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22-25 April 2013

INTERNATIONAL ENVIRONMENTAL LAW
PROFESSOR GÜNThER HANDL

Codification Division of the United Nations Office of Legal Affairs

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Professor Handl is the founder and former editor in chief of the Yearbook of International Environmental Law, and author of many books and articles in the field of public international law, international environmental law and law of the sea. Professor Handl is the recipient of a number of awards, including the Prix Elisabeth Haub 1997-98.

Professor Handl has been a member of the Austrian delegation to UNCED and has served as a consultant to various international organizations, including the United Nations Environment Programme, the Organization for Economic Co-operation and Development, the Asian Development Bank and the World Bank.
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CASE RELATING TO THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL COMMISSION OF THE RIVER ODER

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1929.

SEPTEMBER 10th.
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PERMANENT COURT OF INTERNATIONAL JUSTICE.

SEVENTEENTH (ORDINARY) SESSION.

Before:

MM. ANZILOTTI, President,
HUBER, Vice-President,
LODER,
NYHOLM,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
PESSÔA,
HUGHES,
NEGULESCO,
WANG,
Judges,

Count ROSTWOROWSKI, Judge ad hoc.

Deputy-Judges,

JUDGMENT No. 16.

CASE RELATING TO THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL COMMISSION OF THE RIVER ODER.

Between

The Governments of His Britannic Majesty in the United Kingdom of Great Britain and Northern Ireland, represented by Mr. O. St. C. O’Malley, C.M.G., First Secretary in H.B.M.’s Diplomatic Service; of the Czechoslovak Republic, represented by H.E. M. Miroslav Plesinger-Bozinov, Envoy Extraordinary and Minister Plenipotentiary; of His Majesty the King of Denmark, represented by H.E. M. Harald Scavenius, Envoy Extraordinary and Minister Plenipotentiary, replaced by M. Hugo Hergel, Chargé d’affaires ad interim; of the French Republic, represented by M. Basdevant, Legal Adviser to the Ministry for Foreign Affairs, Professor at the Faculty of Law of Paris; of the German Reich, represented by H.E. Dr. Seeliger, Envoy Extraordinary and Minister Plenipotentiary; of His Majesty the King of Sweden, represented by
H.E. M. Adlercreutz, Envoy Extraordinary and Minister Plenipotentiary;

and

The Government of the Polish Republic, represented by M. Bohdan Winiarски, Professor at the University of Poznań;

The Court,

composed as above,

having heard the observations and conclusions of the Parties,

delivers the following judgment:

The Governments of His Britannic Majesty in the United Kingdom of Great Britain and Northern Ireland, of the Czechoslovak Republic, of His Majesty the King of Denmark, of the French Republic, of the German Reich, and of His Majesty the King of Sweden, hereinafter referred to as the “Six Governments”, of the one part, and the Government of the Polish Republic, of the other part, have submitted to the Permanent Court of International Justice, by means of a Special Agreement concluded in London on October 30th, 1928, between the aforesaid Governments, and filed with the Registry of the Court, in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, under cover of a letter from the British Legation at The Hague dated November 29th, 1928, the question, with regard to which they were in disagreement, as to the territorial limits of the jurisdiction of the International Commission of the Oder to be laid down in the Act of Navigation of the Oder.

According to the terms of the Special Agreement, the Court is asked to decide the following questions:

“Does the jurisdiction of the International Commission of the Oder extend, under the provisions of the Treaty of Versailles, to the sections of the tributaries of the Oder, Warthe (Warta) and Netze (Notec) which are situated in Polish territory, and, if so, what is the principle laid down which must be adopted for the purpose of determining the upstream limits of the Commission’s jurisdiction?”

Article 3 of the Special Agreement providing that the Agreement “shall be communicated to the Court by one of the Parties”, the Court was duly made cognizant of the case on November 29th, 1928, the date on which the British Legation’s letter was received. The Agreement was duly communicated on or after that date to all concerned, as provided in Article 40 of the Statute; further, in accordance with the terms of Article 63 of the Statute, notification of the deposit was sent to the Parties to the Versailles Treaty, other than those concerned in the case.

The President of the Court, by an Order of December 29th, 1928, fixed the dates for the filing of the documents of the written procedure, subject to the Court’s right to modify the times so fixed in the event of the Parties submitting proposals to that effect. Such proposals having been received, the President, by an Order of February 25th, 1929, extended the times for the filing of Cases and Counter-Cases and decided to dispense with the submission of written Replies by the Parties. A further extension was granted by an Order of March 26th, 1929, which fixed their expiration at April 15th and. June 10th, 1929, respectively.

The Cases and Counter-Cases were duly filed within the times thus finally fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of public sittings held on August 20th, 21st, 22nd, 23rd and 24th, 1929, the Court heard the arguments of Sir Cecil Hurst, K.C., G.C.M.G., K.C.B., Counsel for H.B.M.’s Government in Great Britain, and of the above-mentioned Agents for the French and German Governments; it also heard declarations made by the Agents for the Czechoslovak, Danish and Swedish Governments mentioned above. Further, it heard the arguments of the above-mentioned Agent for the Polish Government, as well as of Counsel for that Government, M. Charles de Visscher, Dean of the Faculty of Law of the University of Ghent. It finally heard the replies of Sir Cecil Hurst, M. Basdevant and Dr. Sediger on behalf of the Six Governments, and the rejoinders of M. Winiarński and M. de Visscher on behalf of the Polish Government.
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In support of their respective contentions, the Parties have cited the documents a list of which is given in the first annex to this judgment; some of these documents were submitted either as annexes to the documents of the written proceedings or during the hearings; the remainder have been collected by the Registry with the assistance of the General Secretariat of the League of Nations.

