SEPARATE OPINION OF JUDGE CÓRDOVA

I am in disagreement with the majority of the Court both with its reasoning as well as to its conclusion with regard to the First Preliminary Objection of the United States. The United States claims that, since the dispute in this case arose prior to August 26th, 1946, the Court lacks jurisdiction to consider and adjudicate the claim of the Swiss Government. I agree with such contention.

The United States Declaration of Acceptance of the compulsory jurisdiction of the Court limits the submission to its competence to the "legal disputes *hereafter* arising", that is to say, after the date of the Declaration, August 26th, 1946. The paramount questions to decide this First Preliminary Objection, therefore, are the definition of the international legal dispute which has been brought by Switzerland before the Court as well as the date of its inception.

The majority of the Court, it seems to me, based its decision on this Objection on the assumption that the legal dispute between the Parties is constituted by the different attitudes taken by them on the question of the restoration of the assets to the Interhandel by the United States. With this most essential finding of the Court I cannot concur, and, from this difference of points of view derive the difference in the conclusions reached by the majority and by me. If the real dispute before the Court is limited to the restoration of the vested assets of Interhandel then, of course, the conclusion that it arose after August 26th, 1946, is right and right is also the decision to reject the first objection; but I am bound to differ with the majority because in my way of thinking the legal dispute, the real difference between governments, lies in their opposite views with regard to the legal character of Interhandel, enemy or neutral.

The Parties in this suit are in complete agreement in regard to the law which should be applied in the case. In particular, they agree on the positive and the negative aspects of the principle of international law which permits a belligerent State to seize and vest enemy property lying within its territory on the one hand, and, on the other, prohibits the same State to take property belonging either to a neutral country or to its subjects. The whole diplomatic discussion of the two Governments and the pleadings of their Agents show the agreement on this principle, which moreover is also incorporated in the law of the United States, the Trading with the Enemy Act of October 6th, 1917. This law empowers the United States Government to seize and appropriate the assets of nationals of an enemy country but, at the same time, excludes

from such action the property of nationals of a neutral State, making it possible for neutral property wrongfully seized to be returned to its owners. There is complete agreement of the Parties with regard to both the applicable law and the inevitable consequence of the application of such law, the legal vesting of the assets of Interhandel by the United States or its return to the Swiss company.

The United States Government seized the property of Interhandel, constituted mainly, and among other assets, by 90 per cent of the stock of the General Aniline and Film Corporation, organized and doing business in the United States. In vesting these assets, the United States relied on its contention that Interhandel was, in fact, German owned, serving only as a cloak for the Frankfurt firm, I.G. Farben. The Swiss Government, after having made investigations, reached the conclusion that that was not the case; that Interhandel, at the time of the seizure of its shares in the General Aniline and Film Corporation, February 16th and April 24th, 1942, was not any more controlled by German interests, having as far back as June 1940 broken all its financial and administrative connections with the German company.

This basic legal dispute between the Parties, the juridical character of Interhandel, develops itself into some other differences as, for example, the return of the shares, or that related to the different procedures to solve such dispute as with regard to the obligation of the United States to abide by the decision of the Swiss Authority of Review or the obligation of the same Government to take part in conciliatory proceedings or to arbitrate the dispute. All of these secondary differences are based either on the Washington Accord of May 25th, 1946, or on the Treaty of Arbitration and Conciliation of February 16th, 1931. In my opinion, all these differences are phases only of one and the same legal dispute—the neutral or enemy character of Interhandel. Should both Governments have been in agreement with regard to the character of Interhandel, either as belligerent or as neutral, this case would have never come before the Court, nor before the local tribunals of the United States. The claim would have never existed.

If the Swiss Government would have presented its claim before the Court based only on the refusal by the United States to abide by the decision of the Washington Accord or to arbitrate the dispute in compliance with the Treaty of 1931, I might have been inclined to believe that the dispute would have been upon the non-compliance of such Accord or of such Treaty; but having presented its claim on the basis of the application of the international law principle of the respect due by belligerents for neutral property, I believe that the subsidiary Swiss submissions constitute only a means to arrive at the same conclusion sought by the plaintiff, the recognition that Interhandel was a neutral company and, as

a corollary, that it has a right to the return of the assets. In other words, the return or restoration of the assets to Interhandel is nothing else but a practical consequence of the solution of the real and only legal dispute of the Parties—the character of the Swiss company—but not the basic dispute itself. The return of the shares and other assets, in itself, is not perhaps even a legal dispute.

