WORLD LAW

The purpose of this section of the *Journal*, included for the first time in the present issue, is primarily to make available current information regarding the judgments, important orders, and advisory opinions of the World Court—now the United Nations International Court of Justice. This tribunal, to all intents and purposes a continuation of the Permanent Court of International Justice established in 1922 in accordance with a provision of the Covenant of the League of Nations, has contributed significantly to the settlement of international disputes and to the development of law. It has, accordingly, a significant place in the world community and the world legal order of today. Its pronouncements, because of their association with the international peace effort, are of importance for everyone. Because of increasing professional preoccupation with international matters, they are of ever-increasing concern to the practicing lawyer. It is believed that, as a medium for the diffusion of such information, the *Journal* can fulfill a real need.

In addition to the activities of the World Court, international legal acts and decisions of other international tribunals and of national courts relating to international law, especially those of the Supreme Court of the United States, as well as other relevant acts of national governments, may be appropriately noted and reviewed in this section.

It seems especially appropriate to begin with a digest to date of the *Interhandel Case*, one of the two issues* to which the United States has been a party before the World Court.

—The Editors

THE INTERHANDEL CASE: SWITZERLAND V. UNITED STATES[1]

THIS CASE was instituted October 2, 1957, when the Swiss Government filed an application with the Registrar of the International Court of Justice claiming restitution of assets of its national, Interhandel,

*The other one was the Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States), [1952] I.C.J. Rep. 176. The *Interhandel Case* is still pending in United States federal courts and may become the subject of further proceedings in the World Court. See also, case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), [1954] I.C.J. Rep. 19, in which the United States was *pro forma* a defendant.

[1] [1959] I.C.J. Rep. 6.

which had been vested in the United States during World War II under claim that they were, in fact, enemy, not neutral, property. The application invoked the compulsory jurisdiction of the Court, under article 36(2)[2] of its Statute, which both Switzerland and the United States had formally accepted. By order of October 24, 1957, the Court denied as unnecessary a request by Switzerland for interim measures of protection. The memorial of the plaintiff was filed in due course; the defendant replied with preliminary objections to the jurisdiction of the Court; whereupon proceedings on the merits were suspended under article sixty-two of the Rules of the Court. Hearings on the preliminary objections of the United States were held in November 1958. In the application and subsequent pleadings, and during the oral proceedings, numerous submissions were presented by the Swiss Government. Submissions accompanying its preliminary objections were re-affirmed by the United States Government at the time of the oral proceedings, which were concerned with the objections to the jurisdiction of the Court.

After a brief historical review of the dispute, the Court, in its judgment of March 21, 1959, disposed of a request by Switzerland for a declaratory judgment on the ground that under article sixty-two of the Rules, it was inadmissible at the present stage of the proceedings. It noted that the Swiss submissions asked for judgment that the Government of the United States was under obligation to restore the Interhandel assets or else to submit the dispute regarding them to arbitration or conciliation under agreements to which both parties to the dispute were parties. The Court then proceeded to consider the United States' objections to its jurisdiction, four in number, one of them consisting of two parts, choosing the order to suit the convenience of its presentation.

First Preliminary Objection

The United States declaration of acceptance of the Court's compulsory jurisdiction came into force on deposit with the Secretary-General of the United Nations, August 26, 1946; it contained a reservation limiting its application to disputes thereafter arising. The United States now contended

> that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before August 26th, 1946, the date on which the acceptance of the Court's compulsory jurisdiction by this country became effective. (P. 10.)

[2] The text of art. 36(2) is included in the United States declaration of acceptance, quoted in this issue of the *Journal*, *supra* pp. 64-65.

The basis of this contention lay in discussions in 1945 and 1946 which the Court found to have taken place within the framework of the Washington Accord of May 25, 1946.[3] The Accord was concerned chiefly with "enemy" assets in Switzerland. Asserting that "the facts and situations which have led to a dispute must not be confused with the dispute itself," the Court decided, after an examination of relevant documents, that the claim of Switzerland for the return of the Interhandel assets in the United States was first formulated in its note of May 4, 1948, to which the United States made its "final and considered" negative reply on July 26, 1948; and that the latter date, accordingly, was the date when the dispute as such arose. This was nearly two years subsequent to the United States declaration of acceptance of the Court's compulsory jurisdiction. The United States preliminary objection first dealt with was rejected.[4]

[3] 14 DEP'T STATE BULL. 1121 (1946). This agreement, in the language of the Court,

> 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:
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> *Article IV, paragraph 1.*
>
> 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."