The Polish Government, in its Case, cited and relied on inter alia certain passages taken, directly or indirectly, from the Minutes of the Commission on Ports, Waterways and Railways of the Conference held in Paris in 1919 which drew up the Versailles Treaty, the Six Governments in their Counter-Case raised an objection to the admission in evidence of such references. The Court, having regard to this objection, made on August 15th, 1929, an Order the full text of which is reproduced in the second annex to this judgment; the operative portion was as follows:

"The Court invites the Agents of the Parties to submit at the hearing fixed for Tuesday, August 20th, at 10.30 a.m., and before any argument upon the merits, their observations and final submissions upon the said question, it being understood that the Court will pass upon this question immediately after receiving such observations and submissions, and that the argument on the merits shall follow forthwith, unless the Court shall otherwise decide."

In execution of this Order, Sir Cecil Hurst, M. Basdevant and Dr. Seeiger on behalf of the Six Governments and M. Winiarski on behalf of the Polish Government, argued this preliminary point before the Court on August 20th, prior to any arguments on the merits, and the Court, by an Order of the same day, reproduced in full in the third annex to this judgment, ruled that:

"the Minutes of the Commission on Ports, Waterways and Railways of the Conference which prepared the

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Treaty of Versailles shall be excluded as evidence from the proceedings in the present case."

The Six Governments in their Counter-Case contended that:

"the answers of the Court to the questions submitted for decision should be those submitted in their Memorial."

These answers were as follows:

Upon the first question: that,

"under the provisions of the Treaty of Versailles, the jurisdiction of the International Commission does extend to sections, situated in Polish territory, of the Rivers Warthe and Netze, tributaries of the Oder, if there are in Polish territory sections of these rivers which come within the definition of 'Navigable waterways of international concern' contained in Article 1 of the Statute on the 'Régime of Navigable Waterways of International Concern, signed at Barcelona on the 20th April, 1921';

or, in the alternative, that,

"Under the provisions of the Treaty of Versailles, the jurisdiction of the International Commission of the Oder does extend to the sections situated in Polish territory of the Rivers Warthe (Warta) and Netze (Note) tributaries of the Oder, if there are in Polish territory sections of these rivers which fulfil the conditions of navigability laid down in Article 33 of the Treaty';

and, upon the second question submitted:

"By virtue of the provisions of Parts (1) and (2) of Chapter III of Section II of Part XII of the Treaty of Versailles, and in particular of Article 338, and by virtue of the provisions of Article 1 (2) of the Barcelona Statute, the principle which must be adopted for the purpose of determining the upstream limits of the Commission's jurisdiction is that these limits should include all sections of the Rivers Warthe (Warta) and Netze (Note) which are covered either by the provisions of Article 33 of the Treaty of Versailles or by the provisions of the general definition contained in paragraph 1 of Article 1 of the Barcelona Statute';

or, in the alternative:
"By virtue of the provisions of Parts (1) and (2) of Chapter III of Section II of Part XII of the Treaty of Versailles, and in particular of Article 331 of the Treaty of Versailles, the principle which must be adopted for the purpose of determining the upstream limits of the Committee's jurisdiction is that these limits should be fixed in accordance with the provisions of paragraph (1) of Article 1 of the Barcelona Statute; or, thirdly, that:

"Under the provisions of Parts (1) and (2) of Chapter III of Section II of Part XII of the Treaty of Versailles, the principle which must be adopted for the purpose of determining the upstream limits of the Committee's jurisdiction is that these limits should be fixed in accordance with the provisions of Article 331 of the Treaty of Versailles at those points where these rivers respectively cease to be either naturally navigable or navigable by reason of lateral canals or channels constructed in their original river beds, either duplicating or improving naturally navigable sections or connecting two naturally navigable sections."

The above are, therefore, the submissions of the Six Governments.

The Polish Government submitted in its Case that the Court will be pleased

[Translation.] "to give judgment that in accordance with the Treaty of Versailles the jurisdiction of the International Commission of the Oder does not extend to those parts of the Warta (Warthe) and the Noteć (Netze), tributaries of the Oder, which are situated in Polish territory, and therefore extends to those sections of the Warta (Warthe) and Noteć (Netze) which provide more than one State with access to the sea, that is to say, the German section of the Warta (Warthe) and the German and common sections of the Noteć (Netze)."

To this the Six Governments opposed in their Counter-Case a submission to the effect that "the contention of the Polish .... Memorial, namely that on the rivers Warthe (Warta) and Netze (Noteć), tributaries forming part of the system of the Oder, while the limits of the régime of navigation must be determined by the application of the Barcelona Statute, the limits of the jurisdiction of the Oder Commission must be determined exclusively by the application of the definition contained in Article 331 of the Treaty of Versailles, should be rejected" and that "the contention of the Polish .... Memorial, with regard to the interpretation of the definition in Article 331 of the Treaty of Versailles, should" also "be rejected".

In its Counter-Case, the Polish Government summarized its contentions in the following three points:

[Translation.]

"(1) Article 331 of the Treaty of Versailles only states that those parts of the Oder system which provide more than one State with access to the sea are international, and consequently, it excludes from this definition those parts of the tributaries of this river above the Polish frontier;

(2) The geographical definition of the internationalized system laid down in Article 331 cannot be modified by the general definition provided for in Article 338 except in so far as concerns the navigation régime, but in no case as concerns the international administration;

(3) In consequence, the jurisdiction of the Oder Commission does not extend to the purely Polish parts of the Warta (Warthe) and the Noteć (Netze)."

