SEPARATE OPINION OF JUDGE WELLINGTON KOO

I agree with the conclusions of the Court in sustaining the Third Preliminary Objection submitted by the United States and in ruling that Switzerland's principal claim relating to the restitution of Interhandel's claimed assets in the United States and its alternative claim relating to the question of submission of the dispute to arbitration or conciliation are inadmissible on ground of the non-exhaustion by Interhandel of the remedies in the United States courts. But I regret I am unable to concur in the Court's rejection of the First Preliminary Objection raised by the United States. I maintain that this Objection should have been upheld, and I propose to set out the reasons for my view.

The First Preliminary Objection is based upon the condition *ratione temporis* in the United States Declaration of August 26th, 1946, accepting the compulsory jurisdiction of this Court under Article 36, paragraph 3, of the Statute. This condition limits the acceptance to "all legal disputes hereafter arising...". Thus the date of the Declaration is the crucial date. Did the present dispute arise before this date as claimed by the United States or after this date as claimed by Switzerland?

Before dealing with the question, it is, however, necessary to give a summary of the facts and situations leading to the dispute.

By an Order of February 12th, 1942, the Secretary of the Treasury of the United States ordered vested over 90 per cent of the shares of the General Aniline and Film Corporation (GAF), a company incorporated in the State of Delaware, together with a sum of approximately $1,800,000. These assets were later vested in the Alien Property Custodian under Orders No. 5 and No. 907 issued by him respectively on February 24th, 1942, and February 15th, 1943. All these vesting Orders were based upon the Trading with the Enemy Act of October 6th, 1917, as amended.

GAF owns almost half of the ordinary shares of Interhandel, while approximately 75 per cent of its own shares and all its issued "B" shares are said to belong to Interhandel, which is the new name for the old company I.G. Chemie (Internationale Gesellschaft für Chemische Unternehmungen Aktiengesellschaft). It should be recalled that I.G. Chemie was a Swiss corporation founded in 1928 with its seat in Basel, Switzerland, by I.G. Farben, a German corporation with its seat in Frankfurt, Germany, and largely owned and controlled by Germans. Switzerland claims that the ties between

the two corporations were legally and completely severed in June, 1940, after its reorganization in 1939-1940 while the United States contends that they were not severed and that Interhandel continued to be controlled or influenced by I.G. Farben after June 1940.

It appears clear from the evidence before the Court that the United States vested the GAF shares under the Trading with the Enemy Act because they were German-controlled. Thus, in the aide-mémoire of February 12th, 1942, the same date as that of the first vesting order handed to the Swiss Minister in Washington by the Secretary of State, it is stated:

> "This action is being taken because, in the judgment of the Secretary of the Treasury, these shares are actually controlled by German interests, and because it is important that this company be freed from German control in order that its facilities may be effectively utilised in this country's war effort."

The United States has consistently maintained this view of the German character of I.G. Chemie, now Interhandel, through all these years, and has not abandoned or modified it. Switzerland, on the other hand, has taken the opposite view since 1945 and has not in any way revised it.

This Swiss attitude was initially manifested as the result of the first investigation conducted by the Swiss Compensation Office from June 11th to July 7th, 1945. Although the letter of November 6th, 1945, from Mr. R. Hohl of the Foreign Affairs Division of the Swiss Federal Political Department to Mr. David J. Reagan of the United States Legation at Berne informed him of a recent decision to have the assets of I.G. Chemie blocked for a limited time, it pointed out at the same time that the decision was made

> "in spite of the fact that this investigation did not lead to the discovery of any document which would permit the conclusion that I.G. Chemie is a company under the control of Germany" and "in order to permit your authorities, if they persisted in regarding this holding as under German influence, to furnish proof for it". (Annex 12 to Preliminary Objections.)

Indeed, the same letter asked Mr. Reagan to

> "inform your authorities of the foregoing and in doing this to stress the point that the thorough investigations in Switzerland have failed to establish the actual existence of a tie between I.G. Chemie and I.G. Farben". *(Ibid.)*

The second investigation was made by the Swiss Compensation Office from November 5th, 1945, to February 25th, 1946. The result of this investigation, according to the Swiss Compensation Office,

simply confirmed the result of the first investigation. From that time on, the attitude of Switzerland on the Swiss character of Interhandel became clearly fixed. The subsequent correspondence between the Swiss Compensation Office and the United States representatives, particularly the letters exchanged of August 10th, 1946, August 20th, 1946, and August 22nd, 1946, and the minutes of the meeting between these representatives and certain members of the Federal Council on August 15th, 1946, although the immediate subject-matter was the question of procedure concerning the joint investigation of the Swiss assets of Interhandel, nevertheless showed clearly that their differences of opinion on this subject stemmed from the basic conflict of their views as to the character of the company. The United States representatives considered Interhandel to be a German-controlled company and therefore stated that:

> "it was intended that there be a joint investigation of I.G. Chemie to determine the extent of German influence in which you specifically would furnish us with your evidence. It is to be regretted that our recollections in this regard differ." (Annex 4 to Swiss Observations and Conclusions.)

The Swiss authorities, on the other hand, were willing only to receive and consider proofs from the United States representatives, and refused to open Swiss files to them for examination, because they adhered to their view that:

> "it was improper for the Swiss Compensation Office to make available to American or other foreign representatives documents relating to a firm which, after two investigations by the Swiss Compensation Office, had been determined to be Swiss owned".

A preliminary question to consider is: what constitutes an international dispute? According to the criterion well established by the Court, especially in the *Peace Treaties* case (*I.C.J. Reports 1950*, p. 74), an international dispute will be held to exist when the two sides „hold clearly opposite views concerning the question". In the light of this definition, the dispute in the present case, in my view, is a manifest one, consisting in a sharp difference of opinion on a question of fact, a conflict of interests relating to the character of Interhandel, i.e whether its ties with I.G. Farben were or were not in fact completely severed by its reorganization in 1939-1940.