[4] The judges stood 10-5 on this finding. The dissenting judges considered the dispute to have been essentially over the status of Interhandel. These judges objected to the Court's reliance on the submission of the parties as the basis for determination of the dispute. In their view, the dispute arose prior to August 26, 1946, and the preliminary objection of the United States ought to have been upheld.

SECOND PRELIMINARY OBJECTION

The United States further contended

that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before July 28th, 1948, the date on which the acceptance of the Court's compulsory jurisdiction by this country became binding on this country as regards Switzerland. (Pp. 10-11.)

The declaration of acceptance of Switzerland, however, contained no reservation regarding the date a dispute arising prior to which was excluded. The argument set out in the United States preliminary objections was quoted by the Court as follows:

The United States Declaration, which was effective August 26th, 1946, contained the clause limiting the Court's jurisdiction to disputes "hereafter arising," while no such qualifying clause is contained in the Swiss Declaration which was effective July 28th, 1948. But the reciprocity principle . . . requires that as between the United States and Switzerland the Court's jurisdiction be limited to disputes arising after July 28th, 1948 . . . . Otherwise, retroactive effect would be given to the compulsory jurisdiction of the Court. (P. 23.)

To this, the Court replied:

Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other Party, Switzerland, has not included in its own Declaration. (P. 23.)[5]

The Court, accordingly, rejected the objection unanimously.[6]

FOURTH PRELIMINARY OBJECTION[7]

The Court next considered the second part of the fourth objection, in which the United States contended

[5] *Cf.* Case of Certain Norwegian Loans (France v. Norway), [1957] I.C.J. Rep. 9, *passim.*

[6] The Court, in rendering this judgment, was composed of President Klaestad; Vice-President Zafrulla Khan; Judges Basdevant, Hackworth, Winiarski, Badawi, Armand-Ugon, Kojevnikov, Lauterpacht, Moreno Quintana, Cordova, Koo, Spiropoulos, Spender; Judge *ad hoc* Carry.

A further submission by Switzerland, relating to the asserted obligation of the United States to agree to arbitration or conciliation was found not to have arisen until 1957. *Infra* note 12.

[7] Discussion of the third preliminary objection follows that of the two parts of the fourth.

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. (P. 11.)

The Court noted that in challenging the seizure and retention by the United States of Interhandel assets, the Swiss Government had invoked both general international law and a specific international act.[8] It then stated that it would not at the present stage of proceedings undertake to assess the validity of the grounds upon which they had been invoked by the Swiss Government, since that would be to enter into the merits of the dispute: it sufficed to consider whether those grounds were such as to justify the provisional conclusion that they might be of relevance to the case and, if so, whether questions relating to their validity and interpretation were questions of international law.[9]

Switzerland had, in its principal submission, invoked the Washington Accord and had argued that Interhandel's assets in the United States were covered by the provision that the United States "will unblock Swiss assets." On the other hand, the United States had contended that the Accord related to German property in Switzerland and the just-mentioned provision for unblocking was "of no relevance whatever in the present dispute." The Court, finding the parties in disagreement with regard to the meaning of the term "unblock" and the term "Swiss assets," said:

> 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[10] of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law. (P. 24.)

Indeed, the "whole question" was "whether the assets of Interhandel" were enemy or neutral property:

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[8] The Washington Accord, *supra* note 3, an executive agreement the parties to which are Switzerland, France, the United Kingdom, and the United States.

[9] The Court based its holding upon the advisory opinion of the Permanent Court of International Justice concerning Nationality Decrees issued in Tunis and Morocco, P.C.I.J., ser. B, No. 4, at 7 (1923). This opinion was in response to a request by the Council of the League of Nations in connection with a comparable dispute between the United Kingdom and France. Appreciation of the divergent views, the Permanent Court found, "involves, owing to the very nature of the divergence, the interpretation of international engagements. The question therefore does not, according to international law, fall solely within the domestic jurisdiction of a single State."