It will thus be seen that the submissions of the Polish Government dealt only with the first of the two questions put to the Court, leaving out of consideration the second question; in this respect, it made the following statement in its Counter-Case:

[Translation.] "The question as to what is the law which should govern the fixing of the upstream limits of the jurisdiction of the International Commission of the Oder can only arise in the event of an affirmative answer being given to the first question. The Polish Government, being of the opinion that the jurisdiction of the Commission does not extend to the purely Polish parts of the Warta (Warthe) and Noteć (Netze), was not obliged to consider the answer to this second question. It makes every reservation as to the submissions made in the Memorial of the Six Governments and as to the grounds for those submissions, and reserves the right to state its case in regard to the three solutions proposed by the Six Governments in the course of the pleadings before the International Court of Justice."

The Court, however, by an Order dated August 15th, 1929, invited
"the Agent for the Polish Government to file with the Registry by midday on Saturday, August 17th, at latest, any alternative submissions as to the second of the two questions submitted to the Court under Article 1 of the Special Agreement of October 30th, 1928".

The full text of the Order is reproduced in the fourth annex to this judgment.

Accordingly, and within the time fixed, the Agent for the Polish Government filed a document, a copy of which was immediately communicated to the other Parties; it contained the following passage:

[Translation.] "... if, contrary to what Poland regards as the law, the Court should answer the first question in the affirmative, the Polish Government could not admit that the definitions contained in Article 1 (1) of the Barcelona Statute and Article 331 of the Versailles Treaty should, as the Six Governments demand, be applied simultaneously. Article 1 (2) of the Barcelona Statute refers to waterways expressly declared, that is to say those enumerated in the first part of Article 331, paragraph 1. That part alone is unchangeable; as regards the definition, that contained in Article 331 is purely and simply to be superseded by Article 1 (1) of the Barcelona Statute."

In the arguments and declarations made on behalf of the Six Governments, their submissions as formulated in the written pleadings filed by them were maintained. On the other hand, the Agent for the Polish Government, in his arguments, submitted at least two contentions which had not been expressly stated or at any rate elaborated in the written documents filed on behalf of this Government. Having regard to this fact, the Six Governments, through the intermediary of Counsel for His Britannic Majesty's Government in Great Britain, formally asked the Court to rule that these contentions should be disregarded, whereas the Agent for the Polish Government requested the Court to overrule this demand of the Six Governments; the Court will deal at a later stage of the present judgment with the situation thus created.

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The Agent for the Polish Government in his oral arguments maintained the conclusions set forth by him in the written pleadings, as regards the first question before the Court, except for the arguments already referred to, and subject to a declaration made by him in his rejoinder to the effect that the conclusion in the Polish Case was badly worded; this conclusion should have stated "only the exact reply to the question submitted by the Special Agreement". With regard to the second question, he reserved his right briefly to state in his rejoinder the reasons for the submissions which he had presented on August 17th, 1929. Counsel for His Britannic Majesty's Government having objected to this course, on the ground that it would preclude the Six Governments from discussing these reasons, M. Winiarski made a short statement concerning the second question also; this statement did not amend or add to the submissions filed on August 17th, 1929, as stated above.

THE FACTS.

According to the arguments and to the documents before the Court, the origin of the present case is as follows:

Under Article 341 of the Treaty of Versailles, "the Oder shall be placed under the administration of an International Commission which shall comprise" representatives of Poland, Prussia, the Czechoslovak State, Great Britain, France, Denmark, and Sweden. This Commission shall, under Article 343 of the Treaty, "proceed immediately to prepare a project for the revision of the existing international agreements and regulations". Such project "shall, inter alia", under Article 344 of the Treaty, "define the sections of the river or its tributaries to which the international régime shall be applied". The régime in question is the one referred to in Article 338 of the Treaty, i.e. the régime set forth in Articles 332 to 337, inclusive, or laid down in the General Convention mentioned by Article 338 as intended to be "drawn up by the Allied and Associated Powers and approved by the League of Nations".
The International Commission set up in order to assume the administration of "the Oder" held its First Session at Baden-Baden in March, 1920. It at once undertook the work of preparing the draft Act of Navigation contemplated by Article 343 of the Versailles Treaty; difficulties, however, arose when it came to the definition of the sections to which the international régime was to apply, and at the Fourth Session of the Commission, held at Swinemünde in July, 1922, the Polish delegate maintained that "the Warta should be internationalized from its confluence with the Oder up to the Polish frontier", adding that the situation was the same as concerned the Notec in so far as it was navigable; the delegate for Prussia, on the contrary, submitted that if the principle of the internationalization of tributaries was to be adopted, it must be integrally maintained, and the navigable portions of tributaries situated in Polish territory should not be excluded from the international river system. The other delegates, except the Polish delegate, more or less completely took the same view.

At its Sixth Session, the Commission adopted, on January 29th, 1924, a resolution stating that the efforts made with a view to reconciling the opposing views had failed; that the Commission would not proceed with the preparation of the Act of Navigation; that, however, Article 376 of the Versailles Treaty afforded a solution; and that therefore the delegates should approach their respective Governments on the matter.

Following upon this resolution, the British Government, by a letter to the Secretary-General of the League of Nations dated August 23rd, 1924, asked that the question set forth hereafter should be submitted to the Advisory and Technical Committee for Communications and Transit of the League of Nations:

".... whether the International Commission provided for in Article 341 of the Treaty of Versailles, in the project to be prepared under Articles 343 and 344 for the revision of the existing International Agreements and Regulations relating to the Oder, is debarred, having regard especially to the provisions of Articles 331 and 338 of the same Treaty, in defining under Article 344 (c) the sections of the river or its tributaries to which the international régime shall be applied, from including tributaries or parts of tributaries of the Oder which are in Polish territory and are navigable".

