

[NB: The Interhandel case involves one unusual aspect: it deals in part with the special requirements of exhaustion of local remedies, which is usually applicable in cases where a state is espousing claims of its nationals, but does not ordinarily apply in purely state-to-state cases not involving 'diplomatic protection' or related human rights issues.]

## **INTERHANDEL**

(Switzerland v. United States of America)

International Court of Justice  
March 21, 1959  
General List: No. 34

(PRELIMINARY OBJECTIONS)

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### JUDGMENT

Present: President KLAESTAD; Vice-President ZAFRULLA KHAN; Judges BASDEVANT, HACKWORTH, WINIARSKI, BADAWI, ARMAND-UGON, KOJEVNIKOV, Sir Hersch LAUTERPACHT, MORENO QUINTANA, CORDOVA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER; Judge ad hoc CARRY; Deputy-Registrar GARNIER- COIGNET.

THE COURT,

composed as above,

delivers the following Judgment:

On October 2nd, 1957, the Ambassador of the Swiss Confederation to the Netherlands filed with the Registrar an Application dated October 1st instituting proceedings in the Court relating to a dispute which had arisen between the Swiss Confederation and the United States of America with regard to the claim by Switzerland to the restitution by the United States of the assets of the Societe internationale pour participations industrielles et commerciales S.A. (Interhandel).

The Application, which invoked Article 36, paragraph 2, of the Statute and the acceptance of the compulsory jurisdiction of the Court by the United States of America on August 26th, 1946, and by Switzerland on July 28th, 1948, was, in accordance with Article 40, paragraph 2, of the Statute, communicated to the Government of the United States of America. In accordance with paragraph 3 of the same Article, the other Members of the United Nations and the non-Member States entitled to appear before the Court were notified.

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The declarations by which the Parties accepted the compulsory jurisdiction of the Court are as follows:

Declaration of the United States of America of August 14th, 1946 (in force since August 26th, 1946):

I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning

(a) The interpretation of a treaty;

\*15 (b) Any question of international law;

(c) The existence of any fact which, if established, would constitute a breach of an international obligation;

(d) The nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to

(a) Disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(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; or

(c) Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.'

Declaration of Switzerland of July 6th, 1948 (in force since July 28th, 1948):

'The Swiss Federal Council, duly authorized for that purpose by a Federal decree which was adopted on 12 March 1948 by the Federal Assembly of the Swiss Confederation and became operative on 17 June 1948,

Hereby declares that the Swiss Confederation recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes concerning:

(a) The interpretation of a treaty;

- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

This declaration, which is made under Article 36 of the Statute of the International Court of Justice, shall take effect from the date on which the Swiss Confederation becomes a party to that Statute and shall have effect as long as it has not been abrogated subject to one year's notice.'

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The present proceedings are concerned only with the preliminary objections raised by the Government of the United States of \*16 America. It is nevertheless convenient to set out briefly the facts and circumstances as submitted by the Parties which constitute the origin of the present dispute.

By its decisions of February 16th and April 24th, 1942, based on the Trading with the Enemy Act of October 6th, 1917, as amended, the Government of the United States vested almost all of the shares of General Aniline and Film Corporation (briefly referred to as the GAF), a company incorporated in the United States, on the ground that these shares in reality belonged to the I.G. Farbenindustrie company of Frankfurt or that the GAF was in one way or another controlled by that enemy company.

It is not disputed that until 1940 I.G. Farben controlled the GAF through the Societe internationale pour entreprises chimiques S.A. (I.G. Chemie), entered in the Commercial Register of the Canton of Bale-Ville in 1928. However, according to the contention of the Swiss Government, the links between the German company I.G. Farben and the Swiss company I.G. Chemie were finally severed by the cancellation of the contract for an option and for the guarantee of dividends, a cancellation which was effected in June 1940, that is, well before the entry of the United States into the war. The Swiss company adopted the name of Societe internationale pour participations industrielles et commerciales S.A. (briefly referred to as Interhandel); Article 2 of its Statute as modified in 1940 defines it as follows: 'The enterprise is a holding company. Its object is participation in industrial and commercial undertakings of every kind, especially in the chemical field, in Switzerland and abroad, but excluding banking and the professional purchase and sale of securities.' The largest item in the assets of Interhandel is its participation in the GAF. Approximately 75% of the GAF 'A' shares and all its issued 'B' shares are said to belong to Interhandel. A considerable part, approximately 90%, of these shares and a sum of approximately 1,800,000 dollars, have been vested by the Government of the United States.

