

SEPARATE OPINION OF JUDGE HACKWORTH

I agree with the conclusions of the Court that the contention by Switzerland that the Government of the United States is under an obligation to restore the assets in the United States, claimed by Interhandel, or, in the alternative, to submit the dispute to arbitration or conciliation, is inadmissible because of the non-exhaustion by Interhandel of its remedies in the courts of the United States.

But I regret that I am unable to concur in the rejection by the Court of the First Preliminary Objection submitted by the United States contesting the jurisdiction of the Court to entertain the Swiss Application.

* * *

The First Preliminary Objection

In my view this Objection should have been sustained for the following reasons:

The Declaration by the United States accepting the compulsory jurisdiction of the Court was filed with the Secretary-General of the United Nations on August 26th, 1946. The Declaration was limited to "legal disputes hereafter arising", i.e. to disputes arising after August 26th, 1946. In my judgment the dispute here in question arose well in advance of the filing of the Declaration. To arrive at a proper understanding of the intrinsic nature of the controversy, it is necessary to examine it as a whole and from its inception. To separate it into two phases—one having to do with the blocking of Interhandel's assets in Switzerland, and the other relating to the vesting of assets claimed by Interhandel in the United States—and to reach conclusions on that basis impresses me as an unrealistic and somewhat artificial approach to the problem. The facts and the history of the controversy do not, in my view, lend themselves to such a process of simplification.

It is common ground that General Aniline and Film Corporation, an American corporation, was created by I.G. Farbenindustrie, A.G., of Frankfurt, Germany. It is also common ground that I.G. Chemie (Interhandel), a Swiss corporation, was founded on the initiative of, and originally was controlled by, I.G. Farben. The Swiss Government has contended that this tie between Interhandel and I.G. Farben was terminated in 1940 when Interhandel was reorganized. This has never been admitted by the United States.

It is unnecessary and inappropriate for present purposes to undertake definitively to pass upon these contentions. Suffice it to say that in point of fact the core of the dispute between the Parties is, and from the beginning has been, of a twofold character—the

enemy or non-enemy status of Interhandel, and the enemy or non-enemy status of assets said to belong to Interhandel. These questions have from the outset constituted the gravamen of the dispute between the two Governments. They are two interrelated aspects of one and the same problem. At no time has either been divorced from the other. It was because of the supposed enemy taint of Interhandel that shares in the General Aniline and Film Corporation, claimed by Interhandel, were vested as enemy property in 1942; it was because of this same supposed enemy taint that an effort was made by the United States to bring about the blocking of Interhandel's assets in Switzerland. It is an oversimplification of the problem to conclude, in the light of known facts, that the controversy regarding assets in Switzerland was or is something separate and apart from that relating to assets in the United States, or to assume that one began where the other left off. The controversy cannot be separated in two geographical sectors, nor is it divisible by elements of time. The same bone of contention—the enemy or non-enemy status of Interhandel and the *bona fides* of its pretensions—stands out in both phases of the dual controversy—that relating to assets in Switzerland and that relating to assets in the United States. It has been continuous. The historical background bears witness to this conclusion.

The Order issued by the Secretary of the Treasury on February 16th, 1942, and that issued by the Alien Property Custodian on February 15th, 1943, recite that the shares of General Aniline and Film Corporation, now claimed by Interhandel, had been vested as enemy property. The last-named Order described the shares as property owned by or held for the benefit of I.G. Farbenindustrie A.G., of Frankfurt, Germany.

On the same day on which the Order of February 16th, 1942, was issued the Department of State sent an Aide Mémoire to the Swiss Minister in Washington informing him of the action taken and stating that it had been taken "because, in the judgment of the Secretary of the Treasury, these shares are actually controlled by German interests". The Aide Mémoire disclaimed any intention on the part of the Government of the United States to impair, injure, or otherwise adversely affect legitimate Swiss interests. Nothing was done or said by Switzerland.

Certain steps were later taken by Interhandel to retrieve the shares, including the filing in 1948 of a civil action in the United States District Court for the District of Columbia. These latter steps although of historical interest are not important for present purposes.