The French Government, by a letter dated October 21st, 1924, made a similar request, formulating as follows the question at issue:

".... whether, in application of the relevant stipulations of the Versailles Treaty, including Article 338, the International Oder Commission should fix the limits of the international river system of the tributaries of the Oder at the frontier between Germany and Poland, or at the point above that frontier at which the said tributaries become naturally navigable".

The British Government, in its request, relied on Article 376 of the Treaty of Versailles, on the Resolution of the Assembly of the League of Nations of December 9th, 1920, and on Article 7 of the Rules for the organization of the Advisory and Technical Committee; under these Rules, this Committee may, if necessary, proceed to nominate a Committee of Enquiry with instructions to investigate the question and submit a report.

The reference of the matter to the conciliation procedure laid down by the above provisions led to the adoption on November 27th, 1924, by a majority of the Advisory and Technical Committee, of a "suggestion for conciliation", which was communicated to the International Oder Commission and to the Governments represented thereon. The "suggestion" was rejected by Poland, while Germany reserved its opinion. The International Oder Commission therefore in June 1925 agreed that the work on the Act of Navigation could not be usefully continued, and adopted a resolution inviting the delegates to inform their Governments of the situation, "in order that they [the Governments] might take such measures as they considered necessary".

The Advisory and Technical Committee, for its part, having meanwhile been informed of the attitude of the Governments concerned with regard to its "suggestion" of November 27th, 1924, adopted at its Eighth Session on July 30th, 1925, a resolution under the terms of which the Committee "considers
that it should declare that the procedure of conciliation which has been undertaken is now closed and that it should duly inform the Governments concerned of this fact'.

The Governments thereupon authorized their respective delegates on the Oder Commission to meet for the purpose of drafting a Special Agreement to bring the matter before the Permanent Court of International Justice for decision and defining the questions on which the ultimate decision of the Court was required. The result was the formal signature, on October 30th, 1928, of the Special Agreement referred to at the outset of this judgment.

THE LAW.

In accordance with Article 1 of the Special Agreement reproduced above, the Court has to deal with two questions which may be formulated as follows:

(1) Does the jurisdiction of the International Commission of the Oder extend to those portions of the Warthe (Warta) and the Netze (Notec), tributaries of the Oder, which are situated in Polish territory?

(2) If so, what is the law which should govern the determination of the upstream limits of this jurisdiction?

The second question, however, arises only if it is decided that the jurisdiction of the Commission extends to the portions of those rivers which are situated in Polish territory; for, if the first question were answered in the negative, the upstream limit of the Commission's jurisdiction would be the Polish frontier.

There does not appear to be any dispute between the Parties with regard to the meaning of the word jurisdiction (jurisdiction) in the present case. The Court considers that this word relates to powers possessed by the Commission under treaties in force; the questions referred to the Court relate to the territorial limits of these powers.

Before considering these questions, the Court must deal with two points which were raised, or reverted to, by the Agent for the Polish Government during the hearings and which the Representatives of the Six Governments claim should be excluded from consideration.

The first relates to the meaning of the word "Oder" in Article 341 of the Treaty of Versailles, the relevant part of which runs as follows:

"The Oder (Odra) shall be placed under the administration of an International Commission...."

The Polish Agent pointed out that Article 341 does not say "the Oder and its system referred to in Article 331," but simply "the Oder," and that therefore, if reliance be placed on this provision, the jurisdiction of the Commission extends to the Oder alone, even if in virtue of Article 331 the régime of internationalization also extends to the tributaries of the Oder.

Whatever value this argument might have in relation to the provisions of the Treaty of Versailles, and the significance of these provisions will be considered later, it is certain that it cannot be admitted to change the terms of the question put to the Court under the Special Agreement. This question as formulated proceeds on the assumption that the Commission's jurisdiction extends over those portions of the Warthe (Warta) and the Netze (Notec) which are not situated in Polish territory, and that the only point in dispute is whether the said jurisdiction ceases at the Polish frontier or whether it also extends into the territory of Poland. It may also be remarked that it was solely on this point that the dispute between the Six Governments and Poland arose in the Oder Commission and was dealt with first during the conciliation procedure and afterwards before the Court; the jurisdiction of the Commission over the German section of the Warthe (Warta) and the German and common sections of the Netze (Notec) is, moreover, conformably to the terms of the submission, admitted in the conclusions
of the Polish Case and is implicit in those of the Polish Counter-Case.

It is therefore quite clear that the questions on which the Court is asked to give judgment presuppose that the jurisdiction of the Commission is not limited to the principal river but also extends to the tributaries. These questions cannot be changed or amplified by one of the Parties.

The second point relates to the applicability of the Statute annexed to the Barcelona Convention of April 20th, 1921, relating to the régime of navigable waterways of international concern.

The Special Agreement asks the Court to settle the question "according to the provisions of the Treaty of Versailles". But Article 338 of that Treaty, of which the text will be reproduced hereafter, is to the effect that certain provisions relating to the matter at issue will be superseded, or possibly completed or modified, by the provisions of a "General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognized in such Convention as having an international character". The Parties agree that the Convention referred to is the above-mentioned Convention of Barcelona. The Six Governments base their principal argument on this latter Convention, or more precisely on the Statute annexed thereto, and made an integral part thereof, the articles of the Treaty of Versailles (aside from Article 338) being only subsidiarily relied upon by them.

