DISSENTING OPINION OF JUDGE WINIARSKI

[Translation]

In its final alternative submission, the Swiss Government asks the Court to declare itself competent to decide whether the United States of America are under an obligation to submit the dispute regarding the validity of the Swiss claim either to arbitration or to conciliation. In the event of the Court declaring itself competent, the Swiss Government puts forward a number of submissions on the merits, presenting the claim formulated in its Application in various forms, but these do not affect the question here examined.

In upholding the Third Objection of the United States Government, so far as it concerns this alternative request, the Court declares that the procedure on the merits is inadmissible, although it might have led to a settlement of the dispute on that point. I cannot concur in that decision.

The United States Government argues that the alternative submissions are directed towards the same end as the principal submission, namely, the restitution to Interhandel of the assets it is claiming in the United States. "Although they avoid the use of the word restitution, the alternative submissions are only alternative ways in which the intended recovery is sought to be accomplished."

The Court is not required to consider what was the purpose of the Swiss Government in formulating its alternative claim regarding arbitration and conciliation. That claim is presented as distinct from the principal claim and must be examined as such. Its subject-matter is clearly defined. It originated with the refusal of the United States Government to submit the dispute concerning Interhandel to arbitration and, in the view of the Swiss Government, the dispute is one that is fit to be settled on the basis of the Washington Accord and the Treaty of 1931. Here there is no question of the protection of the rights and interests of the national whose cause its Government is espousing; the rights and interests at stake derive directly from international instruments which the States have signed, and to that kind of dispute the rule of the exhaustion of local remedies does not apply.

As the Judgment says, the reason for the rule is to enable a State in which the rights of a foreign national are alleged to have been injured in breach of international law to provide a remedy by its own means within the framework of its own laws. But where the rights and obligations of the two States flow directly from their treaties and agreements there can be no question of settling such dispute by recourse to local remedies. The American courts

are competent to adjudicate on the rights of a Swiss national; they have no competence to adjudicate on the existence of an obligation on the part of the United States to submit to arbitration or conciliation. The legal problems are here on different planes and their solution must be different. In my opinion, the Third Preliminary Objection should be dismissed. If the Court holds that it is not possible at this stage of the proceedings to dismiss the objection without prejudging a question of merits, or, at the least, if it thinks that it is impossible to determine with certainty that the consequences of dismissal would not affect the merits, it could follow precedents and join the objection to the merits. That would enable it to resume the proceedings and to settle the dispute by a single judgment.

In support of the decision two reasons are given in which I cannot concur.

First, the Judgment says that one interest, and one alone, that of Interhandel, underlies both the proceedings resumed by that company in the United States courts and the present international proceedings, and that that interest should determine the scope of the action brought by the Swiss Government in both its submissions. Assuming that one and the same interest is the basis of both actions, it is difficult to agree that this consideration—the existence of one, and only one, interest—should prevail over the reasons which limit the local remedies rule to claims by individuals. In the case now under consideration the claim put forward in the alternative submission aims at obtaining a recognition that the United States are under an obligation to submit to arbitration or conciliation, and the Swiss Government may have a strong interest in seeing the Court offer it a legal remedy that has been denied it.

Furthermore, a decision by the Court dismissing the Third Objection of the United States so far as concerns the alternative submission would in no way affect the right of the arbitral tribunal, should one be set up, to apply the local remedies rule quite independently, should the occasion arise, while conciliation proceedings are not required to observe that rule.

For all these reasons, I am unable to concur in the decision of the Court which declares the claim formulated by the Swiss Government in its alternative submission to be inadmissible.

(Signed) B. WINIARSKI.