## SEPARATE OPINION OF SIR PERCY SPENDER

In my opinion, as a result of the inclusion in the United States Declaration of Acceptance of the Court's jurisdiction of its Reservation *(b)* stipulating that the Declaration should not apply to disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States, the Court has no valid United States acceptance of its jurisdiction before it and is without competence to entertain the Application of the Government of Switzerland. This conclusion emerges from an examination of Objection 4 *(a)*.

The Court upholds the Third Objection and holds that the Application of the Swiss Government is inadmissible. Having regard to this decision the Court being further of the opinion that part *(a)* of the Fourth Objection is without object at the present stage of the proceedings, finds it not necessary to adjudicate thereon.

There is more than a little practical wisdom to recommend this as a course to follow. The Objection presents issues of far reaching significance. They concern not only the interests of the two States engaged in the present proceedings but those of other States as well. I would have preferred to adopt towards part *(a)* of the Fourth Objection the same attitude as has the Court, but after considerable reflexion I regret that this is not open to me.

To decide upon all other objections raised by the United States to the Court's jurisdiction and not to deal with this Objection, is to leave unanswered questions which strike at the very roots of the Court's jurisdiction.

The United States has challenged jurisdiction on a number of grounds. It has failed on its Objections 1, 2 and 4 *(b)*, which are objections to the jurisdiction of the Court. It has succeeded on its Third Objection, but this has properly been treated by the Court as a plea not to its jurisdiction but to the admissibility of the Application of the Swiss Government.

Before however adjudicating upon the Third Objection, the Court, in my opinion, is obliged first to satisfy itself that otherwise it has jurisdiction. It cannot be so satisfied unless and until it rules upon Objection 4 *(a)*.

The United States under this Objection has invoked the automatic reservation contained in its Declaration of Acceptance. It declines thereunder to submit to the jurisdiction of the Court the matter of the sale and disposition of the shares in GAF, including the passing of title. This declination applies to all the issues raised in the Swiss Application and Memorial, including, but not limited

to, the Swiss-United States Treaty of Conciliation and Arbitration 1931 and the Washington Accord of 1946.

This objection was maintained in the United States' final conclusions and submissions.

Neither State to the present proceedings was willing to examine too critically the vital questions posed by the Objection. The Objection was handled tenderly by both and for understandable reasons.

The issues involved raised their heads in the *Norwegian Loans* case (*I.C.J. Reports 1957*, p. 9). Here also, each side walked discreetly around them. Because in that case the validity of the reservation of the Republic of France was not questioned by the Parties, because indeed both Parties to the dispute regarded the reservation as expressing their common will relating to the Court's competence, the Court gave effect to the reservation as it stood and as the Parties recognized it.

In the present case the validity of the United States reservation was questioned by the Swiss Government. In the course of the oral argument the Co-Agent for Switzerland submitted *(inter alia)*:

> "As we have already said in our observations, so-called automatic reservations are incompatible not only with the very principle of compulsory arbitration (Article 36 (2) ... of the Statute), but also with Article 36 (6) ... which gives the Court the power to determine its own jurisdiction."

In the formal submissions of the Government of Switzerland made at the end of the oral proceedings, it rather moved away from this by contending that the Objection now being limited in the present case to the right to dispose of and sell the shares in GAF, it was in reality completely linked with the fate of the United States Objection 4 *(b)* relating to the domain that is reserved according to customary international law. I cannot agree.

If the reservation of the United States is invalid because of incompatibility with Article 36 of the Statute of the Court, it would be impossible for the Court to act upon it. More than this, if it is invalid this may involve as in my opinion it does the total invalidity of the United States Declaration of Acceptance rendering it null and void.

The jurisdiction of the Court depends upon the Declarations of Acceptance made by the Parties before it in these proceedings. Whether it has or has not jurisdiction depends not only upon the consensus of agreement to be derived from a comparison of the two Declarations, but upon whether that consensus is compatible with the provisions of the Court's Statute.

Is, then, the United States reservation *(b)* compatible with Article 36 of the Statute? And if not, what are the legal consequences which flow from this incompatibility?

The Court can only function within its Statute and within the limits of its authority. It cannot depart from the terms of the Statute.

If the reservation of the United States is inconsistent with the Statute, or if the result of its inclusion in its Declaration is to render the latter wholly inoperative as an acceptance of the Court's jurisdiction, the Court, in my opinion, is bound so to declare.

Article 36 (6) of the Statute provides that in the event of a dispute as to whether the Court has jurisdiction the matter *shall* be settled by the decision of the Court. But the United States reservation *(b)* empowers the United States exclusively on its own determination to say in the event of a dispute whether the Court has or has not jurisdiction. In the event of a dispute as to the Court's jurisdiction the matter is not settled by the decision of the Court unless the United States so agrees. It determines whether the matter shall or shall not be settled by the Court. But it is the Court and the Court alone that under the Statute is to decide its jurisdiction. It is not competent for a State to reserve to itself a right to withdraw from the Court in the event of a dispute as to whether the Court has jurisdiction in a particular case, the very matter which by virtue of Article 36 (6) *shall* be settled by the decision of the Court.

The United States in this case has invoked its reservation and so sought to prevent the Court from exercising the authority given to it and discharging the duty imposed upon it by its Statute.

This reservation may be used by the United States to prevent the Court from discharging its function and to exclude from the Court's competence at any time any dispute *with regard to any matters* which the United States itself determines as essentially within its domestic jurisdiction.

