DISSENTING OPINION OF PRESIDENT KLAESTAD

Being unable to concur in essential parts of the Judgment, I feel bound to express my divergent opinion. I shall deal with the Preliminary Objections in the order which I consider appropriate.

I. In part *(a)* of its Fourth Preliminary Objection the Government of the United States submits

> "that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the sale or disposition of the vested shares of General Aniline & Film Corporation (including the passing of good and clear title to any person or entity), for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph *(b)* of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country".

This is the first time that the question of the validity of the American Reservation *(b)*, or a similar reservation, has been in dispute between Parties to a case before the Court. It is the first time the Court has had occasion to adjudicate upon it.

The question of a similar French reservation was discussed in one Separate and two Dissenting Opinions appended to the Judgment in the *Norwegian Loans* case. But the Court did not consider and decide this question and was not in a position to do so, since the question of the validity of the reservation was not in dispute between the Parties, who had not laid it before the Court and had not argued it.

A similar situation arose at the first stage of the present case concerning a Swiss request for the indication of interim measures of protection. The Co-Agent of the Swiss Government referred to the question of the validity of the American Reservation *(b)*, but he did not expressly contend that it is invalid. As to this question there did not at that time appear to exist any dispute which called for the consideration of the Court.

But now, at the present stage of the case, this question is in dispute between the Parties. The Government of the United States has invoked the Reservation, the Swiss Government has challenged its validity, and the United States Government has thereafter not withdrawn the Objection invoking the Reservation, but on the contrary expressly maintained it in its final Submissions presented to the Court on November 6th of last year. It is true that the Agent for the United States Government stated that this Preliminary

Objection has become "somewhat academic", or "somewhat moot". He explained that under Section 9 *(a)* of the United States Trading with the Enemy Act, the Government of the United States is forbidden to sell vested property as long as a suit for its return is pending before American courts, and he assured the Court that the vested shares in the General Aniline and Film Corporation would not be sold as long as the claim of Interhandel was pending before American courts. (Oral Proceedings, November 5th, 6th and 14th.) This does not, however, prevent the sale of these shares as soon as this claim is finally decided by American courts. The Agent further stated that the United States Government does not withdraw this Preliminary Objection (*ibid.*, November 5th). And in his last address to the Court he asserted that "condition *(b)* of our Declaration is valid", and he again re-affirmed part *(a)* of the Fourth Preliminary Objection and asked the Court to adjudicate upon it (*ibid.*, November 14th). In such circumstances it is clear to me that the Court must now consider the Reservation and adjudicate upon the Preliminary Objection invoking it.

This Reservation provides that the United States Declaration accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute shall not apply to:

> "*(b)* 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".

Article 36, paragraph 6, of the Statute of the Court provides:

> "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

In other words: the American Reservation provides that the matter shall be determined by the United States, while the Statute provides that it shall be decided by the Court. This juxtaposition of the two texts shows that the Reservation is in conflict with the Statute, Article 36, paragraph 6.

Article 1 of the Statute provides that the Court "shall function in accordance with the provisions of the present Statute". The same provision is inserted in Article 92 of the Charter of the United Nations. The Court is therefore, both by its Statute and by the Charter, prevented from applying that part of the clause which reserves to the United States the determination of the matter. It becomes impossible for the Court to act upon the words: "as determined by the United States of America".

It may be asked whether the fact that the Court cannot act upon these words which are in conflict with the Statute, also renders

it impossible for the Court to give effect to the other parts of the Declaration of Acceptance which are in accordance with the Statute.

The view has been expressed that the Reservation is for various reasons invalid and that this invalidity of the Reservation entails the invalidity of the Declaration of Acceptance as a whole. The necessary consequence of this view would be that the Government of the United States could neither sue nor be sued in accordance with the fundamental rule relating to the compulsory jurisdiction of the Court; that Government could neither act as a claimant nor become a defendant under Article 36, paragraph 2, of the Statute. It would, in other words, find itself in the same legal situation as States which have not submitted to the compulsory jurisdiction of the Court by filing Declarations of Acceptance under Article 36, paragraph 2. Would such a consequence be in conformity with the true intention of the competent authorities of the United States?

It has always been held by this Court as well as by the Permanent Court of International Justice that the compulsory jurisdiction of the Court depends on the will or intention of the Governments concerned.