Once the determination of the legal dispute has thus been made, it is necessary to fix the time when it really arose. Only then will we be in a position to analyse the first Preliminary Objection in the light of these two basic questions.

The United States Government vested Interhandel's property on February 16th and April 24th, 1942. This action was taken, as I have said, on the basis of the assumed enemy character of Interhandel by the United States authorities in spite of its apparent Swiss nationality. So it was notified to the Swiss Diplomatic Agent in Washington in a *Memorandum of February 16th, 1942 (Exhibit 10 of the Preliminary Objections of the United States)*. This Memorandum also stated that such action did not mean, in any way, the intention to take over any *bona fide* Swiss property, a statement which evidently meant that the vested shares and other assets of Interhandel were not considered *bona fide* property of the Swiss corporation. This is the first document in our record to show that one Party stated its position to the other with regard to the character of Interhandel as an enemy-controlled company. The Swiss Government did not immediately question such enemy character, nor, therefore, the right of the United States to vest its property. It decided first to make some investigations in order to find out what was the real situation between Interhandel and the German company, Farben Industries of Frankfurt. According to the allegations in the case, the two investigations conducted by the competent Swiss authority showed that Interhandel and Farben Industries had broken completely their relations since 1940, that is, even before the United States came into the World War; the Swiss Government communicated these findings to the American authorities, expressing the hope that "*a settlement will be reached* with regard to *the Interhandel's property in the United States*", the assets and stock that had been vested in 1942. This petition was made known to the United States Government in the *Memorandum dated June 4th, 1947 (Exhibit 16, Preliminary Objections)*. In other words, the Swiss Government would never have claimed the restoration of the assets had it not come to the conclusion that Interhandel was a *bona fide* neutral Swiss company, nor the United States would have ever vested such assets, had it not believed the Interhandel was in reality an enemy-owned firm.

There are many other communications between the two Governments regarding different aspects and shades of the negotiations relating to the character of Interhandel, but all of them were connected with the provisional blocking in Switzerland by the Swiss Government of the Interhandel properties; the Memorandum dated June 4th, 1947, seems to be the first document on record in which the opposed views of the Swiss Government to the thesis of the United States are stated with regard to Interhandel's character of enemy owned company *in connection with the return of the vested property by the United States*. I would have therefore accepted the date of June 4th, 1947, as the date when the dispute between the two Governments with regard to the enemy or neutral character of Interhandel arose in connection with the vesting of the assets of the General Aniline and Film Corporation, had it not been for the expressions used by the Department of State in its *Memorandum* of June 18th, 1947, wherein in answer to the already mentioned Aide Mémoire of June 4th, 1947, of the Swiss Government, the United States said (Exhibit 17 to the Preliminary Objections):

> *"During the course of the negotiations leading to the Accord of May 25, 1946, the United States representatives made clear that a decision on the Interhandel case can have no effect of any settlement of or decision on the vesting action by the Alien Property Custodian of February 1942 of the stock of the General Aniline and Film Corporation. The United States Government has not changed its views in this matter."*

That is to say, the United States Government affirms that before May 25th, 1946, the date of the Washington Accord, it had already discussed and rejected the contention of the Swiss Government that the findings of the Swiss authorities under the Washington Accord, with regard to the character of Interhandel as neutral or enemy, should have the "effect of any settlement of or decision" on the question of the vesting of its assets and shares. Since this most important assertion has been left completely unanswered by the plaintiff Government, I feel justified in my belief that *the dispute* upon the legal character of Interhandel in relation with the vesting of the shares and assets by the United States *arose even prior to the date of the Washington Accord, May 25th, 1946*.

I conclude, therefore, that the dispute arose before the date of the Declaration of the United States, August 26th, 1946, and that the First Preliminary Objection should have been upheld by the Court.

I agree with the Court's decision to retain the Third Preliminary Objection, but, in my opinion, the reasoning of the majority, based mainly on the necessity to avoid the danger of two proceedings being followed—local as well as international—does not cover all the issues presented by Switzerland. I believe that the Court

should have founded its application of the principle of exhaustion of local remedies on a much broader basis.