Whether any jurisdiction at any time resides in the Court in respect of any dispute; whether there is any obligation upon the United States to accept the jurisdiction of the Court on any dispute, depends upon the will or subjective determination of that State, a determination that may be made even after the dispute has been brought before the Court.

This reservation is clearly inconsistent and incompatible with Article 36 (6) of the Statute and with the concept of compulsory jurisdiction and reciprocal obligation contemplated in Article 36 (2) thereof. An "obligation" to recognize the jurisdiction of the Court, the existence or extent of which "obligation" in respect to any particular dispute is a matter which can be determined by the State concerned, is not a legal obligation at all.

It is in no way relevant to assume, as assume I do, that the United States would seek to use its reservation with prudence and reason.

In my opinion reservation *(b)* of the United States is invalid. If so, the Court is unable to give any effect to it.

What are the consequences of its invalidity?

The answer seems to me dependent upon the enquiry whether the reservation, either wholly or in part, is severable from the rest of the Declaration.

Is it permissible to discard the reservation altogether or the words "as determined by the United States", leaving what remains of the Declaration valid and operative?

The answer is clearly, I would think, "no", and for the reason that the reservation, of which the words "as determined by the United States of America" are the core, is not a mere term but an essential condition of the United States Acceptance. The reservation could be described as a critical reservation without which the Declaration of Acceptance would never have been made. This seems reasonably self evident. It is not in my opinion permissible to have recourse to the debate in the United States Senate when the Declaration was before it; nor, were it permissible, would it be necessary or profitable. The will and the intent of the United States is to be found in its expression thereof in its Declaration of Acceptance and nowhere else. The meaning of the reservation, automatic in character, is clear. To sever this reservation or the words "as determined by the United States" and to hold that the Declaration after severance represents the will and intent of the United States would be to ignore the proper construction to be accorded to the Declaration as a whole. To do so would impose upon the United States an acceptance quite different to that which it made. It would have no warrant in law. In my opinion the reservation is a vital and unseverable condition of the Declaration of Acceptance. If it is bad, neither it nor any part of it can be severed from the whole. If it is invalid, as in my opinion it is, the whole Declaration is null and void.

In my opinion this concludes the matter. The Court is without jurisdiction.

Certain other possible constructions of the reservation should however be considered.

May it not be read as implying that the determination of the United States must be "reasonable" and so save it from any inconsistency with Article 36 (6)?

So to read the reservation would require us to disregard its terms. That is precisely *one of the things the reservation was intended to remove from any jurisdiction of or any review by the Court.* The history of the reservation would itself prove this abundantly. But there is no need to go beyond the words of the reservation itself. There was *excepted* by the United States from the field of its acceptance of the Court's jurisdiction any dispute which *it*—not some

other body—determined as essentially within its own domestic jurisdiction, and irrespective of whether or not this Court should think the exercise by the United States of its sovereign power in so determining was or was not reasonable or the circumstances such as would make it reasonably possible for it so to determine. The United States, and it alone, was the sole judge of its action and/or of its reasonableness.

In the *Norwegian Loans* case, Judge Read, when dealing with the terms of a somewhat comparable French reservation—"disputes relating to matters which are essentially within the national jurisdiction as *understood* by the Government of the French Republic" —construed it as permitting the Court to review the reasonableness of the circumstances under which the reservation was invoked. Whether the circumstances were such that it would be *reasonably possible* for Norway (relying in that case on the principle of reciprocity) to reach an *understanding* that the dispute was essentially national, would be a question for the Court to determine. But if those circumstances existed the conclusion reached by the State could not be questioned. In other words, whether the circumstances were such was not for a Government but for the Court. If, however, such circumstances existed, the conclusion of the Government concerned determined the matter (*I.C.J. Reports 1957*, p. 93).

It is not necessary to examine the reasons of that distinguished Judge in reaching this view. I think it reasonably clear that, had he been faced with the reservation in *this* case, he would have come to a quite different conclusion. The learned Judge was, of course, dealing with an automatic reservation couched in different terms. Had he felt compelled to interpret its words as meaning that the relevant Government had an arbitrary power to settle any question of jurisdiction, then it would have been necessary for him to conclude that the Declaration of France was null and void as contrary to Article 36 (6) of the Statute. "It is inadmissible, by a process of interpretation, to rewrite the Clause in question as if it read 'disputes relating to matters as regards which the Government ... has *declared* that it understands that they are essentially within the national jurisdiction'." (P. 95.) That would have conferred an arbitrary power. The reservation in this case is at least as strong. The word "determined" is one of very definite content.

In my opinion there is no room whatever for construing the United States reservation by implying into it a concept that the determination must be reasonable or that it must not be unreasonable.

There remains to be considered whether the reservation should be interpreted in the sense that the Court has jurisdiction to decide whether it is invoked in good faith.

This reservation left the question of jurisdiction specifically to be "determined" by the United States of America and by it alone. It cannot be construed as meaning that the words inserted by the United States as a reservation from the Declaration of Acceptance should be read as containing the words "provided it is so determined by the United States of America in good faith". There is no room for redrafting the reservation and giving it an entirely different meaning to that which its words bear and which they clearly enough were intended to bear.

