DISSENTING OPINION OF JUDGE ARMAND-UGON

[Translation]

Being to my regret unable to concur in the Court's decision on Objections Nos. 3 and 4*(a)*, I think it is my duty to set forth the reasons for my dissenting opinion.

I

1. The Third Objection is founded upon the rule of the exhaustion of local remedies. It is not included as a qualification of the American declaration accepting the compulsory jurisdiction of the Court; it is invoked as a general principle of international law. The plea is an objection to the admissibility of the Application; it contests that admissibility only and is not directed against the Court's jurisdiction. The rule of the exhaustion of local remedies does not affect the jurisdiction of the Court, which may be competent, even if internal remedies have not been exhausted. Accordingly, the question of the admissibility of the Application lies outside the field of jurisdiction. In its Judgment in the *Corfu Channel* case this Court admitted the distinction between admissibility and jurisdiction (*I.C.J. Reports 1947-1948*, pp. 26-27); in other cases it has said that the exhaustion of the remedies is an argument in defence directed to the admissibility of the claim (*I.C.J. Reports 1952*, p. 114, and *1953*, p. 23). The present judgment reaches the same conclusion. The Permanent Court had upheld the same contention. Therefore the Court cannot adjudicate on the admissibility of the Application until it has established its jurisdiction (Series A/B, No. 67, p. 24).

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2. On October 2nd, 1957, the day on which the Swiss Application was filed, the local remedies were, in the opinion of the United States Government, exhausted. The Aide-Mémoire to the Note of the Department of State dated January 11th, 1957, says that "the (Interhandel) case now stands dismissed without any qualification". "Interhandel has had the benefits of both remedies (administrative and judicial). Both its claim and suit have been dismissed." "Interhandel has received due process of law. The claim of Interhandel to the shares in question has thus been defeated." When the Application was filed, the United States Government was about to proceed with the sale of 70% of the shares of GAF.

Those are the circumstances in which Switzerland filed its Application. On October 3rd, 1957, the Swiss Government submitted a request for the indication of interim measures of protection.

At the public hearing on October 12th, 1957, dealing with interim measures, Mr. Dallas S. Townsend, Co-Agent of the United States of America, made the following statement:

> "Chemie unsuccessfully exhausted its appellate remedies to the Supreme Court, and when the six months period of grace had expired, without Chemie making the production, the District Court entered the order and in 1956 held that Chemie's complaint stood dismissed. Again Chemie appealed unsuccessfully to the Court of Appeals and in this way attempted to get back into the case. The Court of Appeals affirmed and now Chemie, in its second trip to the Supreme Court, is making another effort to get back into the case by petitioning the Supreme Court to review the decision of the Court of Appeals. This petition is now pending before the Supreme Court of the United States." (*I.C.J. Reports 1957*, pp. 108-109, cited in the Memorial, paragraph 79.)

While the Court on October 3rd, 1957, was examining the Swiss Application for the indication of interim measures, the Supreme Court of the United States, on October 14th, 1957, received a petition for a writ of *certiorari* filed by Interhandel on August 6th, 1957, in which Counsel for the Parties were asked to discuss the question whether the United States District Court for the District of Columbia was justified in dismissing Interhandel's claim by application of a rule of procedure on the grounds that it had not obeyed an order for the production of the documents.

Do declarations by the representatives of the American Government express that Government's official opinion? Is the effect of an application for a writ of *certiorari*, by its mere presentment, to reopen a case which had been closed since August 6th, 1957, the date of the judgment given by the Court of Appeals? Were the Parties in agreement that local remedies were exhausted at the time when the Swiss Application was filed? Was that point in dispute at the time of its filing? In view of these circumstances, was the Application admissible and was the Swiss Government acting in good faith? A definite answer to all these questions presupposes information which the documents in the case do not at this stage of the proceedings furnish. Was it only on the date of the decision by the Supreme Court to grant the request for a writ of *certiorari* that the case was reopened [1]?

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[1] The examination of this request led to the decision of the Supreme Court of June 16th, 1958, by which the judgment of the Court of Appeals was reversed.

The last part of the judgment of the Supreme Court says:

> "On remand, the District Court possesses wide discretion to proceed in whatever manner it deems most effective. It may desire to afford the Government additional opportunity to challenge petitioner's good faith. It may wish to explore plans looking towards fuller compliance. Or it may decide to com-

3. The principle of the exhaustion of local remedies is not absolute and rigid; it has to be applied flexibly according to the case. Some situations or facts may entitle the Court to accede to a request, even if the remedies have not been completely exhausted.

