous condition of its Declaration of Acceptance, reserved to itself—and to itself alone—the right to determine that question. This is so in particular in relation to a State whose attitude in that matter has for over half a century exhibited a pronounced degree of uniformity and consistency.

In fact, by virtue of its Judgment in the case of *Certain Norwegian Loans* the Court is precluded, unless it decides to depart from the principle therein acted upon, from reviewing the propriety or the accuracy or the good faith of the determination made by the United States of America. There the Court applied the French automatic reservation, as invoked by Norway, without entering into the question whether the subject of the dispute was in law actually within the domestic jurisdiction of Norway:

> "The Court considers that the Norwegian Government is entitled, by virtue of the condition of reciprocity, to invoke the reservation contained in the French Declaration of March 1st, 1949; that this reservation excludes from the jurisdiction of the Court the dispute which has been referred to it by the Application of the French Government; that consequently the Court is without jurisdiction to entertain the Application." (*I.C.J. Reports 1957*, p. 27.)

The position was made even clearer by the passage immediately following. The Court said: "In view of the foregoing it is not necessary for the Court to examine the first ground of the first Objection", namely, the objection of Norway that the matter was according to international law—and not merely by virtue of her own determination—essentially within her domestic jurisdiction.

The very fact that, by virtue of its Statute, the Court, in interpreting a particular jurisdictional instrument, is the ultimate judge of the question, imposes upon it a special and exacting responsibility. The circumstance that the Court has no power to pronounce on the manner and justification of the exercise of the automatic reservation adds substance to the view that, in a Declaration of Acceptance of that kind, there is absent the indispensable element of legal obligation. The Court being a legal tribunal cannot apply what, as a matter of legal effect, is essentially no more than a declaration of principle and of general willingness to submit disputes to the jurisdiction of the Court.

Attention has been drawn in this connection to the protestations, the sincerity of which is open neither to examination nor doubt, that the faculty of determination would not be used capriciously but with due regard to the reputation and the traditions of the United States in the matter of international judicial and arbitral settlement. However, these very assurances emphasize the sense of the absence of a legal bond—as distinguished from political and moral considerations—restricting the freedom of action of the United States in this respect. Moreover, while the nation which accepts the Optional Clause subject to the automatic reservation may vouch for its own good faith and moderation in invoking that reservation, it is not in a position to do so with regard to the other signatories of the Optional Clause who, by virtue of reciprocity, automatically acquire as against that State the right to invoke the automatic reservation. In the case of *Certain Norwegian Loans*, Norway—who had adhered to the Optional Clause without reservations—considered herself fully entitled to invoke the automatic reservation against the State which had incorporated it in its Declaration of Acceptance. The Court held that she was entitled to do so. The legal consequences of the automatic reservation are not limited to the State which incorporates it in its Declaration of Acceptance; these consequences are automatically multiplied, as against the Declaring State, by the number of other Signatories of the Optional Clause. In fact, in so far as it is possible or permissible at all to refer to any legal sanction for what is an entirely legitimate act, this is the only legal sanction of the automatic reservation.

* * *

The preceding considerations also supply, substantially, an answer to the question whether although the Court cannot act upon the automatic reservation—that is to say, although that reservation is invalid—the Declaration of Acceptance may, apart from that reservation, be treated as otherwise subsistent and given effect by the Court. In the case concerning *Certain Norwegian Loans* I gave reasons in my Separate Opinion—which must be read as forming part of the present Opinion—why that question must be answered in the negative. These reasons included the general principle of law governing the subject, namely, the principle that a condition which, having regard to the intention of the party making it, is essential to and goes to the roots of the main obligation, cannot be separated from it. This is not a mere refinement of private law, or of any municipal system thereof, but—as all general principles of law—a maxim based on common sense and equity. A party cannot be held to be bound by an obligation divested of

a condition without which that obligation would never have been undertaken.