To do so would involve rewriting proviso *(b)* of the United States Declaration of Acceptance, would distort the meaning of the Declaration by imposing a quite different reservation upon the United States to that inserted by it as a condition of its acceptance. There is no room for questions of abuse of power or good faith or bad faith in relation to a determination by the Government concerned that the dispute *is* within its domestic jurisdiction.

In my opinion, the reservation of the United States proviso *(b)* to its Declaration of Acceptance is invalid. Neither it nor any part of it can be severed therefrom since it is of the essence of the Declaration of Acceptance. The Declaration is incompatible with any compulsory legal obligation and with Article 36 (6). It has no legal force as a declaration under Article 36 (2). Accordingly, I am compelled to the conclusion that the United States Declaration of Acceptance is, and has from its inception been, null and void. The United States cannot sue or be sued in this Court on the basis of its Declaration. It has, in short, never legally submitted to the jurisdiction of the Court.

In the result I am of opinion that the Court has no jurisdiction to deal with the Application of the Government of Switzerland except so to declare. Since however the majority of the Court take the view that the objection should not be decided at the present stage of the proceedings, I deem it my duty to express my views on the other objections put forward by the United States.

*First Objection*

The United States Declaration of Acceptance of the compulsory jurisdiction of the Court is limited to disputes "hereafter arising"—that is arising after the 26th August 1946. Disputes which had theretofore arisen are accordingly excluded.

The purpose and intent of such a provision is clear. It accepts the Court's jurisdiction on disputes arising after the relevant date. It excludes from it all disputes which have arisen before the 27th August 1946. If a dispute existed before this date, it matters not in what form it may subsequently be presented to the Court or what the legal issues directly connected with and relevant to the

dispute may be or become, or what the nature of the relief claimed, *that* dispute is not within the competence of the Court.

Such a provision, if it is not to be interpreted in a manner to exceed the intention of the State accepting the jurisdiction of the Court, should receive a broad construction.

A "dispute" within the meaning of the provision need not be spelt out or defined with legal exactitude or particularity. It is enough if its subject-matter and its nature are identifiable. A dispute may arise long before it crystallizes into its component parts or reveals all its different facets. No special formality is necessary. It need not arise in the course of diplomatic negotiations. It may do so independently thereof and may precede negotiations.

Nor is it a condition precedent to a "dispute" arising that one State must indicate that it intends to resort to international judicial or arbitral procedure or action unless its claim is satisfied. A State party to a dispute may temporarily abandon its contention; may subsequently revive it and then decide to seek a remedy by judicial or other proceedings or action.

A dispute may lie dormant for years. The decision to take action and the nature of the action to be taken, the forum to be chosen, or the remedy to be sought are not decisive as to whether a dispute at any given time exists or existed.

A dispute may, as not infrequently happens, enter upon a new phase. An entirely separate dispute may of course arise between the parties with which the existing dispute is only casually connected. But if the substance of the dispute remains the same, the fact that it has entered upon a new phase or that other issues directly connected with and relevant to the dispute in which the parties are also in disagreement are subsequently added or appear, or that new claims for relief are presented, cannot alter the problem such as is here presented to the Court. Were it otherwise, legal ingenuity would usually be able to transmute a dispute which clearly enough was beyond the jurisdiction of the Court, into one within its competence. The Court should concern itself with substance, not form.

"Disputes" within the meaning of the United States Declaration must bear the same interpretation as the same word appearing in Article 36 of the Statute, with which it is co-terminous in meaning. A State submitting to the jurisdiction of the Court is entitled to place reliance upon the judicial pronouncements of this Court and its predecessor, as to the meaning to be given to this word when settling and agreeing upon the terms of its Declaration of Acceptance.

The Permanent Court of International Justice and this Court have on a number of occasions considered the meaning of this word. In my opinion it is not necessary to go beyond the pronouncement of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* (P.C.I.J., Series A, No. 2 at p. 14), "a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons". See, too, *German Interests in Polish Upper Silesia* (P.C.I.J., Series A, No. 6 at p. 14); *Chorzów Factory Case* (P.C.I.J., Series A, No. 13 at pp. 10 and 11); *Asylum Case* (*I.C.J. Reports 1950*, at p. 403). Nothing which appears in the *Right of Passage over Indian Territory (I.C.J. Reports 1957)* qualifies this definition.

In the light of these observations, did then the dispute, the subject of the litigation, arise before or after the 26th August 1946?

To provide the correct answer it is necessary to determine what the dispute is.

The dispute "*relates*" to an alleged obligation of the United States to restore to Interhandel certain assets within the United States. These assets were the shares in G.A.F. But to say that the dispute "relates" to a certain subject-matter does not state or identify the nature of the dispute.

There could not be other than complete agreement with the view expressed in the Court's judgment that facts and situations which lead to a dispute must not be confused with the dispute itself. Neither should the "dispute" be confused with the "claim" or claims for relief, which normally may be expected to follow the dispute itself, or with the subject-matter of each claim. The present case is an example of the need in particular to distinguish between the "subject-matter of the dispute", the "dispute" and the "claim".

The relevant facts in the present case which constitute the dispute have not altered since 2nd October 1957 when the Swiss Application was filed. Yet since the date thereof a number of new claims have been put forward. Nonetheless, the "dispute" has remained the same.