The dispute arose when the Swiss Compensation Office concluded from its two investigations undertaken between June 1945 and February 1946 that Interhandel was no longer under German influence from 1940 onwards and when the Swiss Government adopted this conclusion and based its arguments on it in all the discussions with the United States representatives, before the

United States Declaration of Acceptance of August 26th, 1946, and even before the Washington Accord of May 25th, 1946.

The applicant State also contended (English translation of Observations, p. 7) that

> "the dispute could at the earliest have arisen on October 12th, 1948, when the Department of State finally declared that it could not agree with the opinion of the Federal Council that the decision of the Swiss Authority of Review of January 5th, 1948, was binding on the United States in so far as it established, within the meaning of the Washington Accord, that Interhandel was a Swiss company".

An examination of the diplomatic correspondence between the Department of State and the Swiss Legation in Washington discloses the fact that it was not the first time that the United States took the position it did in the note of October 12th, 1948, that the decision of the Swiss Authority of Review was not binding upon the United States, because it "was not one under the Accord". In a memorandum to the Swiss Legation of June 18th, 1947, regarding Interhandel it is stated:

> "The question of the disposition to be made of this case is one which under the terms of the Accord and annex thereto must be dealt with through the Joint Commission..."
>
> "During the course of the negotiations leading to the Accord of May 25th, 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."

Again in its note of July 26th, 1948, the Department of State says:

> "As representatives of the Swiss Government have heretofore been informed, this Government considers the decision of the Swiss Authority of Review as having no effect on the question of the assets in the United States vested by this Government and claimed by I.G. Chemie."

In short the Swiss position is that since Article IV of the Washington Accord provides for the United States Government

> "to unblock Swiss assets in the United States",

and since the Swiss Authority of Review under the Accord has determined the Swiss character of Interhandel, its assets in GAF, vested by the United States Government, should be unblocked.

On the other hand the United States has not only denied the binding effect of the said decision of the Swiss Authority of Review but also challenged the relevance of the Washington Accord in the case, since in its view, the said Article IV relates only to Swiss assets blocked in the United States and has nothing to do with German assets vested in the Alien Property Custodian.

This confrontation of the two opposite views did not originate with the note of the Department of State of October 12th, 1948, but dates back to the two decisions of the Swiss Compensation Office given in the period of June 1945-February 1946, on the Swiss character of Interhandel. The Swiss Authority of Review merely reviewed the above-mentioned decisions subsequently on appeal of Interhandel against the temporary blocking of its assets and adopted them as the basis for its own decision.

It was the two decisions of the Swiss Office of Compensation which marked the beginning of the attitude of the Swiss Government as to the Swiss character of Interhandel—an attitude which is opposed to that of the United States.

As to its position regarding the question of the relevance of the Washington Accord to the decisions of the Swiss Compensation Office and the Authority of Review, the Note of the Department of State to the Swiss Minister in Washington of July 26th, 1948, referring to its aide-mémoire of April 21st, 1948, also states:

> "The Department further pointed out that this had been the consistent view of the Government of the United States since May 25 1946, and that concurrently with the signing of the Accord this understanding was stated to, and understood by, Swiss officials."

It is true that the Swiss Government denied that there was any trace in the records of the negotiations which resulted in the Washington Accord of May 25th, 1946, of declarations made by the United States representatives, and took the position:

> "At any rate, any such declarations would have no binding effect on the signatories of the Accord by reason of not being mentioned in the Accord nor in its Annex, nor in the letters exchanged the same day."

But it is equally true that the view of the United States as to the enemy-controlled character of Interhandel, which is the core of the dispute in the present case, has not changed in any measure from the time of the negotiations for the Accord, in May 1946, and indeed, as has been shown above, even from the time of the vesting of the GAF shares in 1942, just as the Swiss Government has not modified its stand as to the Swiss or neutral character of Interhandel from the time of the two decisions of the Swiss Compensation Office in November 1945 and February 1946. The United States Note of

July 26th, 1948, only further confirmed its previous view of the enemy-controlled character of Interhandel and did not originate that view.

There remains one question to consider, namely, whether the discussions between the United States representatives and the Swiss Authorities concerning the German or Swiss character of Interhandel are relevant to the present dispute and whether they do not relate only to Interhandel's assets in Switzerland. In my view their relevance is self-evident. The character of Interhandel, whether German of Swiss, that is, whether enemy or neutral, is the crucial issue in the present case with reference to its assets in the United States just as it was with reference to its assets in Switzerland. It is on this issue that the two Parties are in conflict from the time when the Swiss Authorities defined their attitude on the basis of the decision of the Swiss Compensation Office in June 1945-February 1946, later confirmed by the Swiss Authority of Review. Both Parties have maintained their respective positions, not only with regard to Interhandel's assets in Switzerland but also with full realization of the consequent effect upon Interhandel's GAF assets in the United States. As was claimed by Swiss counsel in the oral pleadings,

> "When property belongs to Swiss physical or legal persons whose Swiss character has already been confirmed in a binding and just manner by the Authority of Review set up under the Washington Accord, they must inevitably follow the fate of property unblocked in Switzerland."

It is clear that the real subject of the dispute before the Court is the question of the enemy or neutral character of Interhandel and not the restitution of its GAF assets, which is only the object of the Swiss claim; and that it arose before August 26th, 1946, the date of the United States Declaration of Acceptance of the jurisdiction of the Court. I am, therefore, of the opinion that the First Preliminary Objection should have been sustained by the Court.

(Signed) WELLINGTON KOO.