Meanwhile the Allied Powers in occupation of Germany, and particularly the United States, undertook to bring about the blocking by the Government of Switzerland of assets of Interhandel in that country. The discussions which ensued are directly relevant

to the question whether the present dispute arose prior to the date on which the United States accepted jurisdiction of the Court.

Without undertaking to give a comprehensive review of these discussions it will be pertinent at the outset to refer to some of those which occurred prior to August 26th, 1946. Although the Swiss Government in late 1945 provisionally blocked the assets of Interhandel, it took the position almost from the start that Interhandel had severed its ties with I.G. Farben in 1940, and that there was, therefore, no need to decree the blocking of its property. (Memorial, para. 18.) This may be said to have marked the beginning of a definite divergence of views and hence of a dispute as to the status of Interhandel and its assets. The position of the Swiss Government was first definitely stated in a communication addressed by Mr. R. Hohl, of the Swiss Federal Department, Division of Foreign Affairs, to Mr. Daniel J. Reagan, Counsellor of the United States Legation at Berne, on November 6th, 1945. This communication, after referring to several talks which Mr. Reagan had had with Mr. Hohl's predecessor, and to an investigation made by the Swiss Compensation Office "which did not lead to the discovery of any document which would permit the conclusion that I.G. Chemie is a company under the control of Germany", added:

"I would like to inform your authorities of the foregoing and in doing this to stress the point that the very thorough investigations in Switzerland have failed to establish the actual existence of a tie between I.G. Chemie and I.G. Farben. You could also inform Washington that the Federal Authorities are going to maintain this temporary blocking until January 31, 1946, and to raise it thereafter unless prior to that date proof has been furnished on the part of the Americans or Allies that I.G. Chemie has to be considered a company predominantly under German influence within the meaning of the decrees of February 16, April 27, and July 3, 1945." (Preliminary Objection, Exhibit 12.)

This statement reveals a definite disagreement by the Swiss authorities with the contentions of the Government of the United States that Interhandel was acting as a cloak for I.G. Farben, the only qualification being an offer to receive proof from the United States or its Allies, and within a fixed time, that I.G. Chemie "has to be considered a company predominantly under German influence".

On January 19th, 1946, the Legation sent a communication to Mr. Hohl in which, after referring to an earlier communication requesting that the provisional blocking of Interhandel's assets be extended beyond the date of January 31st, he also referred to a reported change in the structure of Interhandel. It was stated:

"My Government has now requested me to convey to you its concern with the circumstance that this change in the structure of

a concern which it regards as German controlled and which has been blocked as such by the competent authorities of your Government ostensibly was permitted by those authorities.

My Government asks that I indicate to you its desire that no changes in the structure or organization of any company at present blocked under Federal decrees with respect to German assets be permitted. It regards this matter as particularly important in view of proposals made by your Government to discuss with the Allied Governments the problem of German assets in Switzerland. My Government intends to revert to this subject in any conferences which may be held in the near future with respect to this problem.

I am advised by my British and French colleagues that they are addressing letters to you in a parallel sense." (*Ibid.*, Exhibit 11.)

The proposed discussions referred to in this quotation later took place in Washington between delegations of France, Great Britain, the United States and Switzerland, and resulted in the signing, on May 25th, 1946, of an Agreement known as the Washington Accord. This Accord provided among other things: (a) for liquidation by Switzerland of property in Switzerland "owned or controlled by Germans in Germany" (the proceeds of which were to be turned over to the Allied Reparation Agency for the rehabilitation of countries devastated or depleted by Germany during the war); and (b) for the unblocking by the Government of the United States of Swiss assets in the United States. It also provided (Article VI) for the arbitration of differences which might arise with regard to the application or interpretation of the Accord. (*Ibid.*, Exhibit 28.)

This Accord has been invoked by Switzerland in the present case and will be referred to hereinafter.

Following conclusion of the Washington Accord, the discussions between representatives of Switzerland and of the United States with respect to Interhandel's assets in Switzerland continued, and on August 10th, 1946, the Swiss Compensation Office sent a communication to Mr. Harry Leroy Jones (a representative of the United States Department of Justice) in care of the American Legation in Berne, saying:

"As you know, we have made two investigations concerning this firm. According to the results of our detailed researches, we are of the opinion that the firm 'Interhandel' should not be blocked. Nevertheless, we blocked it provisionally in view of the fact that representatives of the United States have declared several times that they possess documents proving that the firm 'Interhandel' is controlled by Germans. Unfortunately, we have not yet been able to learn the nature of these documents." (*Ibid.*, Exhibit 14.)