In the Swiss Application the dispute is referred to in the preambular paragraph as having arisen "relating" to the restitution by the United States of the assets above mentioned. The Application then proceeds to set out the facts on which the Application is founded. It refers to "dispute" throughout in the singular. It states *inter alia* that "the dispute" concerns the interpretation of a treaty and questions of international law and that its settlement "involves interpretation of the Washington Accord and an examination of questions of international law". Nowhere in the Application, except in so far as is to be determined from the facts stated, is "the dispute" defined. To state that the dispute "relates to, etc." does not itself indicate or determine its nature.

Although two different claims for relief were put forward in the Application, Switzerland itself only refers throughout to *one* dispute which it had sought to have settled first by negotiation, then by seeking recourse to arbitration, etc., and finally by application to this Court.

It is that dispute—whatever it was—that the Application asks the Court either to determine itself on the merits, or, alternatively, to declare is one fit for submission for "judicial settlement, arbitration or conciliation".

What then, on a proper examination of the facts, was the nature of the dispute to which Switzerland is referring?

It is, I think, clear enough that it was, whether or not Interhandel, the nominal owners of the shares in G.A.F. at the time of vesting, was Swiss-owned or German-owned or controlled.

This, I think, is borne out by the correspondence and documents which passed between the Parties, and is supported by the Application itself and the Memorial.

The fundamental Swiss contention, in whatever different forms it seeks relief, or whenever a demand for restitution was made, is, that Interhandel was Swiss (neutral), not German (enemy). It is on the resolution of this dispute that any obligation by the United States to make restitution basically depends.

Whether the dispute were determined by this Court on its merits, or dealt with by arbitration or conciliation, the dispute—as distinct from the forms in which relief is claimed, which have I think too greatly controlled the decision of the Court—is the same. And this remains so whether the Swiss Government, in seeking to have the shares restored to Interhandel, calls in aid Article IV of the Washington Accord, the decision of the Swiss Authority of Review, or the Arbitration and Conciliation Treaty of 1931.

If the dispute did not arise after 26th August 1946, it is not in my opinion competent for the Court to deal with that dispute in any way either on its merits or by declaring that that dispute "is fit for submission for judicial settlement, arbitration or conciliation". Such a dispute is wholly outside the jurisdiction of the Court.

There are I think certain signposts before and after the 26th August 1946 that give direction to our enquiry.

*(a)* The main, if not the only substantial reason why the United States repeatedly maintained that the "blocking" of Interhandel in Switzerland should be continued was because its principal asset was its participation in G.A.F. then being administered by the U.S. Alien Property Custodian. This was known to the Swiss authorities from at least July 1945 (Exposé of Swiss Compensation

Office, 24th September 1947, Annex 3 to the Swiss Memorial, p. 7).

*(b)* The United States Authorities from July 1945 to August 1946 "repeatedly maintained to the Swiss authorities that the *connection with I.G. Farben was still maintained*". *(Ibid.)*

*(c)* In the opinion of the Swiss Compensation Office *the German interest* in Interhandel could not be proved.

*(d)* "Like the earlier enquiry the second investigation (Footnote November 1945-February 1946) *established* that Interhandel was in *no* degree *under German influence.*" (Swiss Application 3 *(b)*.)

*(e)* "Despite this *quite categorical* outcome the Swiss Compensation Office continued to block Interhandel—taking into account the fact that the allied members of the Joint Commission, which meanwhile had been set up under the Washington Accord, *had not been willing to accept* the findings of the second enquiry." *(Ibid.)*

*(f)* The G.A.F. remained under the administration of the Alien Property Custodian from 1942 onwards because it was considered by the United States "to be a *company under German control*". (Decision of Swiss Authority of Review, Annex 19 to Swiss Memorial, para. B.)

*(g)* The question decided by the Swiss Authority of Review was whether Interhandel *was under German control. (Ibid.,* para. 4.)

*(h)* The Swiss Authority of Review found this issue in favour of Interhandel and ordered the blocking to be annulled. *(Ibid.,* paras. 11 and 12.)

*(i)* This decision provides one of the main supports relied on by the Swiss Government in this case.

*(j)* The Memorial of the Government of Switzerland under Part I thereof "Statement of Facts" states that Interhandel attempted many years before the Second World War "*to free itself from all German influence* and succeeded as we shall show". (First paragraph.) In paragraph 6 "To decide whether a preponderant *German interest* existed" in Interhandel the distribution of shares in that Corporation is examined. In paragraph 7 "To determine whether or not" Interhandel "was subject to *German control*" some importance was attributed to the composition of the machinery of the Corporation which subsequent paragraphs deal with. In paragraph 18 referring to the two decisions of the Swiss Office of Compensation it is stated that the first "found ... that Interhandel had completely *severed its ties with I.G. Farben* in 1940 and therefore there was no need to decree the blocking of its property", the second enquiry "confirmed that Interhandel *was not controlled by the Germans*". In Part II under "Statement of the Law" para-

graph 81 states "The Swiss Government alleges that the property of the G.A.F. is Swiss. It is therefore incumbent upon it to prove that fact. Such proof would appear to us to be furnished as soon as it is established that the *preponderant interest* in the Corporation under the control of which G.A.F. is (in other words Interhandel) *is in Swiss hands*. This conclusion also results from the investigations of the Swiss Compensation Office and from the decision of the Authority of Review *which also cover the American assets*. It is up to the respondent to furnish proof to the contrary."

*(k)* The Submissions to the Memorial recite *(inter alia)*:

(i) The United States was by virtue of Article IV of the Washington Accord under an obligation to unblock *Swiss assets* in the U.S.A. including those of Interhandel. (1st recital.)