[10] Relating to unblocking Swiss assets. See *supra* note 3.

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. (P. 25.)

The Court then considered the objection in the light of the alternative Swiss submission requesting it to adjudge the United States under obligation to submit the dispute to arbitration or conciliation. It noted that the Washington Accord contained a clause providing for arbitration[11] and that the Swiss-United States Treaty of Arbitration and Conciliation, 1931, provided that[12]

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 conciliation, as the Contracting Parties may at the time decide.

"The interpretation and application of these provisions relating to arbitration and conciliation," said the Court, "involve questions of international law."

Accordingly, the Court rejected part (b) of the fourth preliminary objection of the United States.[13]

Coming now to the reservation by the United States in its declaration of acceptance of the jurisdiction of the World Court under article 36(2) of its Statute, of

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,

the Court was confronted with what the United States accounted part (a) or the first part of its fourth preliminary objection—

[11] Art. VI.

[12] Art. I, 129 L.N.T.S. 465; 47 Stat. 1983. See also arts. V, VI. Both parties except from the obligation to arbitrate matters within domestic jurisdiction, but neither reserves the right to determine for itself whether a matter is within its domestic jurisdiction. Submission to arbitration was, however, to be effected by special agreement, subject, in the case of the United States, to the advice and consent of the Senate. Art. VII.

[13] The judges stood 14-1. Judge Kojevnikov considered that this preliminary objection "ought not to have been rejected but, in the present case, should have been joined to the merits if the Court had not upheld the third objection."

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[14] (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. (P. 11.)

By this, the Court understood that the United States sought the finding that it was

without jurisdiction to entertain the Application of the Swiss Government, for the reason that the sale or disposition by the Government of the United States of the shares of GAF which have been vested as enemy property "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." The Preliminary Objections state that: "Such declination encompasses all issues raised in the Swiss Application and Memorial (including issues raised by the Swiss-United States Treaty of 1931 and the Washington Accord of 1946)," but they add: "in so far as the determination of the issues would affect the sale or disposition of the shares." And they immediately go on to say: "However, the determination pursuant to paragraph (b) of the Conditions attached to this country's acceptance of the Court's compulsory jurisdiction is made only as regards the sale or disposition of the assets."

During the oral arguments, the Agent for the United States continued to maintain that the scope of part (a) of the Fourth Objection was limited to the sale and disposition of the shares. At the same time, while insisting that local remedies were once more available to Interhandel and that, pending the final decision of the Courts of the United States, the disputed shares could not be sold, he declared on several occasions that part (a) of the Fourth Objection has lost practical significance, that "it has become somewhat academic," and that it is "somewhat moot."

Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part (a) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection of the United States, it appears to the Court that part (a) of the Fourth Pre-

[14] The Delaware corporation shares of stock in which, in the name of Interhandel, had been vested under the Trading with the Enemy Act, 40 Stat. 419 (1917), as amended, 55 Stat. 838, 839-41 (1941).

liminary Objection is without object at the present stage of the proceedings. (Pp. 25-26.)[15]

THIRD PRELIMINARY OBJECTION

Finally, the Court passed upon the United States' objection

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. (P. 11.)

This objection it considered one to the admissibility of the case for adjudication rather than to its jurisdiction. For that reason, it deferred its consideration until it had decided the preceding objections, all of which related to jurisdiction alone.

On October 24, 1957, in the same month in which the Swiss application was filed, the Court had issued an order,[16] in response to Switzerland's request[17] for interim measures of protection of the shares of stock its national claimed and which it considered to be in danger of sale by the United States holding authorities acting under national law.[18] Interhandel had, in accordance with that law, brought suit in United States national courts seeking restitution of this property, but its case had been dismissed with prejudice, without having been heard on the merits.[19] Effort on Interhandel's part had not, however, ceased, and on October 14, 1957, subsequent to the institution of proceedings in the World Court and request for interim measures, the Supreme Court had granted a writ of certiorari.[20] In June 1958, the Supreme Court reversed the action of the Court of Appeals and remanded the case.[21] The case was, in March 1959, and still is, pending in the United States courts. Accordingly, while a tenable contention of exhaustion of local remedies could be made when Switzerland's case was instituted in the World Court, the situation with respect both to danger of disposal of Interhandel's property and to the possible trial of its case on the merits

[15] The judges stood 10-5 on this finding.