These considerations of fair and reasonable interpretation must be applied to a Declaration in which a State accepts the obligations of the Optional Clause subject to the automatic reservation. If that reservation is an essential condition of the Acceptance in the sense that without it the declaring State would have been wholly unwilling to undertake the principal obligation, then it is not open to the Court to disregard that reservation and at the same time to hold the accepting State bound by the Declaration. In the case of the United States of America that aspect of the situation seems so compelling as to be outside the realm of controversy. As has been shown above in connection with the asserted right of the Government of the United States of America to determine in each case the existence of the obligation to resort to judicial or arbitral settlement, that safeguard has been of the essence of every general commitment which the United States of America has been willing to undertake in that sphere. Having regard to these reasons—and to the reasons which I set forth in greater detail in the Separate Opinion in the case of *Certain Norwegian Loans* (*I.C.J. Reports 1957*, pp. 55-59)—I come to the conclusion that there is not before the Court a valid and effective Declaration of Acceptance by reference to which the Court can assume jurisdiction in the present case with regard to any aspect of the dispute.

Neither is there any legal possibility of postponing the decision of the Court on that fundamental jurisdictional issue. Unlike in the case of *Certain Norwegian Loans*, that question is now directly before the Court and, as a matter of ordinary administration of justice, it must be decided before the Court gives a judgment which implies the possibility of future proceedings on the merits. The automatic reservation has been invoked; although stated to have become "moot", it has been formally maintained by the defendant Government. It has been challenged by the applicant Government. I have already given reasons why the submission that the automatic reservation has become "moot" in the present case cannot be accepted as a matter either of fact or legal relevance. In the case of *Certain Norwegian Loans* it was possible to maintain—though I was unable to subscribe to that view—that as neither party challenged the validity either of the automatic reservation or of the Declaration as such the Court was not in a position to raise the issue *proprio motu*. In the present case the question of the validity of the automatic reservation and of the manner of its application—and, with it, inevitably the question of the validity of the Declaration of Acceptance as a whole—are squarely before the Court. There may be reasons militating in favour of postponing a decision holding that that

particular Declaration of Acceptance—and, by necessary implication, similar Declarations of Acceptance—are ineffective in law whether invoked by or against the declaring State. However, these are not reasons of a legal nature.

There is a further additional factor of decisive importance which, in my view, renders it impossible to avoid the principal jurisdictional issue as presented by the Parties. In the case of *Certain Norwegian Loans* it was the applicant State which had made its Declaration of Acceptance subject to the automatic reservation; that State was not in a position to raise the issue of the validity of that reservation and of its own Acceptance. The defendant State, for reasons which need not be examined here, acted on the view that the success of its case would be best assured by invoking, through the mechanical operation of the principle of reciprocity, the automatic reservation incorporated in the Acceptance of the applicant State. The position is wholly different in the case now before the Court. The defendant State has formally availed itself, in respect of the crucial aspect of the dispute, of the automatic reservation contained in its Declaration of Acceptance. Its right to do so effectively was challenged by the applicant Government on the alternative grounds of the invalidity of the automatic reservation and the alleged arbitrary manner in which it had been invoked. Whatever may be the basis of the challenge to the automatic reservation as such or the propriety of the appeal to it in the case before the Court, it is clear that the issue has been raised before the Court and that the Court cannot discharge its duty without examining and answering it.

It is not permissible to attach importance to the circumstance that a decision of the Court holding the Declaration of Acceptance made by the United States of America to be ineffective and invalid would, in this particular case, enure to the benefit of the very State which made that kind of Declaration. This is not a case of a State benefiting from its own wrong. As already stated, there is no element of illegality involved in a Declaration of Acceptance which is inconsistent with the Statute of the Court. No rule of international law forbids governments to perform acts and make declarations which are incapable of producing legal effects. The Court cannot be concerned with the question of the propriety or effectiveness, from any point of view other than the legal one, of a Declaration which purports to accept the compulsory jurisdiction of the Court but which, in law, fails to do it for the reason that it leaves it to the State concerned to determine whether a particular dispute is subject to the jurisdiction of the Court.