(ii) Interhandel was *not under enemy control* at the time of the entry of the United States into the Second World War. (2nd recital.)

(iii) G.A.F. was controlled by Interhandel. (2nd recital.)

(iv) The decision of the Swiss Authority of Review recognizes *the Swiss character of Interhandel*. (3rd recital.)

(v) That decision became *res judicata vis-à-vis* the parties to the Accord and so internationally binding on the United States of America. (4th recital.)

(vi) Independently of the above decision general international law prohibited the confiscation of private property belonging to *nationals* of *neutral* States. (5th recital.)

(vii) Accordingly the United States was bound as a result of the decision of the Swiss Authority of Review to restore the assets of Interhandel. (6th recital.)

*(l)* "Despite" the decision of the Swiss Authority of Review "the American authorities categorically refused to comply with the Swiss request for the release of the G.A.F. shares in the United States". (Paragraph 4 of Application.)

The essential nature of the dispute referred to by Switzerland in its Application and Memorial was whether or not Interhandel, the nominal owners of the shares at the time of vesting, was "Swiss" owned or "German" owned or controlled, in other words whether Interhandel had completely severed its ties with I.G. Farben.

The dispute so described may be put in different words, as indeed at times it has been, but it is that dispute, however described, which is presently before the Court and it is upon the resolution

of that dispute that the Swiss claim ultimately depends. If Interhandel were Swiss (neutral), not "German" (enemy), the Swiss claim is that its shareholding in G.A.F. was "Swiss" and should be restored to it.

Within this dispute there have arisen, as is not unusual, other issues between the Parties which are themselves the subject of dispute. But when examined it will be seen that they are but aspects or parts or phases of the same fundamental dispute.

The Swiss Government in its Application and Memorial stated in detail facts upon which it claimed to be in a position to establish that Interhandel was "Swiss" and accordingly that its shareholding in G.A.F. was Swiss. In its view whether this was "Swiss" was dependant upon whether Interhandel was Swiss as it claimed it was in a position to prove. In support of its case it has, however, placed much reliance upon the Washington Accord.

Thereunder it claims that by virtue of Article IV, paragraph 1 thereof, the United States assumed the obligation to unblock Swiss assets among which it claims are the assets in G.A.F. alleged to belong to the "Swiss" Corporation Interhandel. If Interhandel were Swiss, if, the Swiss Authority of Review found, it had severed its connections with I.G. Farben, then this shareholding it is contended was also Swiss. But assuming that this Article has any relevance to this case, the dispute remained the same.

Switzerland, in the Observations and Submissions on the Preliminary Objections, sought to supplement its claims by an alternative claim in which it requested the Court to declare that the "property" which Interhandel "possesses" in G.A.F. "have the character of non-enemy (Swiss) property and *consequently* (the italics here are mine) to declare that by refusing to return the said property the United States was acting contrary to the decision of the Swiss Authority of Review of January 1948 and was in breach of Article IV, paragraph 1, of the Washington Accord and of the obligations binding upon them under the general rules of international law".

Assuming that the decision of the Swiss Authority of Review is relevant to these proceedings, and this issue is also in dispute, it is clear that the Government of Switzerland is relying upon it as conclusive evidence against the United States of America on the real dispute before the Court, namely, as to the Swiss character of Interhandel and consequently the Swiss character of its shareholding in G.A.F.

The fundamental dispute—notwithstanding all the other issues within it—is and has always been whether Interhandel—the nominal holder of the shares in the United States of America—was

"Swiss". And the enquiry under the objection is whether a dispute on that issue arose before the 26th August 1946.

The "neutral" or "enemy" character of Interhandel was, of course, material under the Washington Accord for the purpose of carrying out its primary objective, namely, the uncovering, the census and the liquidation of German property in Switzerland. But the character of Interhandel had a significance both for Switzerland and the United States of America which went beyond this because of the assets in the United States of America which had stood in the name of Interhandel before they became "vested". Once the procedure under the Accord was completed, the Swiss case on this aspect is, and at all material times must have been, that it covered American assets and applies to "vested" property in the United States of America. (Annex 22 to Swiss Memorial; para. 81 of Swiss Memorial.) The United States for its part "*because* the principal assets" of Interhandel were the shares in G.A.F., had "*repeatedly maintained* to the Swiss Authorities that the connection with I.G. Farben was still maintained". (Annex 3 to Swiss Memorial.) It is, I think, a proper conclusion that both the United States of America and Switzerland in the discussions and correspondence which took place between the two countries after May 1946 at the latest, regarded the character of Interhandel in relation to the liquidation of German property in Switzerland as having a connected and significant bearing on Interhandel's shares in G.A.F.

Interhandel was a holding company. Its most important asset were the shares in G.A.F. It held over 90 per cent of the shares therein. Somewhat less than half of the ordinary shares of Interhandel were the property of G.A.F. If Interhandel were held by the Swiss authorities to be "Swiss", whilst that could not—apart from the Swiss arguments based on Article III of the Annex to the Washington Accord *(res judicata)*—have decided the fate of Interhandel "assets" in G.A.F., it could assume considerable importance in relation to them and any alleged obligation upon the United States to restore them to Interhandel. On the other hand, were Interhandel determined by them to be "German" or German controlled, this would have had an important practical bearing on any claim by Interhandel to have the shares restored to it.