A limit is placed upon the rule of exhaustion if the period within which the remedies will be exhausted is not known. The Permanent Court acknowledged this limitation in its Order of February 4th, 1933, in the *Prince von Pless* case, on the grounds of an unwarrantable delay by the Polish tribunal, and the Court decided not to adjudicate upon the applicability of the principle of exhausting local remedies (Series A/B, No. 52, p. 16).

The Interhandel case, first brought before the American courts on October 27th, 1948, passed through various stages and was still not settled by June 16th, 1958 (nearly ten years later). A further unknown period will therefore have to elapse before the remedies are exhausted. That being so, are such slow remedies "adequate" and "effective", as is required by the arbitral award in the case of the *Finnish vessels?* (*Reports of International Arbitral Awards*, Vol. III, p. 1495.)

4. The substance of the Interhandel claim is to obtain from the American courts the restitution and the taking immediate possession of the vested shares and the handing over by the defendants to the claimant of all dividends and interest pertaining thereto. This claim is founded in law on the fifth amendment to the Constitution of the United States and the amended law of October 6th, 1917, relating to trading with the enemy. The Application of the Swiss Government in its final submission A, requests the Court to adjudge and declare that the Government of the United States of America is under an obligation to restore the assets of Interhandel; it takes its stand upon Article IV of the Washington Accord and on the principle of international law which forbids the confiscation of neutral property. The two claims, that of Interhandel and that of the Swiss Government, are based upon different legal grounds [1].

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mence at once trial on the merits. We decide only that on this record dismissal of the complaint with prejudice was not justified.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this Opinion. It is so ordered."

It is seen therefore that the District Court may select alternatives or different expedients.

[1] The Swiss Government is not acting in the present dispute as the representative of its national; the reparation claimed is not of the same legal character as that asked for by its national and the damage suffered by Switzerland is not identical with that incurred by Interhandel. The Permanent Court examined these questions very carefully in its Judgment (Series A, No. 17, pp. 27-28), as follows:

"It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of

The Interhandel claim seeks to obtain by methods of local redress a decision by the American courts that the (in Interhandel's opinion) unlawful act of vesting is a violation of domestic law, whilst the Application of the Swiss Government is based upon damage caused by the breach of an international agreement and of the law of nations. It is not known whether, at this stage of the proceedings, Interhandel could or could not pursue its claim before the American courts and introduce there the legal grounds relied upon by the Swiss Government with a view to the claim being decided by the American courts. That would be a modification of Interhandel's claim and it would have to be ascertained whether American procedure permits such action. The Supreme Court of the United States, in its decision of June 16th, 1958, reversing the earlier decision in the Interhandel case, makes no allusion in its directives to the District Court to the questions of international law which, according to the Application of the Swiss Government, constitute the subject-matter of the dispute. According to the American Agent, the courts could examine that case. On the other hand, the Swiss Agent says that it would be impossible. This difference of opinion turns mainly upon the question of the application by the national courts of the Washington Accord in its character of Executive Agreement, a treaty which, not having been approved by Congress, is not incorporated in United States domestic law.

5. Even if such action proved to be possible, it would still have to be borne in mind that the Swiss Government is not a party to the dispute before the American courts. It would therefore seem that the local remedies sought in those courts might not afford a final redress to satisfy the case put forward by the Swiss Government. Where a question of international law is involved, only an international court can give a final decision.

The purpose of the local remedies rule is simply to allow the national tribunals in the first stage of the case to examine the international responsibility of the defendant State as presented in

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the injured State have suffered as the result of the act which is contrary to international law. This is even the most usual form of reparation; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. 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."

the Application; that examination would of course have to be made by a national court. If that court is not competent to make a complete examination of the Swiss case from the point of view of its own law, the purpose of the rule of exhaustion would not be fulfilled.

For the moment, however, and without further information the Court cannot enter the field of hypotheses; it must abide by the terms of the Interhandel claim. The Application of the Swiss Government seeks (rightly or wrongly) reparation for direct damage caused to a State.

The unlawful act really derives from the failure of the American Government (according to Switzerland) to execute the decision of the Swiss Authority of Review, which is to be regarded as a judgment by an international arbitral tribunal, within the framework of the Washington Accord, and therefore binding upon the Parties to the dispute.

The examination of the Third Objection means prejudging a point which can only be dealt with along with the merits. The rule of the exhaustion of local remedies does not apply to a case in which the act complained of directly injures a State. Is that act or is it not a breach of international law?