While the door was left ajar for a further discussion "to the end that the affair in question can be liquidated as soon as possible", there is a definite note of finality to the Swiss Conclusion that the assets of Interhandel should not be blocked.

Still later, on August 16th, 1946, in a memorandum from Mr. Conover to Mr. Plitt, Attaché and Counsellor, respectively, of the American Legation, the former gave an account of a conference which he and Mr. Jones had had that afternoon with Mr. Fontanel of the Swiss Political Department. He said that Mr. Fontanel explained that he had called upon Mr. Petitpierre, Head of the Political Department, and presented a letter from Mr. Jones; that Mr. Petitpierre had stated that I.G. Chemie would not immediately be unblocked, "but that it was improper for the S.C.O. [Swiss Compensation Office] to make available to American or other foreign representatives documents relating to a firm which, after two investigations by the S.C.O., had been determined to be Swiss owned", and that "Mr. Petitpierre, therefore, felt that it was incumbent upon the American authorities to present evidence to contradict these findings". (*Ibid.*, Exhibit 15.)

Here again we have a statement by the Head of the Political Department of the Swiss Government that "after two investigations by the S.C.O., Interhandel had been determined to be Swiss owned", and that it was "incumbent upon the American authorities to present evidence to contradict these findings".

It would seem to be manifest from these documents that whereas the United States was maintaining that Interhandel was a German controlled organization, the Swiss Government was taking the definite position that Interhandel was completely divested of German control or interest. It can scarcely be doubted that a difference of view amounting to a dispute had thus eventuated, and that that dispute related both to the status of Interhandel and to its assets. The Swiss position, opposed to that of the United States, had become definite, and this prior to the time of the filing of the Declaration of the United States on August 26th, 1946.

There can be little point to saying, as was said in the oral presentations, that this period was devoted to friendly co-operation. The discussions were polite, to be sure, but nevertheless they were pointing in opposite directions. The dispute had not been formalized in diplomatic exchanges from the higher channels, but this is not a criterion. The officials, on both sides, represented their governments; they were acting in no other capacity. They were the officials in charge of the subject-matter. They had been designated by their governments to try to come to an understanding, but instead had reached an impasse on the crucial issues. Neither side deviated from its position.

But it is said that the dispute related to assets in Switzerland. So it did, but it was much broader than this. The gravamen of the dispute related to the status and operations of Interhandel. Was it truly a neutral concern, or was it acting as a cloak for I.G. Farben, the parent organization? Switzerland said that Interhandel had been cleansed of the taint of enemy character; that it was now wholly neutral in composition and its assets were assets of a neutral. The United States did not agree. Measured by any yardstick there appears to be no escape from the conclusion that there was a definite dispute between the Parties, a dispute not alone as to assets of Interhandel in Switzerland but a dispute as to the *status* of Interhandel itself and the *bona fides* of its pretensions *vis-à-vis* I.G. Farben. It was in the wake of this dispute that Switzerland later made claim to assets in the United States said by Switzerland to be neutral property.

* * *

Between the dispute concerning assets in Switzerland and the present dispute relating to assets in the United States, there is a definite connecting link. This link is shown by later exchanges of diplomatic correspondence between the two Governments:

On June 4th, 1947, the Swiss Legation in Washington sent an Aide Mémoire to the Department of State stating that the competent Swiss Authorities had allowed an appeal by Interhandel against the blocking of its assets and that it appeared very likely that the blocking would soon be lifted. In that event, it was said, "the Swiss authorities are confident that a favourable settlement will be reached with respect to the stock of the General Aniline and Film Corporation, which belongs to Interhandel and which was vested in the Alien Property Custodian in February 1942". (*Ibid.*, Exhibit 16.)

The Department of State replied, June 18th, 1947, stating that the question of the disposition to be made of the Interhandel case was one to be dealt with through the Joint Commission provided for in the Washington Accord and that:

"... Under these circumstances the Government of the United States in conformity with the obligations it undertook under the Washington Accord of May 25, 1946, is unable to consider the question raised in the reference note in any other forum than the Joint Commission.