It is contended by Switzerland that prior to the 26th August 1946, the Swiss authorities were not concerned with the fate of Interhandel's shareholding in G.A.F. Any difference of opinion, if any, which took place prior thereto, could, therefore, it is said, have had no relation to that shareholding.

To the extent to which it is necessary to deal with this contention, I cannot accept this as accurate. The United States were expecting Interhandel to bring suit in the United States to recover the shares in G.A.F. The letter of 20th August 1946 from the Swiss

Compensation Office to Mr. Le Roy Jones, described as Chief of the Alien Property Section Department of Justice of the United States (Annex 3 to Swiss Memorial, p. 9), appears sufficiently to establish that Switzerland shared the view that Interhandel would probably bring such a suit.

Whether any difference of opinion which took place before the date of the Washington Accord did or did not bear a relation to Interhandel's holding in G.A.F., I am of the opinion that after the date thereof it did have such a relation, and a direct one.

1. The Swiss Compensation Office, under the Washington Accord, was the authority empowered to uncover, take into possession and liquidate the property in Switzerland of Germans in Germany.

2. The view of the Swiss authorities is, and consistent with the case it makes out must, it seems to me, at the relevant times have been that:

*(a)* The Swiss Authority of Review was created by the Accord and its duty was, when required so to do, to review the decisions which the Swiss Compensation Office was called upon to take under the Accord.

*(b)* The fact that the Swiss Compensation Office began its investigations in respect to Interhandel before the conclusion of the Accord in no way would prevent a decision of the Authority of Review from having been taken within the framework of the Accord because of the provisions of Article 1 thereof. "In other words, though the investigations of the Swiss Compensation Office began ... before the conclusion of the Accord ... they were continued and completed within the framework of the Accord" (Swiss oral argument of 11th November 1958). The decision of the Swiss Compensation Office "was made in observance of the Articles of the Accord" (Swiss Note of 7th September 1948, Annex 22 to Swiss Memorial). The significance of this viewpoint becomes apparent when seen against the light of the Swiss contention that the decision of the Swiss Authority of Review *"confirming the non-German character of Interhandel* became *res judicata"* since it was an appeal from the Swiss Compensation Office made by "the party (Interhandel) in interest" under the Accord.

3. The procedure laid down in Article III of the Annex to the Accord, the Swiss Government claims, would determine what were Swiss assets in the United States under Article IV of the Accord (Swiss Note of 7th September 1948, Annex 22 to Swiss Memorial). "The Washington Accord specifies in Article IV, Section I, that the Government of the United States is under an obligation to unblock Swiss assets in the United States, that is to say, all Swiss assets without any exception whatsoever. *Who decides whether any particular property should be described as Swiss assets? Who decides on the criterion for distinguishing Swiss assets from German assets blocked in the United States?*

"If we study the Washington Accord in this connection, one thing is certain. When property belongs to Swiss physical or *legal* persons whose Swiss character has already been confirmed in a binding and final manner by the Authority of Review under the Washington Accord, *they must inevitably follow the fate of property unblocked in Switzerland*" (Swiss oral argument, 11th November, 1958).

4. Under the Accord (Article III of Annex thereto) decisions of the Authority of Review, made under the provisions of the Accord, were final. But so also were the decisions of the Swiss Compensation Office, unless the Joint Commission was "unable to agree to the decision of that Office", or unless "the party in interest" desired the matter to be submitted to the Authority of Review. Article III of the Annex provides "The decisions of the *Compensation Office* or of the Authority of Review, *should* the matter be referred to it, *shall be final.*"

5. A decision of the Swiss Compensation Office was, on the Government of Switzerland's case as I understand it, the initial step in the chain of proof to establish under Article IV of the Accord, whether Interhandel's "assets" in the United States were or were not "blocked" assets, which under Article IV of the Accord, the United States of America was under obligation to unblock. If the Swiss Office of Compensation decided that Interhandel was "Swiss"—as, of course, it had already done—and it confirmed its determination or conclusion after the Washington Accord, and if the United States (or Joint Commission) did not contest its determination or conclusion, the view of the Government of Switzerland must have been it seems to me that that would decide the fate of Interhandel's "assets" in G.A.F. If the Joint Commission Powers refused to accept the decision of the Swiss Compensation Office and the matter went before the Authority of Review, its decision would become Switzerland claims *res judicata* unless the Allied Governments requested arbitration. In other words, if the Swiss character of Interhandel in *Switzerland*, as determined by the Swiss Compensation Office, was admitted or not contested or if on review Interhandel was determined by the Swiss Authority of Review to be Swiss, the shares in G.A.F., on the Swiss view of the Accord, would *"inevitably follow the fate of property unblocked in Switzerland"*.

It is not without significance that as at the 12th December 1945, 454,948 "A" shares in G.A.F. were deposited in Switzerland in the form of certificates and these were claimed by Interhandel to be fully under its control.

Did or did not the Swiss Government, as from the date of the Accord, and before the 26th August 1946, hold the opinion that Interhandel was not "German" or under German control but "Swiss" and that consequently Interhandel's "assets" were "Swiss"

not "German"? If it did, it was an opinion directly opposed to that of the United States authorities. I am satisfied it did, irrespective of whether that opinion could be described as "provisional" or subject to possible change, or not. It was a firmly held opinion put forward in direct conflict with that held by the United States authorities since 1942. Moreover it seems to me clear enough that on Switzerland's case, it knew at least that the determination of the Swiss Compensation Office was a not unimportant factor in establishing the Swiss character of G.A.F. "assets" in the U.S.A. The Swiss Compensation Office was on its case a definite link in the procedure necessary to prove that Interhandel's "assets" in G.A.F. were Swiss assets in the U.S.A. The Swiss Compensation Office was the competent Swiss authority for this purpose.