6. The Permanent Court was very cautious in upholding an objection based upon the local remedies rule and was in no hurry to relinquish its jurisdiction. In three cases it joined the objection to the merits (Series A/B, No. 54, Series A/B, No. 67, and Series A/B, No. 75); it upheld the objection in one case (Series A/B, No. 76) as a defence on the merits; in another case (Series A/B, No. 77) the Court accepted it on the basis of a treaty clause. The same objection was dismissed in two cases (Series A, No. 6, and Series A, No. 9). The present Court also dismissed it in the *Ambatielos* case. (*I.C.J. Reports 1953*, pp. 18, 22 and 23.)

This is therefore the first time that the Court is upholding, without joining it to the merits, a preliminary objection based upon the rule of exhaustion of local remedies and not included in the Declaration accepting the jurisdiction of the Court. The judicial precedents mentioned should not have been abandoned.

7. In its examination of the preliminary objections the Court has to avoid prejudging matters relating to the merits of the dispute, particularly when the questions raised, whether of fact or of law, show that the parties are in disagreement and when these questions are closely linked to the merits. Any such encroachment upon the merits of the dispute deprives the parties of the right given them by the Statute and Rules of Court to submit written pleadings and make oral statements on the merits of the dispute (Series A/B, No. 67, p. 24).

8. The Permanent Court laid down wise directives when the objection on grounds of non-exhaustion of local remedies touches upon the merits. In its decision (Series A/B, No. 75, p. 55) it said:

> "Whereas, at the present stage of the proceedings, a decision cannot be taken either as to the preliminary character of the objections or on the question whether they are well founded, and any such decision would raise questions of fact and law in regard to which the Parties are in several respects in disagreement and which are too closely linked to the merits for the Court to adjudicate upon them at the present stage;
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> Whereas, in view of the said disagreement between the Parties, the Court must have exact information as to the legal contentions respectively adduced by the Parties and the arguments in support of these contentions;
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> Whereas the Court may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it."

For these reasons, at the present stage of the proceedings, it seems that the Third Objection to the Swiss principal submission should rightly and reasonably have been joined to the merits.

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II

1. The United States Government submitted to the Court a Fourth Preliminary Objection, as follows:

> "*(a)* 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 and 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."

And it adds, further, that the decision of the United States "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".

2. That objection has not been abandoned or withdrawn by the Government of the United States at this stage of the proceedings. The Swiss Government also asks the Court to adjudicate upon this form of the Fourth Objection.

Article 62, paragraph 5, of the Rules of Court provides that "after hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits". To give a decision on an objection means either to uphold or to dismiss it, or to join it to the merits. When it admits an objection which puts a definite end to the Application, the Court may refrain from examining other objections. In the present case it has upheld an objection founded upon the rule of exhaustion of local remedies, which has a delaying character. The Swiss Government might be entitled to submit its Application afresh, if the local remedies have not exhausted the facts and legal arguments upon which its claim is based. The admission of the Third Objection by the Court does not have the effect of finally and fully dismissing the Swiss Application; the Court ought therefore to have decided on Objection 4 *(a)*—which would have that effect.

There is another reason why the Court ought to have done this. Examination of its jurisdiction was necessary in order that it might duly consider the Third Objection, which belongs to the class of objections to admissibility. But that objection could only be considered by the Court after it had established that it had jurisdiction.

3. The Declaration of the United States made under Article 36, paragraph 2, of the Statute of the Court provides that the Declaration 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".

This Declaration consists of two parts, acceptance of the Court's jurisdiction and reservations to that acceptance. Those two elements of a single juridical act are separable. Nothing justifies us, when reading the text, in considering them as an indivisible whole.

4. A declaration accepting compulsory jurisdiction is a secondary act, one which can be linked to the application of paragraphs 2, 3 and 6 of Article 36 of the Statute. These clauses provide it with a legal *substratum*. The declaration has the character of a secondary act dependent upon a primary one. The Court, whose duty it is to safeguard its Statute, is certainly empowered to determine whether the secondary part of the declaration is in accord with the primary text; in doing so, it may appraise the legality of the different parts of the declaration in order to determine whether the relevant clauses of the Statute have been correctly applied. The declaration cannot run counter to the Statute. There can be no doubt of that.