Towards the end of the war, under a provisional agreement between Switzerland, the United States of America, France and the United Kingdom, property in Switzerland belonging to Germans in Germany was blocked (Decree of the Federal Council of February 16th, 1945). The Swiss Compensation Office was entrusted with the task of uncovering property in Switzerland belonging to Germans or controlled by them. In the course of these

investigations, the question of the character of Interhandel was raised, but as a result of investigations carried out in June and July, 1945, the Office, considering it to have been proved that Interhandel had severed its ties with the German company, did not regard it as necessary to undertake the blocking of its assets.

For its part, the Government of the United States, considering that Interhandel was still controlled by I.G. Farben, continued to seek evidence of such control. In these circumstances the Federal \*17 Department of Public Economy and the Federal Political Department ordered the Swiss Compensation Office provisionally to block the assets of Interhandel; this was done on October 30th, 1945. The Office then carried out a second investigation (November 1945-February 1946) which led it to the same conclusion as had the first.

On May 25th, 1946, an agreement was concluded between the three Allied Powers and Switzerland (the Washington Accord). Under one of the provisions of the Accord, Switzerland undertook to pursue its investigations and to liquidate German property in Switzerland. It was the Compensation Office which was 'empowered to uncover, take into possession, and liquidate German property' (Accord, Annex, II, A), in collaboration with a Joint Commission 'composed of representatives of each of the four Governments' (Annex, II, B). The Accord lays down the details of that collaboration (Annex, II, C, D, E, F) and provides that, in the event of disagreement between the Joint Commission and the Compensation Office or if the party in interest so desires, the matter may within a period of one month be submitted to a Swiss Authority of Review composed of three members and presided over by a Judge. 'The decisions of the Compensation Office, or of the Authority of Review, should the matter be referred to it, shall be final' (Annex, III). In the event, however, of disagreement with the Swiss Authority of Review on certain given matters, 'the three Allied Governments may, within one month, require the difference to be submitted to arbitration' (Annex, III).

The Washington Accord further provides:

'Article IV, paragraph I.

The Government of the United States will unblock Swiss assets in the United States. The necessary procedure will be determined without delay.

Article VI.

In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration.'

After the conclusion of the Washington Accord, discussions with regard to Interhandel between the Swiss Compensation Office and the Joint Commission as well as between representatives of Switzerland and the United States were continued without reaching any conclusion accepted by the two parties. The Office, while declaring itself ready to examine any evidence as to the German character of Interhandel which might be submitted to it, continued to accept the results of its two investigations; the Joint Commission challenged \*18 these results and continued its investigations. By its decision of January 5th, 1948,

given on appeal by Interhandel, the Swiss Authority of Review annulled the blocking with retroactive effect. It had invited the Joint Commission to participate in the procedure, but the latter had declined the invitation. This question was not referred to the arbitration provided for in the Washington Accord.