The Court is justified in concluding that the local courts of the United States are dealing with exactly the legal suit which the Court would have to decide if it had to consider the merits of the case before the local remedies would have been exhausted; its finding that Interhandel should first exhaust all local remedies pending in the United States before this Court would be able to consider and adjudicate the same issues is, of course, entirely correct. But, besides the question of the existence of two parallel procedures, there are some other reasons which, in my opinion, the Court should have taken also into consideration in applying the principle to both the principal as well as to the subsidiary or alternative submissions of Switzerland.

The argument related to the parallel procedures which the principle of exhaustion of local remedies tries to avoid can successfully be opposed to the main as well as to the subsidiary submission related to the non-compliance by the United States of the decision of the Swiss Authority of Review and to its refusal to arbitrate the dispute. It cannot be opposed nevertheless against the contention put forward by Switzerland that the Court should decide that the United States are bound to enter into proceedings of conciliation in compliance with the Treaty of Arbitration and Conciliation of 1931. Conciliation being a procedure in the nature of an extra-judicial settlement by the parties and not ending in a binding decision certainly cannot be considered as a parallel international procedure to that followed before the local courts of the United States.

To apply the principle of exhaustion of local remedies to the claim of Switzerland with regard to conciliation, it is necessary to resort to other reasons which also underlie it. The principle, as I have said, is based and justified on grounds perhaps more important than the mere possible avoidance of conflicting procedures and decisions. The main reason for its existence lies in the indispensable necessity to harmonize the international and the national jurisdictions—assuring in this way the respect due to the sovereign jurisdiction of States—by which nationals and foreigners have to abide and to the diplomatic protection of the Governments to which only foreigners are entitled. This harmony, this respect for the sovereignty of States is brought about by giving priority to the jurisdiction of the local courts of the State in cases of foreigners claiming against an act of its executive or legislative authorities. This priority, in turn, is assured only by means of the adherence to the principle of exhaustion of local remedies.

The right of the State, in the present instance Switzerland, to protect its national Interhandel, for an alleged wrongful act of a foreign government, that of the United States, does not legally

arise until the judicial authorities of the latter decide irrevocably upon such wrongful act through a decision of its judicial authorities. Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated. This principle informs all systems of law—civil as well as criminal, local as well as international.

A State may not even exercise its diplomatic protection, and much less resort to any kind of international procedure of redress until its subject has previously exhausted the legal remedies offered him by the State of whose action he complains.

In the present case it cannot be affirmed that the damage to Interhandel has been caused by the vesting of its property by the local authorities of the United States until such vesting has been definitely consummated, that is, until the judicial authorities of the Unites States will have definitely confirmed such action by a judgment which will have the force of *res judicata*. Then, and only then, will Interhandel and the Swiss Government be entitled to resort to this International Court or any other competent international proceedings seeking redress for the supposed violation of the law of nations which the local authorities will not be any more in a position to grant. That is why the well-settled principle of international procedure of the exhaustion of local remedies is based on the fundamental idea that a claim is not ripe, that there is no international claim, until the damaged foreigner has complied with such principle.

In the present case it seems that there was a mistake with regard to the exhaustion of local remedies since the United States Government itself expressed its opinion that such exhaustion had already been effected. On this false impression, it seems, the Swiss Government presented before the Court its Application instituting proceedings against the United States. But once this wrong belief had been dispelled, the juridical situation—as far as I can understand it—was that such Application had been wrongfully brought before the Court. In other words, it seems to me that the finding of the Court should have been, that the different claims of the Swiss Government before the Court, the restoration of the vested assets, the obligation of the United States to comply with the decision of the Swiss Authority of Review and the duty of the respondent Government to arbitrate or conciliate the dispute, could not be entertained by the Court not only because of the pending proceedings in the United States but because of the more general reason that an international claim does not yet exist in any of its different possible faces, restoration of property, submission to

arbitration or conciliation, or compliance with the terms of the Washington Accord, until the tribunals of the United States hand down their last and final decision on the suit brought before them by Interhandel.

(Signed) R. CÓRDOVA.