It appears from the debate in the United States Senate concerning the acceptance of the compulsory jurisdiction of the Court, reported in the Congressional Record for July 31st and August 1st and 2nd, 1946, that fear was expressed lest the Court might assume jurisdiction in matters which are essentially within the domestic jurisdiction of the United States, particularly in matters of immigration and the regulation of tariffs and duties and similar matters. The navigation of the Panama Canal was also referred to. Such were the considerations underlying the acceptance of Reservation *(b)*. It may be doubted whether the Senate was fully aware of the possibility that this Reservation might entail the nullity of the whole Declaration of Acceptance, leaving the United States in the same legal situation with regard to the Court as States which have filed no such Declarations. Would the Senate have accepted this Reservation if it had been thought that the United States would thereby place themselves in such a situation, taking back by means of the Reservation what was otherwise given by the acceptance of the Declaration? The debate in the Senate does not appear to afford sufficient ground for such a supposition.

For my part, I am satisfied that it was the true intention of the competent authorities of the United States to issue a real and effective Declaration accepting the compulsory jurisdiction of the Court, though—it is true—with far-reaching exceptions. That this view is not unfounded appears to be shown by the subsequent attitude of the United States Government.

By various Applications filed in the Registry of the Court on March 3rd, 1954, March 29th, 1955, June 2nd, 1955, and August 22nd, 1958, the Government of the United States submitted claims against Governments which had not filed any Declarations accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. In previous notes to these Governments the United States Government had invited them to file such Declarations of Acceptance. It is difficult to believe that other Governments would have been invited to do so if the Government of the United States had not itself had the true intention of submitting validly and effectively to the compulsory jurisdiction of the Court.

These considerations have led me to the conclusion that the Court, both by its Statute and by the Charter, is prevented from acting upon that part of the Reservation which is in conflict with Article 36, paragraph 6, of the Statute, but that this circumstance does not necessarily imply that it is impossible for the Court to give effect to the other parts of the Declaration of Acceptance which are in conformity with the Statute. Part *(a)* of the Fourth Preliminary Objection should therefore in my view be rejected.

II. With regard to the First and Second Preliminary Objections, I am in general agreement with the Court.

It should, however, be observed that the Court has not adjudicated upon the controversial and, in the present case, disputed question concerning the validity of Reservation *(b)* in the United States Declaration of Acceptance. If that Reservation should be considered as legally invalid, and if, as has been suggested, this invalidity should entail the invalidity of the Declaration as a whole, the Court would find itself without any valid American acceptance of its jurisdiction under Article 36, paragraph 2, of the Statute. Without the consent of the United States Government the Court would lack power to act in the present dispute, and the question of adjudicating upon the First and Second Preliminary Objections could not arise. The legal situation would be similar to the situation which arises when a claim is made against a State which has not filed any Declaration under Article 36, paragraph 2, and which has not otherwise submitted to the jurisdiction of the Court.

III. In its Third Preliminary Objection the United States Government challenges the jurisdiction of the Court on the ground that Interhandel has not exhausted the local remedies available to it in the United States courts.

The Court has held that an objection of this kind is not a plea to the jurisdiction of the Court, but a plea to the admissibility of the Application. Sharing this view I am further of the opinion that an adjudication upon this Objection presupposes that the Court has first established its jurisdiction, when that jurisdiction is challenged,

as it is in the present case. This Objection is of a temporary and relative character, dependent on the outcome of the lawsuit of Interhandel in the United States courts. It is not, as are the absolute objections to the jurisdiction of the Court, directed against that jurisdiction, which in the present case is governed by Article 36, paragraph 2, of the Statute, and the Swiss and United States Declarations made thereunder. The true legal nature of this Preliminary Objection becomes clear when it is considered that the dispute may, under certain conditions and in a modified form, again be submitted to the Court as soon as the remedy available to Interhandel in United States courts is finally exhausted.

For these reasons I consider that I shall have first to deal with all of the Preliminary Objections to the jurisdiction. Only if I should arrive at the conclusion that all of these Objections must be rejected, will the question of the application of the local remedies rule arise for me. This view is in accordance with the Order of June 27th, 1936, in the *Losinger & Co.* case, in which the Permanent Court of International Justice held that an objection based on the local remedies rule is an objection to the admissibility of the Application, and that the Court will have to adjudicate upon that question *if it should assume jurisdiction.*

IV. In part *(b)* of its Fourth Preliminary Objection, the United States Government contends:

> "that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline & Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States".

This is not, however, an accurate description of the dispute submitted to the Court by the Swiss Application and Memorial. That dispute relates to the alleged obligation of the United States to restore assets of Interhandel in the United States and, alternatively, to submit this dispute to arbitration or conciliation. What the Court has to consider is whether that dispute, according to international law, relates to matters within the domestic jurisdiction of the United States. I concur in the view of the Court that the dispute relating to these questions involves matters of international law, and that this Preliminary Objection should therefore be rejected.

It should, however, be observed that the Court has not adjudicated upon the controversial and, in the present case, disputed question concerning Reservation *(b)* and its relation to other parts of the United States Declaration of Acceptance.