Before the Committee of Enquiry of the Advisory and Technical Committee of the League of Nations, the Polish Government had contended that the Barcelona Convention, which that Government had not ratified, could not be invoked against it. This argument had been dealt with and contested by the Six Governments in their Case; but, as it did not appear either in the Case or in the Counter-Case of the Polish Government, the other side considered themselves entitled to regard it as abandoned. The Agent for the Polish Government having, however, in his oral argument, relied on the fact that Poland had not ratified the Barcelona Convention, the Six Governments asked the Court to reject the Polish contention in limine, on the ground that it would be contrary
to the letter and spirit of the Rules of Court and to the practice of arbitral tribunals on which those Rules are based, to admit new contentions at an advanced stage of the proceedings and after the opposing Parties had been led to believe that such arguments would not be put forward.

The Court considers that the objection of the Six Governments is untenable.

The fact that Poland has not ratified the Barcelona Convention not being contested, it is evident that the matter is purely one of law such as the Court could and should examine ex officio. It may further be observed that neither the Polish Case nor the Counter-Case contains anything from which it may definitely be concluded that they intended to abandon the argument based on non-ratification. The Court will therefore pass upon this point and will do so at the outset; for it is on the solution to be given by it to this question that its decision depends as to what Treaty provisions must serve as a basis for its consideration of the dispute.

The question whether the Barcelona Convention may be invoked against Poland which has not ratified it, arises out of Article 338 of the Treaty of Versailles which runs as follows:

"The régime set out in Articles 332 to 337 above shall be superseded by one to be laid down in a General Convention drawn up by the Allied and Associated Powers, and approved by the League of Nations, relating to the waterways recognized in such Convention as having an international character. This Convention shall apply in particular to the whole or part of the above-mentioned river system of the Elbe (Labe), the Oder (Odra), the Niemen (Russenstrom-Memel-Niemen), and the Danube, and such other parts of these river systems as may be covered by a general definition.

Germany undertakes, in accordance with the provisions of Article 379, to adhere to the said General Convention as well as to all projects prepared in accordance with Article 343 below for the revision of existing international agreements and regulations."
In virtue of this article the contracting Parties to the Treaty of Versailles have agreed that certain provisions of that Treaty shall be superseded by those of the future General Convention; the question is therefore whether this supersession depends on ratification of the said Convention by the States concerned—in this particular case on ratification by Poland.

It follows that the question does not relate to the Barcelona Convention in general as such, but only to the effects which that Convention may have under Article 338 of the Treaty of Versailles. It also follows that the question is important only in so far as the Barcelona Convention would, by extending them, modify the territorial limits of the jurisdiction of the Oder Commission as laid down in the Treaty of Versailles.

The question therefore is whether the obligation undertaken by Poland in virtue of Article 338 of the Treaty of Versailles is sufficient to render the Barcelona Convention applicable to the extent contemplated by that article.

With respect to this, it must be pointed out that Article 338 expressly refers to a “Convention”; unless the contrary be clearly shown by the terms of that article, it must be considered that reference was made to a Convention made effective in accordance with the ordinary rules of international law amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of their ratification.

It remains to be seen whether Article 338 intended to derogate from that rule. The contemplated Convention is one drawn up by the Allied and Associated Powers and approved by the League of Nations. As regards the first point, it may be admitted that the expression to draw up (établir) a. convention is perhaps not entirely without ambiguity; but it would be hardly justifiable to deduce from a somewhat ill-chosen expression an intention to derogate from a rule of international law so important as that relating to the ratification of conventions. As regards the approval of the League of Nations, this is probably explained by Article 23 (c) of the Covenant, under which the Members of the League are bound to “make provision to secure and maintain freedom of communications and transit”. There is nothing to support the view that this approval, the purpose of which is quite different from that of ratification, should replace the latter rather than supplement it.

The Court, therefore, concludes that, even having regard to Article 338 of the Treaty of Versailles, it cannot be admitted that the ratification of the Barcelona Convention is superfluous, and that the said Convention should produce the effects referred to in that article independently of ratification.

But if any doubt still remained as to the interpretation of Article 338, it would be dispelled by the provisions of the Convention itself. The Convention may be regarded as “drawn up” by the Allied and Associated Powers acting under Article 338 of the Treaty of Versailles. Now, far from dispensing with ratification in general or declaring that ratification would not be necessary in order to bring about the effects which the Convention was intended to have under the Peace Treaties, the Powers assembled at Barcelona adopted provisions differing in no way from the clauses generally inserted in international conventions of this nature; such provisions clearly make the coming into force of the Convention as regards each of the Parties depend upon ratification. The provisions in question are as follows:

"Article 4.

The present Convention is subject to ratification. The instruments of ratification shall be transmitted to the Secretary-General of the League of Nations, who will notify the receipt of them to the other Members of the League and to States admitted to sign the Convention. The instruments of ratification shall be deposited in the archives of the Secretariat.

In order to comply with the provisions of Article 18 of the Covenant of the League of Nations, the Secretary-General will register the present Convention upon the deposit of the first ratification.

Article 5.

Members of the League of Nations which have not signed the present Convention before December 1st, 1921, may accede to it."
The same applies to States not Members of the League to which the Council of the League may decide officially to communicate the present Convention.

Accession will be notified to the Secretary-General of the League, who will inform all Powers concerned of the accession and of the date on which it was notified.

Article 6.

The present Convention will not come into force until it has been ratified by five Powers. The date of its coming into force shall be the ninetieth day after the receipt by the Secretary-General of the League of Nations of the fifth ratification. Thereafter the present Convention will take effect in the case of each Party ninety days after the receipt of its ratification or of the notification of its accession.

Upon the coming into force of the present Convention, the Secretary-General will address a certified copy of it to the Powers not Members of the League which are bound under the Treaties of Peace to accede to it.”