The last part of paragraph *(b)* of the United States reservation lays down that the United States of America will determine whether a dispute submitted to the Court relates to questions which lie within the domestic jurisdiction of the United States of America. The clause "as determined by the United States of America", as applied in the present case, is incompatible with paragraph 6 of Article 36 of the Statute, which says: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

5. States may make reservations when accepting the jurisdiction of the Court under paragraphs 2 and 3 of Article 36, but those reservations cannot limit the right conferred upon the Court by the Statute to determine the question of its jurisdiction. No reservation is admissible in regard to paragraph 6. The Court is sole judge of its jurisdiction.

"Paragraph 6 of Article 36—the Court has maintained—merely adopted a rule consistently accepted by general international law in the matter of international arbitration." (*Nottebohm* case, Preliminary Objection, *I.C.J. Reports 1953*, p. 119.) And a little later the Court further emphasizes: "But even if this were not the case, the Court, 'whose function is to decide in accordance with international law such disputes as are submitted to it' (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case." (*Ibid.*, p. 120.)

In this matter no country which has announced its accession to the Optional Clause can reserve for itself the right to make its opinion prevail over the jurisdiction of the Court, once the Court has been seised of a case. From that moment the powers of the Court cannot be curtailed; they must be exercised as established by the Statute. It lies exclusively with the Court to settle any dispute about jurisdiction. No government can impose its view upon the Court in this matter. The question of the Court's jurisdiction is one which only the Court can finally settle. That intention is clearly set out in paragraph 6 of Article 36, which is binding upon all States acceding to the Statute of the Court.

Judge Kellogg rightly argued this when he said: "Every Special Agreement submitting a case to this Court must be considered to have, as tacitly appended clauses thereto, all the pertinent articles of the Court's Statute, and must, in case of doubt as to its meaning, be interpreted in the light of such provisions of the Statute of the Court" (Series A, No. 24, p. 33). The same is true of any declaration founded upon paragraph 2 of Article 36.

6. The Parties to a dispute cannot depart from the Statute of the Court unilaterally or by agreement between themselves. The Permanent Court had occasion to adjudicate on this latter point. In the *Free Zones* case the parties had agreed in their Special Agreement to request the Court to let them know unofficially the content of its deliberations before delivering judgment. That request was refused as contrary to Articles 54, paragraph 3 (Secrecy of Deliberations), and 58 (Reading of Judgment in open Court) of the Statute. The same Court declared in its Order of August 19th, 1929: "In contradistinction to that which is permitted by the Rules (Article 32), the Court cannot, on the proposal of the parties, depart from the terms of the Statute."

Another instance may be given: a declaration of the parties whereby they do not consider themselves bound by the Court's judgment, cannot be allowed, being contrary to Article 59 of the Statute (Series A/B, No. 46, p. 161). The rules of substance and procedure fixed by the Statute must be regarded as immutable: neither the Court nor the parties can break them.

7. Since the reservation in regard to paragraph 6 of Article 36 contained in *(b)* of the American Declaration ("as determined", etc.) is obviously contrary to that paragraph, and cannot be linked to the application of any text in the Statute, the Court should regard it as unwritten and inoperative in the present case. That is to say, the respondent Government cannot rely upon it in support of its Objection 4 *(a)*. The clause in question, not being provided for in any part of the Statute, should be declared without effect *vis-à-vis* the Court.

That conclusion does not imply that the acceptance of the Court's jurisdiction, given in the American Declaration, is altogether without value and to be considered as null and void in its entirety. Such a view would run counter to the clear intention of the respondent State, which has submitted cases to the Court's decision both as claimant and respondent. The way in which this Declaration was employed by the Government of the United States in those cases shows that the reservation in paragraph *(b)* was not a determining factor at the time of its formulation and submission. The United States Government even stated in the present case, when objecting to the jurisdiction of the Court, during the hearings on the indication of interim measures of protection, that it did not "intend to imply that it envisages use of paragraph *(b)* ... with respect to all aspects of the Interhandel controversy which may be involved in the (Swiss) submission. The United States Government will in due course, upon further study, disclose its position in these respects in further detail." Indeed, in the United States objections to the Swiss Application, paragraph *(b)* is restricted to the "matter of the sale or disposition of such shares (GAF), including the passing of good and clear title to any person or entity". In the view of the

United States Government, paragraph *(b)* of its reservation can be separated from the rest of the acceptance and even from the other reservations. The Declaration as a whole is not linked to the clause mentioned in paragraph *(b)*, which is an accessory stipulation.

Consequently, this objection 4 *(a)* should be dismissed and the jurisdiction of the Court upheld.

(Signed) ARMAND-UGON.