In these circumstances, the Swiss Government considered itself entitled to regard the decision of the Swiss Authority of Review as a final one, having the force of *res judicata vis-a-vis* the Powers parties to the Washington Accord. Consequently, in a Note of May 4th, 1948, to the Department of State, the Swiss Legation at Washington invoked this decision and the Washington Accord to request the Government of the United States to restore to Interhandel the property which had been vested in the United States. On July 26th, 1948, the Department of State rejected this request, contending that the decision of the Swiss Authority of Review did not affect the assets vested in the United States and claimed by I.G. Chemie. On September 7th, 1948, in a Note to the Department of State, the Swiss Legation in Washington, still relying on its interpretation of the Washington Accord, maintained that the decision of the Swiss Authority of Review recognizing Interhandel as a Swiss company was legally binding upon the signatories of that Accord. It expressed the hope that the United States Government would accordingly release the assets of Interhandel in the United States, failing which the Swiss Government would have to submit the question to the arbitral procedure laid down in Article VI of the Washington Accord. On October 12th, 1948, the Department of State replied to that communication, maintaining its previous view that the decision of the Swiss Authority of Review was inapplicable to property vested in the United States. It added that United States law in regard to the seizure and disposal of enemy property authorized non-enemy foreigners to demand the restitution of vested property and to apply for it to the courts. On October 21st, 1948, Interhandel, relying upon the provisions of the Trading with the Enemy Act, instituted proceedings in the United States District Court for the District of Columbia. Direct discussion between the two Governments was then interrupted until April 9th, 1953, on which day the Swiss Government sent to the Government of the United States a Note questioning the procedure applied in the United States in the Interhandel case, stating that this procedure had led to a deadlock, and suggesting negotiations for a satisfactory settlement.

Up to 1957 the proceedings in the United States courts had made little progress on the merits. Interhandel, though it had produced a considerable number of the documents called for, did not produce all of them; it contended that the production of certain documents was prohibited by the Swiss authorities as constituting an offence under Article 273 of the Swiss Criminal Code and as violating banking \*19 secrecy (Article 47 of the Federal Law of November 8th, 1934). The action brought by Interhandel was the subject of a number of appeals in the United States courts and in a Memorandum appended to the Note addressed by the Department of State to the Swiss Minister on January 11th, 1957, it was said that Interhandel had finally failed in its suit. It was then that the Swiss Government, on October 2nd, 1957, addressed to the Court the Application instituting the present proceedings. The assertion in the Note of January 11th, 1957, that Interhandel's claim was finally rejected proved, however, to be premature, as the Court will have occasion to point out in considering the Third Objection of the United States.

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The subject of the claim as set forth in the final submissions presented on behalf of the Swiss Government, and disregarding certain items of a subsidiary character which can be left aside for the moment, is expressed essentially in two propositions:

(1) as a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of the Societe internationale pour participations industrielles et commerciales S.A. (Interhandel);

(2) as an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure in accordance with certain conditions set forth first in the principal submissions and then in the alternative submissions.

The Government of the United States has put forward four preliminary objections to the Court's dealing with the claims of the Swiss Government.

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#### Fourth Preliminary Objection

Since the Fourth Preliminary Objection of the United States relates to the jurisdiction of the Court in the present case, the Court will proceed to consider it before the Third Objection which \*24 is an objection to admissibility. This Fourth Objection really consists of two objections which are of different character and of unequal scope. The Court will deal in the first place with part (b) of this 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 seizure and retention of the vested shares of General Aniline and Film Corporation, for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States'.

In challenging before the Court the seizure and retention of these shares by the authorities of the United States, the Swiss Government invokes the Washington Accord and general international law.

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With regard to its principal submission that the Government of the United States is under an obligation to restore the assets of Interhandel in the United States, the Swiss Government invokes Article IV of the Washington Accord. The Government of the United States contends that this Accord relates only to German property in Switzerland, and that Article IV 'is of no relevance whatever in the present dispute'.

By Article IV of this international agreement, the United States has assumed the obligation to unblock Swiss assets in the United States. The Parties are in disagreement with regard to the meaning of the term 'unblock' and the term 'Swiss assets'. The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings it is sufficient for the Court to note that Article IV of the

Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law.

The Government of the United States submits that according to international law the seizure and retention of enemy property \*25 in time of war are matters within the domestic jurisdiction of the United States and are not subject to any international supervision. All the authorities and judicial decisions cited by the United States refer to enemy property; but the whole question is whether the assets of Interhandel are enemy or neutral property. There having been a formal challenge based on principles of international law by a neutral State which has adopted the cause of its national, it is not open to the United States to say that their decision is final and not open to challenge; despite the American character of the Company, the shares of which are held by Interhandel, this is a matter which must be decided in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war.