Whether the convictions and contentions of the Swiss authorities are to be called provisional or otherwise—whatever terms are used to diminish the significance of the official Swiss attitude after the Accord and before 26th August 1946—it is I think sufficiently clear that the Swiss attitude must have been that Interhandel was Swiss, and accordingly its holding in G.A.F. was Swiss, with the consequence which flowed from that if their claim as to the applicability of Article IV of the Accord was correct.

It said in terms quite sufficient to establish a dispute—our opinion is that Interhandel is Swiss—that is our contention—that is our determination. If you persist in claiming otherwise, prove it, if you can.

I do not intend to detail all the further evidence which persuades me that the dispute existed before the 26th August 1946. I shall content myself with the following:

*(a)* The Swiss Compensation Office investigated Interhandel June-July 1945. It "drew ... the logical conclusion that Interhandel was a Swiss company..." (para. 3 *(b)* of Application). This conclusion was diametrically opposed to the official determination of the United States.

*(b)* The Swiss Compensation Office, against its conviction and only at the direction of the Swiss Federal Political and another Department, continued the "temporary" blocking of Interhandel. This was done, the Swiss Government states, under pressure by or as the result of representations from the Allied Governments, particularly the U.S.A. The blocking was continued not because there is any reason to suppose the Swiss Political Department differed with the conclusion of the Swiss Compensation Office, but because of the pressure or representations. The Swiss Compensation Office subsequently gave support to Interhandel's appeal to the Swiss Authority of Review. From at least July 1945 the Swiss

Compensation Office persisted in its view that Interhandel was "Swiss".

*(c)* The United States continued at all material times to assert that Interhandel was not "Swiss" but "German".

*(d)* An official statement of the Government of Switzerland contained in its letter of 6th November 1945 (Exhibit 12 to United States Preliminary Objections), after referring to the investigation of the Swiss Compensation Office, went on to state that a decision had been made recently to block for a limited time "in order to permit your authorities, if they *persisted* in regarding this *holding* as under German influence to furnish the proof for it. This way one has taken into account the *importance* which your Government attaches to the matter."

*(e)* At this stage (November 1945), as appears from this letter, the Swiss position may be summed up as follows:

> Our conclusion is that Interhandel is Swiss-owned. That is our opinion. You dispute it. We realize the importance your Government places on the result, but if you persist in your contention that the "holding" is under German influence, you prove it before the 31st January 1946.

*(f)* At least from February 1946 onwards, the Swiss Compensation Office remained adamant in its contention that Interhandel was "Swiss", not "German". *It adhered throughout to this contention.* The fact that it indicated to United States officials that if they could produce evidence to establish Interhandel was German-controlled, it was prepared to consider it, in no way diminishes the fact that it adhered firmly to its determination and was in disagreement with the United States authorities.

*(g)* The Swiss Political Department was informed not only of the determinations of the Swiss Compensation Office, but of discussions with United States officials. (See e.g. letter of 10th December 1945, President of the Swiss Compensation Office to M. Petitpierre, Head of Political Department of the Government of Switzerland, Annex 2 to Swiss Observations, and letter next referred to.)

Only a few further documents need be specifically referred to:
*10th August 1946—Letter Swiss Compensation Office to Mr. Harry Le Roy Jones*

This letter stated that:

The Swiss Compensation Office was of *opinion* that Interhandel should not be blocked, and for the reason that Interhandel was in its view "Swiss", not "German". This was a view diametrically opposed to and in disagreement with the opinion of the United

States. It was a difference between the two countries on an issue of prime importance, in the Swiss view at least, and hardly less important from the point of view of the United States Alien Property Control in relation to the G.A.F. holding of Interhandel. There was a dispute on the real issue (cf. Annex 22 to Memorial, pp. 144 and 146). If Interhandel were unblocked, in the Swiss view of the Accord, the fate of G.A.F. shares "*inevitably followed*" that event.

Having stated its opinion as above, it refers to the United States opinion to which Swiss opinion was opposed as—"*Your opinion* that the Interhandel firm is controlled by Germans".

In this letter one was saying Interhandel is *not* controlled by Germans, or it is our opinion it is not; the other was saying it *is* controlled by Germans, or it is our opinion that it is. And the relation of this clash of opinion on Interhandel's G.A.F. holding is at this stage manifest.

*Minutes of Conference at Federal Political Department, 16th August 1946*

The United States record of the meeting is set out in Exhibit 15 to its Preliminary Observations. Mr. Fontanel, who represented the Swiss Federal Political Department, stated that M. Petitpierre—the official head of that Department—had said that Interhandel would not be immediately unblocked, that Interhandel "after two investigations by the Swiss Compensation Office *had been determined to be Swiss-owned*", and that M. Petitpierre therefore felt it was incumbent upon the American authorities to present evidence to contradict these findings. (Cf. para. 81 of the Swiss Memorial.)