[16] [1957] I.C.J. Rep. 105.

[17] Oct. 3, 1957, under art. 41 of the Statute and art. 61 of the Rules of the Court. See also art. 62 of the Rules. For the text of the Rules see [1950-1951] I.C.J. Y.B. 235. They were adopted May 6, 1946, and have not since been changed, [1958-1959] *id.* at 34.

[18] *Supra* note 14.

[19] Societe Internationale pour Participations Industrielles et Commerciales S. A. v. Brownell, 243 F.2d 254 (D.C. Cir. 1957).

[20] 355 U.S. 812 (1957).

[21] 357 U.S. 197 (1958).

in United States courts immediately changed. The World Court, having been assured that the United States was not taking action "to fix a time schedule for the sale" of the shares of stock, and understanding that such sale could be effected only after the termination of judicial proceedings pending in United States courts, found as of October 24, 1957, that there was "no need to indicate interim measures of protection."[22]

In the light of the foregoing developments, the Court in its judgment of March 21, 1959, found little difficulty in reaching the conclusion that Interhandel's local remedies had not been exhausted. It said:

> 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. (P. 27.)

It had also been contended by the Swiss Government, the Court went on to say,

> 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. (P. 28.)

In conclusion,

[22] Several of the Judges made separate or dissenting statements.

The Court considers that one interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. This interest is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form. On the other hand, the grounds on which the rule of exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission. In these circumstances, the Court considers that any distinction so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded. (P. 29.)[23]

Accordingly, the Court upheld the third preliminary objection of the United States so far as the principal and alternative submissions of the Swiss Government were concerned.

A number of the members of the Court appended separate statements or opinions, concurring or dissenting.[24] In his dissent, the President of the Court, Judge Klaestad, dealt with, among other aspects of the case, the United States reservation of decision by itself whether any given question was one of domestic jurisdiction. Various considerations led him to the conclusion

that the Court, both by its Statute and by the Charter, is prevented from acting upon that part of the Reservation which is in conflict with Article 36, paragraph 6, of the Statute,[25] but that this circumstance does not necessarily imply that it is impossible for the Court to give effect to the other parts of the Declaration of Acceptance which are in conformity with the Statute. (P. 78).

In reaching the opinion that the self-judging portion of the United States reservation could be disregarded by the Court without considering invalid as a whole the United States declaration of acceptance of jurisdiction under article 36(2) of the Statute of the Court, Judge Klaestad was influenced by the following considerations, among others:

It appears from the debate in the United States Senate concerning the acceptance of the compulsory jurisdiction of the Court, reported in the Congressional Record for July 31st and August 1st and 2nd, 1946, that fear was

[23] The judges, on this point, stood 9-6.

[24] Judges Basdevant and Kojevnikov and Judge *ad hoc* Carry made brief statements. Judges Hackworth (with whom concurred Vice-President Zafrulla Khan) Córdova, Koo, and Spender rendered separate opinions. President Klaestad and Judges Winiarski, Armand-Ugon, Lauterpacht, and Spiropoulos rendered dissenting opinions.

[25] "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be determined by the decision of the Court."

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

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

By various Applications filed in the Registry of the Court on March 3rd, 1954, March 29th, 1955, June 2nd, 1955, and August 22nd, 1958, the Government of the United States submitted claims against Governments which had not filed any Declarations accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. In previous notes to these Governments the United States Government had invited them to file such Declarations of Acceptance. It is difficult to believe that other Governments would have been invited to do so if the Government of the United States had not itself had the true intention of submitting validly and effectively to the compulsory jurisdiction of the Court. (Pp. 77-78.)[26]

[26] See also the dissenting opinion of Judge Guerrero in the Case of Certain Norwegian Loans, [1957] I.C.J. Rep. 9, 67. In that case, Judge Lauterpacht wrote a very comprehensive separate opinion taking the position that a declaration of acceptance containing a reservation regarding jurisdiction *as determined by itself* is not a legal act of which the Court can take cognizance and, accordingly, that such a declaration as a whole is void and without effect. *Id.* at 34. Judge Lauterpacht takes substantially the same position in the *Interhandel Case.*