In its alternative submission, the Swiss Government requests the Court to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or conciliation. The Swiss Government invokes Article VI of the Washington Accord, which provides: 'In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration.' It also invokes the Treaty of Arbitration and Conciliation between Switzerland and the United States, dated February 16th, 1931. Article I of this Treaty provides: 'Every dispute arising between the Contracting Parties, of whatever nature it may be, shall, when ordinary diplomatic proceedings have failed, be submitted to arbitration or to conciliation, as the Contracting Parties may at the time decide.' The interpretation and application of these provisions relating to arbitration and conciliation involve questions of international law.

Part (b) of the Fourth Preliminary Objection must therefore be rejected.

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### Third Preliminary Objection

The Third Preliminary Objection seeks a finding that 'there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts'.

Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government. Indeed, by its nature it is to be regarded as a plea which would become devoid of object if the requirement of the prior exhaustion of local remedies were fulfilled.

The Court has indicated in what conditions the Swiss Government, basing itself on the idea that Interhandel's suit had been finally rejected in the United States courts, considered itself entitled to institute proceedings by its Application of October 2nd, 1957. However, the decision given by the Supreme Court of the United States on October 14th, 1957, on the application of Interhandel made on August 6th, 1957, granted a writ of certiorari and

readmitted Interhandel into the suit. The judgment of that Court on June 16th, 1958, reversed the judgment of the Court of Appeals dismissing Interhandel's suit and remanded the case to the District \*27 Court. It was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States courts. Its suit is still pending in the United States courts. The Court must have regard to the situation thus created.

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. A fortiori the rule must be observed when domestic proceedings are pending, as in the case of Interhandel, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of Interhandel vested in the United States.

The Swiss Government does not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies, but contends that the present case is one in which an exception to this rule is authorized by the rule itself.

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However, the Swiss Government has raised against the Third Objection other considerations which require examination.

In the first place, it is contended that the rule is not applicable for the reason that the measure taken against Interhandel and regarded as contrary to international law is a measure which was taken, not by a subordinate authority but by the Government of the United States. However, the Court must attach decisive importance to the fact that the laws of the United States make available to interested persons who consider that they have been deprived of their rights by measures taken in pursuance of the Trading with the Enemy Act, adequate remedies for the defence of their rights against the Executive.

\*28 It has also been contended on behalf of the Swiss Government that in the proceedings based upon the Trading with the Enemy Act, the United States courts are not in a position to adjudicate in accordance with the rules of international law and that the Supreme Court, in its decision of June 16th, 1958, made no reference to the many questions of international law which, in the opinion of the Swiss Government, constitute the subject of the present dispute. But the decisions of the United States courts bear witness to the fact that United States courts are competent to apply international law in their decisions when necessary. In the present case, when the dispute was brought to this Court, the proceedings in the United States courts had not reached the merits, in which considerations of international law could have been profitably relied upon.

The Parties have argued the question of the binding force before the courts of the United States of international instruments which, according to the practice of the United States, fall within the category of Executive Agreements; the Washington Accord is said to belong to that category. At the present stage of the proceedings it is not necessary for the Court to



express an opinion on the matter. Neither is it practicable, before the final decision of the domestic courts, to anticipate what basis they may adopt for their judgment.

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For all these reasons, the Court upholds the Third Preliminary Objection so far as the principal Submission of Switzerland is concerned.

...

THE COURT,

by ten votes to five,

rejects the First Preliminary Objection of the Government of the United States of America;  
unanimously,

rejects the Second Preliminary Objection;

by ten votes to five,

finds that it is not necessary to adjudicate on part (a) of the Fourth Preliminary Objection;

\*30 by fourteen votes to one,

rejects part (b) of the Fourth Preliminary Objection; and

by nine votes to six,

upholds the Third Preliminary Objection and holds that the Application of the Government of the Swiss Confederation is inadmissible.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-first day of March, one thousand nine hundred and fifty-nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Swiss Confederation and the Government of the United States of America, respectively.

(Signed) Helge KLAESTAD, President.

(Signed) GARNIER-COIGNET, Deputy-Registrar.