The Court, therefore, considers that, as the Barcelona Convention cannot be relied on as against Poland, the questions submitted must be solved solely on the basis of the Treaty of Versailles and without regard to the reference made in Article 338 of the latter Treaty to the Convention in question.

* * *

Coming now to the first question, it may be recalled that the Six Governments ask for an answer in the affirmative, having regard (1) principally to Article 1 of the Statute annexed to the Convention of Barcelona, which is made applicable by Article 338 of the Treaty of Versailles; (2) subsidiarily, to certain articles of the Treaty of Versailles.

The Court, having, for the reasons given above, set aside the reference to the Barcelona Convention, will consider the question on the basis of the relevant articles of the Treaty of Versailles; it is on these articles alone that Poland relies in asking for a negative reply.

At the outset the Court should draw special attention to the general arrangement of Chapter III of the 2nd Section of Part XII of the Treaty of Versailles (Ports, Waterways and Railways); in this chapter are found all the articles that can have a bearing on this dispute.

This chapter contains three groups of articles. In the first, headed “(1) General Clauses”, are comprised the rules common to the four rivers, the Elbe, the Oder, the Niemen (Russ vstw-Memel-Niemen) and the Danube, which form the subject of the chapter. The second group contains “Special Clauses relating to the Elbe, the Oder and the Niemen (Russ vstw-Memel-Niemen)”; whilst the third group is devoted to “Special Clauses relating to the Danube”. This arrangement clearly shows that the special clauses must not merely be read and interpreted in the light of the general clauses, but also that they find in the latter a natural complement.

It follows that, since Article 341, which places the Oder under the administration of an international commission, does not define the territorial limits of that administration, reference must be made to Article 337, which is the first in the chapter and which indicates the limits within which the river system of the Oder is internationalized.

It is true—and on this point the Polish representatives have insisted repeatedly and from different points of view—that what is called the “régime of internationalization” of rivers, which as regards the Oder arises out of Articles 332 to 337 of the Treaty of Versailles, is not necessarily bound up with the administration by an international commission. But it is none the less true that, when a Commission is set up, it is natural to suppose that the territorial limits of the “régime” and of the “administration” by the Commission whose function is to make practical application of the principles of the régime, are coincident. Failing any contrary indication drawn from the context, it must therefore be understood that the competence of a river commission with such a function extends to all the internationalized portions of the river and river system.

Now Chapter III of Part XII of the Treaty of Versailles—except for Article 338 which does not apply in the present
case—contains no indication which could justify any differentiation between the territorial limits of the régime defined in the first group of provisions (Articles 332 to 337) and those of the administration set up or provided for in the second group (Articles 340 to 345). On the other hand, a precise indication that the régime and administration are coincident is found in Article 344 (b) which defines the matters confided to the Commissions’ powers in a manner exactly corresponding to the régime set out in Articles 332 to 337 (which under Article 345 are to govern pending the ratification of the new project) whilst Article 332 in its turn expressly refers to Article 331.

For all the reasons above given, the contention of Poland that the powers of the Commission should be limited to the river designated by the name of Oder must be discarded, even if such contention were not excluded for the reason relating to procedure already mentioned.

If the territorial limits of the régime of internationalization and those of the Commission’s administration are the same as regards the Oder, it follows that the question before the Court must be determined according to the terms of Article 331, the text of which is as follows:

"The following rivers are declared international:
the Elbe (Labe) from its confluence with the Vitava (Moldau), and the Vitava (Moldau) from Prague;
the Oder (Odra) from its confluence with the Oppa;
the Niemen (Rausstrom-Menkel-Niemen) from Grodno;
the Danube from Ulm;
and all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without transhipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river.

The same shall apply to the Rhine-Danube navigable waterway, should such a waterway be constructed under the conditions laid down in Article 353."

As regards the interpretation of this article, the only point at present in dispute is the meaning of the words "all navigable parts of these river systems which naturally provide more than one State with access to the sea".

It is not disputed that the Warthe (Warta) and the Netze (Noteć) rise in Poland and that after flowing for a long way through Polish territory, they form the German-Polish frontier for a certain distance, and that then they pass into German territory, where the Netze (Noteć) flows into the Warthe (Warta) before that river joins the Oder.

The actual wording of Article 331 shows that internationalization is subject to two conditions: the waterway must be navigable and must naturally provide more than one State with access to the sea. These are the two characteristics—and this observation, as will be seen, is not without importance in relation to the question to be answered—by which a distinction has for a long while been made between the so-called international rivers and national rivers.

The navigability of the Warthe (Warta) and the Netze (Noteć) in Polish territory being assumed, the Court has to deal only with the second condition, namely, whether that part of the two tributaries which is above the German frontier may be regarded as providing more than one State with access to the sea, in the sense of Article 331 of the Treaty of Versailles. The Polish Government contends that that part of the Warthe (Warta) and of the Netze (Noteć) respectively, which is in Polish territory provides only Poland with access to the sea and that therefore it does not fall within the definition of Article 331. On the other hand, the Six Governments maintain that the condition prescribed by that article is fulfilled; for the fact of providing more than one State with access to the sea concerns the waterway as such and not a particular part of its course.

It remains therefore to be considered whether the words "all navigable parts of these river systems which naturally provide more than one State with access to the sea" refer to tributaries and sub-tributaries as such, in such a way that if a tributary or sub-tributary in its naturally navigable course traverses or separates different States, it falls as a whole within the above definition; or whether they refer rather to that part of such tributary or sub-tributary which provides
more than one State with access to the sea, in such a way that the upstream portion of the tributary or sub-tributary is not internationalized above the last frontier crossing its naturally navigable course.