During the course of the negotiations leading to the Accord of May 25, 1946, the United States representatives made clear that a decision on the Interhandel case can have no effect of any settlement or decision on the vesting action by the Alien Property Custodian of February 1942 of the stock of the General Aniline and Film Corporation. The United States Government has not changed its views in this matter." (*Ibid.*, Exhibit 17.)

In a further communication addressed to the Department of State on May 4th, 1948, the Minister of Switzerland referred to procedures taken in Switzerland with respect to Interhandel and stated that the Swiss Authority of Review had, on January 5th, 1948, retroactively lifted the blocking of Interhandel. It was said that, since the three Allied governments had not within the time provided by the Washington Accord asked to have the difference submitted to arbitration, the decision of the Authority of Review "declaring Interhandel a Swiss concern has become final and binding upon all parties to the Accord". The Note concluded:

"Under Article IV of the Washington Accord, the Government of the United States agreed to the release of Swiss assets in the United States.

The Minister would therefore appreciate it if the Department of State would contact the competent government agencies with a view to having the vested property returned to Interhandel." (*Ibid.*, Exhibit 19.)

By a Note dated July 26th, 1948, to the Swiss Chargé d'Affaires *ad interim*, the Department of State rejected the request for the release of the vested assets claimed by I.G. Chemie (Interhandel) stating "as the final and considered view of this Government on the matter" that:

"As representatives of the Swiss Government have heretofore been informed, this Government considers the decision of the Swiss Authority of Review as having no effect on the question of the assets in the United States vested by this Government and claimed by I.G. Chemie.

The decision of the Swiss Authority of Review was made on an appeal of I.G. Chemie from a provisional blocking order by the Swiss Compensation Office pursuant to the Swiss Federal Council Decree of February 16, 1945, and not on an appeal taken under the terms of the Washington Accord of May 25, 1946. The question of whether the assets in Switzerland held by I.G. Chemie are German assets which come within the provisions of the Washington Accord is still before the Joint Commission. Plainly the decision of the Swiss Authority of Review, when made as a result of an appeal under a Swiss decree rather than as a result of an appeal by the Joint Commission or by an interested party under the Accord, is not binding upon the United States, even as to the status of I.G. Chemie assets in Switzerland." (*Ibid.*, Exhibit 20.)

This correspondence amply demonstrates that the present dispute concerning the enemy or non-enemy status of Interhandel and the enemy or non-enemy status of assets in the United States claimed by Interhandel is nothing more than a continuation of the pre-

viously existing dispute with respect to Interhandel and its assets in Switzerland. It is said in the quotation just given that the decision of the Authority of Review is not binding on the United States "even as to the status of I.G. Chemie assets in Switzerland". From this it would seem to be manifest that the earlier phase of the dispute was never resolved except by *ex parte* proceedings in Switzerland, which were not recognized by the United States, and that that dispute continued unabated and was immediately carried over to vested assets in the United States. The Swiss insistence upon the binding force of the decision of the Swiss Authority of Review accentuates the continuance of the dispute.

The issues relating to the enemy or non-enemy status of Interhandel and of the claimed assets have not changed since 1945, when the blocking of assets in Switzerland was first raised between the Parties. To say that the present dispute relates to the restitution of assets in the United States and that this dispute arose on July 26th, 1948, when the Swiss Government's note of May 4th, 1948, requesting restoration of the assets was given a negative reply by the United States, states only part of the problem. It confuses the subject of the dispute with the object to be attained. The subject of the dispute is one thing and the object to be attained by its solution is quite a different thing. If there were no dispute regarding the status of Interhandel and the assets, there presumably could be no dispute regarding restoration of the assets. The first-named dispute, as previously stated, has existed since 1945. It is on the outcome of this dispute that restoration of assets depends.

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On the basis of the foregoing, I conclude that the present dispute arose prior to the filing on August 26th, 1946, of the Declaration by the United States accepting compulsory jurisdiction of the Court, and that under that Declaration the Court was without jurisdiction to entertain the claim of the Swiss Government.

The First Objection should have been sustained and the Application should have been dismissed.

(Signed) GREEN H. HACKWORTH.