Neither is there any sanction involved in treating such a Declaration of Acceptance as legally non-existent. For it operates equally

in relation to the declarant State and to its actual or potential opponents. There is no sanction involved in giving full effect to the condition on which, and on which alone, a State has accepted the jurisdiction of the Court. The United States cannot avail itself of its—legally ineffective—Declaration of Acceptance in order to bring an action before the Court against another State; but for the very reason that the Declaration is legally ineffective no State can invoke it against the United States. Such indirect sanction as there is—and it is one with which the Court cannot be concerned—is of a different nature. While it unfailingly protects the declarant Government from the jurisdiction of the Court, it deprives it, with equal certainty, of the benefits of that jurisdiction in cases in which the declarant Government is the plaintiff.

* * *

For the reasons which I have stated and which compel me to dissent from the Judgment of the Court, I have come to the conclusion that, having regard to the invalidity of the automatic reservation and, consequently, of the Declaration of Acceptance as a whole, the scope of a jurisdictional judgment of the Court in the present case must be reduced to a minimum. The Court is not in a position to act negatively by declining jurisdiction on account of Objections 1 and 2 (the Objections *ratione temporis*) and Objection 4 *(b)* (relating to matters alleged, but not determined, by the United States of America to be within its domestic jurisdiction). For any such negative decision presupposes the existence of a valid Declaration of Acceptance in relation to which jurisdictional objections can be examined and answered. For the same reason the Court cannot declare the Application to be inadmissible on account of non-exhaustion of local remedies. Moreover, any such declaration of inadmissibility implies admissibility after local remedies have been exhausted—a contingency which cannot properly be contemplated on the basis of the existing Declaration of Acceptance of the United States of America. The only course which, in my opinion, is properly open to the Court is to hold that in view of the invalidity of the automatic reservation and the consequent invalidity of the Declaration of Acceptance there is not before it an instrument by reference to which it can assume jurisdiction in relation to any aspect of the dispute. These consequences may seem to be startling. However, they appear to be so only if we disregard the nature and the contents of the instrument by reference to which the jurisdiction of the Court is here being invoked.

As the Court has decided, at least provisionally, to proceed on the basis that the Declaration of Acceptance of the United States is a valid legal instrument cognizable by the Court, I considered it my duty to participate in the formation of the Court's Judgment.

I have concurred in it with regard to the first and second Objections *ratione temporis*. On the other hand, I would have been in favour of joining to the merits the third Objection, relating to the exhaustion of local remedies, in so far as it bears upon the principal claim for the restitution of the assets of Interhandel. In this respect I concur generally in the reasons expressed in the dissenting opinions of President Klaestad and Judge Armand-Ugon.

I have also been unable to associate myself with the decision holding that the subsidiary claim of the Government of Switzerland relating to the obligation of the United States to submit the dispute to arbitration or conciliation is inadmissible on account of the non-exhaustion of local remedies by Interhandel. I cannot accept the contention of the United States that the demand for restitution which forms the subject-matter of the Swiss Application and which, in substance, is now being litigated before the Courts of the United States and the demand by the Swiss Government for arbitration and conciliation are essentially one dispute. I consider that with regard to that aspect of the claim of Switzerland there apply, with some cogency, the principles which are now firmly rooted in the jurisprudence of the Court and which were clearly expressed in the Judgment of the Permanent Court in the *Chorzów Factory* case (Series A, No. 17, p. 28). The Court said there:

> "... The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State."

There must exist weighty reasons for any departure from that principle so clearly formulated. That principle is not a mere doctrinal refinement. An international award may give to a State satisfaction different from restitution of the property seized; a State may have a legal interest, independent of any material compensation and restitution, in vindicating the remedy of arbitration provided for in the Treaty. It may also have a legal interest in having its right to arbitral proceedings determined as soon as possible without being exposed, after the local remedies have been exhausted, to a further considerable delay in establishing that right by a decision of this Court.