In support of their argument, the Six Governments have submitted that the word part in Article 331 refers to river systems, and that a part of a river system, in the natural meaning of the terms, is one of the units composing the said system, namely, a tributary or sub-tributary. And they have endeavoured to support this interpretation by observing that, when in Article 331 it was intended to refer to a part of a waterway, the word section was used.

The Court fully appreciates the value of this argument, but considers that it is not alone sufficient to show that the intention of the contracting Parties was to internationalize tributaries and sub-tributaries as such.

Nor can the Court, on the other hand, accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of States. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favorable to the freedom of States.

The Court must therefore go back to the principles governing international fluvial law in general and consider what position was adopted by the Treaty of Versailles in regard to these principles.

It may well be admitted, as the Polish Government contend, that the desire to provide the upstream States with the possibility of free access to the sea played a considerable part in the formation of the principle of freedom of navigation on so-called international rivers.

But when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.

It is on this conception that international river law, as laid down by the Act of the Congress of Vienna of June 9th, 1815, and applied or developed by subsequent conventions, is undoubtedly based. The relevant provisions of this Act are as follows:

[Translation.]

"Article 108.

The Powers whose territories are separated or traversed by the same navigable river undertake to settle by common agreement all questions affecting navigation thereon. They shall appoint for this purpose commissioners, who shall meet, at the latest, six months after the end of this Congress, and take for the basis of their work the principles laid down in the following articles.

Article 109.

Navigation throughout the whole course of the rivers referred to in the preceding article, from the point where they respectively become navigable to their mouths, shall be entirely free, and shall not in the matter of commerce be prohibited to anybody, provided that they conform to the regulations regarding the police of this navigation, which shall be drawn up in a manner uniform for all and as favourable as possible to the commerce of all nations."

If the common legal right is based on the existence of a navigable waterway separating or traversing several States, it
is evident that this common right extends to the whole navigable course of the river and does not stop short at the last frontier; no instance of a treaty in which the upstream limit of internationalization of a river is determined by such frontier rather than by certain conditions of navigability has been brought to the attention of the Court.

It therefore remains to consider what is the position adopted in this matter by the Treaty of Versailles. In contradistinction to most previous treaties which limit the common legal right to riparian States, the Treaty of Versailles and the other Peace Treaties which almost textually reproduce the essential provisions of the former Treaty, adopted the position of complete internationalization, that is to say, the free use of the river for all States, riparian or not. Article 332 grants freedom of navigation on waterways declared international in the previous article to all Powers on a footing of perfect equality. This provision would be inappropriate, if not arbitrary, if the freedom stopped short at the last political frontier.

The introduction of representatives of non-riparian Powers on the river commissions is not exclusively or mainly due to the desire to afford a greater measure of protection to the interests of landlocked States; it is rather to be explained by the interest that non-riparian States may have in navigation on the waterways in question. It would be difficult to understand why that interest should not be recognized where the question of reaching the ports of the last upstream State is involved. The interest of all States is in liberty of navigation in both directions.

In the same way, it must be noted that Article 331 mentions geographical points in fixing the limit from which rivers are internationalized, without taking any account of the last political frontier. Thus, the Elbe (Labe) is declared international from its confluence with the Vitava (Moldau) and the Vltava (Moldau) from Prague; the Oder (Odra) from its confluence with the Oppa; the Niemen (Russstrom-Memel-Niemen) from Grodno; the Danube from Ulm. It is not necessary for the Court to enquire what criteria served as a basis for this determination. It is sufficient to observe that points within the territory of the last upstream riparian

State were everywhere chosen; this fact, which entirely corresponds with the principles of international fluvial law summed up above, seems hardly in accordance with the Polish contention which, if it were well-founded, should apply to the principal river as much as to the tributaries.

Finally, mention must also be made of Article 344 (c) which provides that the projects for revision of the existing international agreements and regulations to be prepared by the international commissions in accordance with Article 343 shall “define the sections of the river or its tributaries to which the international régime shall be applied”. This provision—which places the river and the tributaries on the same footing—is easily understood if, in the case of the tributaries as in the case of the river, the delimitation depends on certain material circumstances, the application of which involves a more or less discretionary element; but it would have no meaning if the limit of internationalization of the tributaries was determined by the last political frontier.

From all that precedes, the conclusion may be drawn that the Treaty of Versailles adopts the same standpoint as the Act of Vienna and the treaty law which applied and developed the principles of that Act. That is, moreover, what the Allied and Associated Powers expressly declared in their Reply to Germany on June 16th, 1919: “the provisions regarding internal navigation routes apply only to river systems which are all international as defined by the Congress of Vienna and by later conventions”.

Article 331 must therefore be interpreted in the light of these principles, which leave no doubt that the internationalization of a waterway traversing or separating different States does not stop short at the last political frontier, but extends to the whole navigable river. The Court, having already observed that the territorial limits of the administration of the Oder Commission coincide with the territorial limits of internationalization referred to in Article 331, therefore reaches the conclusion that the jurisdiction of that Commission extends to those portions of the Warthe (Warta) and Netze (Noteč) which are situated in Polish territory.
Besides the arguments already considered, the Parties submitted several others during the written and oral proceedings drawn from certain provisions of the Peace Treaties concerning other rivers, in particular the Moselle and the Danube, and from the proceedings for the establishment of the definitive Statute of the latter river. The Court, being of opinion that these arguments, drawn from independent provisions and diplomatic negotiations, cannot modify the conclusion which it has reached by means of a direct interpretation of the provisions applicable in the particular case, does not think it necessary to deal with these arguments.