If this Reservation should be considered as legally valid, it is difficult to see how it is possible for the Court to decide that the

dispute relates to international law and not to matters within the domestic jurisdiction of the United States, inasmuch as that question, as a consequence of the invocation of the Reservation, is to be determined by the United States and not by the Court, in so far as "the sale or disposition of the vested shares of the General Aniline & Film Corporation" is concerned.

If, on the other hand, the Reservation is to be considered as invalid, and if this invalidity should, as has been suggested, entail the invalidity of the Declaration of Acceptance as a whole, the question of adjudicating upon this Preliminary Objection could not arise. Without a valid Declaration accepting the Court's compulsory jurisdiction, the Court would lack jurisdiction to decide whether the dispute is of domestic or international character.

These considerations show how necessary it would have been to adjudicate upon part *(a)* of the Fourth Preliminary Objection before adjudicating upon part *(b)* of that Objection.

V. Having found that all of the Preliminary Objections to the jurisdiction of the Court must be rejected, I have now finally to deal with the Third Preliminary Objection to the admissibility of the Application, relating to the question of the exhaustion of the local remedies available to Interhandel in the United States courts.

It is pointed out on behalf of the United States Government that "the suit of Interhandel seeking a return of the stock is now being actively litigated in the trial court of the United States", and "that there now exists the possibility that Interhandel may secure a return of the stock in proceedings in the United States courts". (Oral Proceedings, November 5th and 6th.)

The Swiss Government has, however, submitted that the claim of Interhandel in the United States courts is based on the American Trading with the Enemy Act, while the claim of the Swiss Government submitted to this Court is based on the international Washington Accord. It is contended that the courts in the United States must decide the claim of Interhandel on the basis of the Trading with the Enemy Act, and that they are excluded from taking into consideration the Washington Accord on which the claim of the Swiss Government is based. If this contention is justified, it may be asked whether the remedy available in the United States courts is an effective remedy. The controversy which this question has raised pertains, however, to the merits of the present dispute. It cannot be decided at this preliminary stage of the proceedings without prejudging the final solution.

The Swiss Government has further invoked the decision of January 5th, 1948, rendered by the Swiss Authority of Review. It contends that this decision should be assimilated to an international arbitral award, and that the Court is, in fact, confronted with the

question of the execution of such an international award having the force of *res judicata* between the Parties to the present dispute. The Swiss Government asserts that the failure on the part of the United States to execute this decision constitutes a direct breach of international law causing damage directly to the Swiss State itself. In the view of the Swiss Government the local remedies rule is not applicable in such a case. In this connection the Swiss Government has referred to a number of questions which are in dispute between the Parties, particularly with regard to the legal character of the Swiss Authority of Review and of its decisions; with regard to the interpretation of its decisions of January 5th, 1948; as to the effect of that decision with regard to the disputed question relating to the neutral or enemy character of Interhandel; as to the direct or indirect consequence of that decision with regard to the assets of Interhandel in the United States.

These various questions are parts of the merits of the dispute. They do not only "touch" those merits; they go to their very roots. These questions cannot in my opinion be determined at this preliminary stage of the proceedings. Nor can it at present be decided with a sufficient measure of certainty whether they are relevant or irrelevant for the adjudication upon the Third Preliminary Objection. Only when the Court, after a regular procedure on the merits, has obtained more complete information with regard to the facts of the case and the legal views of the Parties, will the Court be in a sufficiently safe position to determine whether this Swiss contention is justified or not. The jurisprudence of the Permanent Court of International Justice shows how cautiously that Court acted when, in preliminary proceedings, it was confronted with similar questions.

The Swiss Government further contends that its claim also for other reasons relates to an initial or direct breach of international law, directly affecting established treaty rights of the Swiss State under such circumstances that the United States have become immediately responsible under international law. Reference is in this respect particularly made to Article IV of the Washington Accord, on which the Swiss Government bases its principal claim for restitution. Reference is also made to the Washington Accord, Article VI, and to the Treaty of Arbitration and Conciliation between Switzerland and the United States of 1931, on which the Swiss Government bases its alternative claim relating to the alleged obligation to submit the dispute to arbitration or conciliation.

The question whether this contention is justified or not, and whether it would have the effect of dispensing the Swiss Government from the observance of the rule relating to the exhaustion of local remedies, can in my opinion only be adequately appraised after a regular procedure dealing with the merits of the case.

It may be added that the alternative Swiss claim relating to the question whether the International Court of Justice is competent to decide whether the dispute should be referred to arbitration or conciliation, cannot in any case be determined by local courts in the United States.

For these various reasons I consider that the Third Preliminary Objection should be joined to the merits.

(Signed) Helge KLAESTAD.