Moreover, the Judgments of the Court in the *Ambatielos* case (*I.C.J. Reports 1952*, p. 44, and *1953*, p. 18) were based on the proposition that, in deciding whether the Court is competent to

determine whether a State is under an obligation to submit a dispute to arbitration, this Court will not anticipate the decision of that tribunal on any question dividing the Parties. Thus, the arbitration tribunal may have views of its own on the extent of the obligation, in the present case, to comply with the rule of exhaustion of local remedies. This being so, it would seem to follow from the Judgments in the *Ambatielos* case and from general considerations that that question must be left to the decision of the arbitration tribunal and that the Court ought not to decline to consider the request of Switzerland on the subject on the ground that local remedies have not been exhausted.

Finally, in so far as the procedure of conciliation is concerned, it must not be taken for granted that the legal requirement of exhaustion of local remedies would be fully or invariably applied by a conciliation commission which is not bound to proceed exclusively on the basis of law.

* * *

I deem it necessary to add some observations with regard to Preliminary Objection 4*(b)* in which the Government of the United States challenges the jurisdiction of the Court on the ground that the issues relating to the seizure and retention of the assets of Interhandel "are, according to international law, matters within the domestic jurisdiction of the United States" (as distinguished from the question of the sale and disposition of the assets of Interhandel—a question which the Government of the United States has determined, in reliance upon the automatic reservation, to be within the domestic jurisdiction of the United States). The Court has rejected Preliminary Objection 4 *(b)* by reference to the principle enunciated by the Permanent Court of International Justice in the Advisory Opinion on *Nationality Decrees in Tunis and Morocco* (P.C.I.J., Series B, No. 4). I concur in that result although it is clear that the test adopted by reference to that Opinion reduces to the bare minimum the practical effect envisaged by the reservation in question. For it is not often that a case may arise in which the grounds of international law relied upon by the applicant State are not, upon provisional examination, relevant to the issue.

However, the main interest of that preliminary objection lies in the fact that there is in the Declaration of Acceptance of the United States no reservation which covers that objection. While concentrating on the reservation of matters of domestic jurisdiction as determined by itself, the United States did not in fact append the more usual reservation of matters which according to international law are essentially within its domestic jurisdiction. Now a State is not entitled to advance a preliminary objection against

the jurisdiction of the Court unless there is a limitation to that effect either in the Declaration of Acceptance or in the Statute of the Court. The Court, in examining and rejecting that objection on its merits, has held, by implication, that a reservation of that kind is inherent in every Declaration of Acceptance and that there is no need to spell it out expressly. I am in agreement with that conclusion so indirectly formulated. As stated, and that view is confirmed by the rejection by the Court of that objection in conformity with the generous and elastic test laid down in the Opinion on the *Tunis and Morocco Nationality Decrees*, the advantage accruing to the defendant State by a recognition of an implied existence of that reservation is distinctly limited. From whatever angle the question is approached, it matters little whether a reservation of this kind is incorporated in a Declaration of Acceptance. States are in any case fully protected from any interference whatsoever by the Court in matters which are according to international law essentially within their jurisdiction. They are so protected not by virtue of any reservation but in consequence of the fact that if a matter is exclusively within the domestic jurisdiction of a State, not circumscribed by any obligation stemming from a source of international law as formulated in Article 38 of its Statute, the Court must inevitably reject the claim as being without foundation in international law.

As the United States has made no reservation of matters which according to international law are within its domestic jurisdiction, Preliminary Objection 4 *(b)* must properly be regarded as a defence on the merits and normally—namely, if there existed a valid Declaration of Acceptance—would have to be examined, during the proceedings on the merits, as being a substantive plea in the sense that there is no rule of international law limiting the freedom of action of the United States on the subject. That defence, if justified, is of a potency transcending that of any reservation. In view of the difficulties and uncertainties to which the reservation of matters of domestic jurisdiction has given rise in the past, I consider it useful to draw attention to some considerations relevant to the fact that the Court has treated the non-existing reservation of matters which according to international law are within domestic jurisdiction as if it were part of the American Declaration of Acceptance.

(Signed) Hersch LAUTERPACHT.