The Swiss Record (Annex 5 to Swiss Observations) supports this, though it reads somewhat differently. It is, however, quite sufficient to rely upon the Swiss Record. Mr. Fontanel asked Mr. Le Roy Jones, who represented the United States at the conference, what stage had been reached in the Interhandel "affair". "If the Americans desire the blocking to be maintained, they would *have* to justify their request by furnishing us, if not with proof, at least with serious indications that I.G. Chemie is under German control."

It is, in my opinion, not possible to accept the argument that because no so-called "final position" was taken by Switzerland, no dispute existed. Parties in dispute frequently change their position. No so-called *final* deadlock is necessary to establish a dispute. On any realistic approach to the matter, the United States and Switzerland were then in dispute on the real issue on which they are now in dispute.

*Letter of 20th August, Swiss Compensation Office to Mr. Jones*

This is six days before the operative date of the United States Declaration of Acceptance. There G.A.F. is clearly in the picture. The Swiss Compensation Office, which at that time was of opinion that the German interest *"cannot be proved"* (p. 9 of Annex 3 to Memorial), was stating that what was involved in the United States' request for further investigation by the Swiss Compensation Office, in collaboration with the United States Department of Justice and Office of the Alien Property Custodian, was "not merely an enquiry concerning the question of the blocking of I.G. Chemie or measures to be taken under the Washington Accord, but rather the discovery of documents in the interests of the Office of the Alien Property Custodian".

It is in my view not possible, on any reasonable reading of this letter, not to be satisfied that if the dispute had not arisen before this date, as I am of the opinion it had, it certainly at this time had. The Swiss Compensation Office had, before sending this letter, submitted the matter to the Federal Political Department. The whole letter merits special attention, but particularly the paragraph commencing with the words "Considering that the object..., etc.". The reply of that Department was to the effect that in the main "it confirms the point of view which I have already indicated to you and which I have outlined above. Namely, on the *Swiss side*, the *opinion* is held that it is *now* for the American authorities to furnish to the Swiss Compensation Office the means of proof which in *the American view* should lead the Swiss Office to block I.G. Chemie definitively, that it to say, to consider it ... as being *under German influence.*"

A few final observations:

In my opinion, it is not permissible to treat this objection as divisible into two parts corresponding to the principal and alternative submissions or claims as if there were two separate disputes, the first, one in which the Government of Switzerland espouses the cause of its national, the second, one in which she claims relief in an independent capacity.

To do so leads to error. Such an approach to this objection mistakes form for substance. It blurs the distinctions between the subject-matter of a dispute, the dispute itself and the submissions or claims for relief, which spring from the dispute. It disregards, in my view, the essential unity of the dispute in this case—the single dispute referred to in the Swiss Application and Memorial. It focusses attention on the submissions or claims for relief rather than on the dispute itself.

All submissions and claims for relief are directed to one common purpose, to obtain for Interhandel restitution of its "assets" in G.A.F. The alternative submission or claim for relief, which directs

itself to a means by which this purpose might be achieved, has, to use the words of the Swiss Memorial (para. 90), "simply a subsidiary character".

To divide the objection in the manner indicated has, it seems to me, led to the error of seeking in respect of the first submission or claim for relief, the initial request by Switzerland for the return to Interhandel of its "assets" in G.A.F. and the first negative reply given by the United States to that request, and so disposing of the objection on this part, and then in turn disposing of what was considered a separate dispute by finding that the same fate should attend that, since it could not have arisen until after the first had.

In any event, I cannot agree that a test of demand and refusal in this case can be decisive in determining the date of the dispute. The "neutral" or "enemy" character of Interhandel being the essential dispute between the Parties, the fact that no claim or demand for restitution was made by Switzerland until after 26th August 1946 is irrelevant to the issue raised by the objection. When the demands or requests connected with either the principal or subsidiary claim for relief were made *the* dispute, in my view, already existed.

It is not without significance that the Memorial of Switzerland contains a number of paragraphs (35-40) which fall under the heading "Swiss Attempts to settle *the* Dispute". From a perusal of these paragraphs it is at once evident that *the* dispute with which we are here concerned and to which both the Swiss Application and its Memorial direct themselves had, as of course it must have, already arisen before any proposal to have recourse to arbitration or conciliation to settle the dispute was or could be made.

For the reasons above advanced, I think the first objection should have been upheld.

* * *

*Second Objection*

In dealing with this Objection the Court, following the course it did on the First Objection, has again divided what, in my opinion, is one dispute into two, elevating what was purely a subsidiary submission or claim for relief into a separate and distinct dispute. I have already expressed my reasons why I think this procedure inadmissible.

My approach to the Second Objection assumes, contrary to the view already expressed by me on the First, that the dispute arose after the 26th August 1946, and before the 28th July 1948. On that assumption I agree with the decision of the Court and with its reasons.

If instead of the words "hereafter arising" there had been inserted the words "arising after the 26th August 1946", the Objection of the United States would, I think, hardly have been arguable. In my opinion the conclusion to be reached would be the same in both. A proper test in this case is to compare the Declarations of Acceptance of the two States and by so doing determine the scope of the Court's jurisdiction covered by each. This I think leads to the conclusion that the consensual agreement, the common ground, between the Parties includes all disputes arising after the effective date of the United States' Declaration, namely the 26th August 1946. The Declarations of each State concur in comprising the dispute in question within their scope.

The Second Objection should be dismissed.

I agree with the decision of the Court and its reasons in upholding the *Third Objection* and in rejecting Part *(b)* of the Fourth Objection.

*(Signed)* Percy C. SPENDER.