One exception, however, must be made as regards the argument which the Polish Government endeavoured to draw from the Reply of the Allied and Associated Powers to the Austrian Delegation, in which the following passage is to be found:

"The Allied and Associated Powers have considered whether the international régime should be extended, as the Austrian Delegation proposes, to the whole navigable course of the tributaries of the Danube, of the Drave, of the Save, of the Theiss. It has not appeared to them desirable for the moment to push internationalization further than the definition of Article 291 (285) provides for, and to internationalize a navigable part of a river system which does not naturally provide more than one State with access to the sea."

Taken in itself, and literally, this passage might seem to express the idea underlying the Polish interpretation of Article 331 of the Treaty of Versailles. But if Austria's demand be read attentively and if the territorial conditions of the course of these tributaries be considered, it appears that what Austria asked for and the Powers refused to admit was the internationalization of even purely national tributaries or of tributaries the national status of which was not yet finally established. If this is so, the refusal "to internationalize a navigable part of a river system which does not naturally provide more than one State with access to the sea" would simply mean a refusal to go beyond the interpretation which the Court has just given to Article 331 of the Treaty of Versailles. The Court is unable to find in the reply given to the Austrian Delegation any sufficient ground for a different interpretation.

* * *

The Court having given an affirmative reply to the first question, must also answer the second.

The Special Agreement does not ask the Court to fix the upstream limits of the jurisdiction of the Oder Commission, but only to say what is the law which should govern their determination. It follows from what has been said that this law is to be found in Article 331 of the Treaty of Versailles.

According to this article, the régime of internationalization and therefore the jurisdiction of the Commission includes "all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without transhipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river". It follows that the jurisdiction of the Commission extends up to the points at which the Warthe (Warta) and the Netze (Noteč) cease to be either naturally navigable or navigable by means of lateral channels or canals which duplicate or improve naturally navigable sections or connect two naturally navigable sections of the same river.

FOR THESE REASONS,

The Court,

having heard both Parties,

by nine votes to three,

gives judgment to the following effect:

(z) Under the provisions of the Treaty of Versailles, the jurisdiction of the International Commission of the Oder
extends to the sections of the Warthe (Warta) and Netze (Noteć) which are situated in Polish territory.

(2) The principle laid down, which must be adopted for the purpose of determining the upstream limits of the Commission's jurisdiction, is the principle laid down in Article 331 of the Treaty of Versailles.

Done in English and French, the English text being authoritative, at the Peace Palace, The Hague, this tenth day of September, nineteen hundred and twenty-nine, in eight copies, one of which is to be placed in the archives of the Court and the others to be forwarded to the Agents of the Governments of His Britannic Majesty in Great Britain, of Czechoslovakia, Denmark, France, Germany, and Sweden, as also to the Agent of the Government of Poland.

(Signed) D. ANZIOLLOTTI,
President.

(Signed) J. LOPEZ OLIVÁN,
Deputy-Registrar.

MM. de Bustamante and Pessóa, judges, and Count Rostworowski, judge ad hoc, declaring that they were unable to concur in the judgment delivered by the Court, and availing themselves of the right conferred on them by Article 62 of the Rules of Court, attached to the judgment this statement of their dissent.

M. Huber, Vice-President, while agreeing with the judgment, felt it necessary to express certain reservations concerning the reasons which led the Court to exclude all application of the Statute annexed to the so-called Convention of Barcelona. On this subject, he presented the following observations.

(Initialled) D. A.
(Initialled) J. L. O.
Trail Smelter Arbitration
(United States of America v. Canada)
16 April 1938 and 11 March 1941

Reports of International Arbitral Awards, Vol. III
PARTIES: United States of America, Canada.

SPECIAL AGREEMENT: Convention of Ottawa, April 15, 1935.

ARBITRATORS: Charles Warren (U.S.A.), Robert A. E. Green-shields (Canada), Jan Frans Hostie (Belgium).

AWARD: April 16, 1938, and March 11, 1941.


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\* For bibliography, index and tables, see end of this volume.
Special agreement.

CONVENTION FOR SETTLEMENT OF DIFFICULTIES ARISING FROM OPERATION OF SMELTER AT TRAIL, B.C. ¹

Signed at Ottawa, April 15, 1935; ratifications exchanged Aug. 3, 1935

The President of the United States of America, and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,

Considering that the Government of the United States has complained to the Government of Canada that fumes discharged from the smelter of the Consolidated Mining and Smelting Company at Trail, British Columbia, have been causing damage in the State of Washington, and

Considering further that the International Joint Commission, established pursuant to the Boundary Waters Treaty of 1909, investigated problems arising from the operation of the smelter at Trail and rendered a report and recommendations thereon, dated February 28, 1931, and

Recognizing the desirability and necessity of effecting a permanent settlement,

Have decided to conclude a convention for the purposes aforesaid, and to that end have named as their respective plenipotentiaries:

The President of the United States of America:

PIERRE DE L. BOAL, Chargé d’Affaires ad interim of the United States of America at Ottawa;

His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, for the Dominion of Canada:

The Right Honorable RICHARD BEDFORD BENNETT, Prime Minister, President of the Privy Council and Secretary of State for External Affairs;

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

Article I.

The Government of Canada will cause to be paid to the Secretary of State of the United States, to be deposited in the United States Treasury, within three months after ratifications of this convention have been exchanged, the sum of three hundred and fifty thousand dollars, United States currency, in payment of all damage which occurred in the United States, prior to the first day of January, 1932, as a result of the operation of the Trail Smelter.

Article II.

The Governments of the United States and of Canada, hereinafter referred to as “the Governments”, mutually agree to constitute a tribunal hereinafter referred to as “the Tribunal”, for the purpose of deciding the questions

¹ U.S. Treaty Series No. 893.
referred to it under the provisions of Article III. The Tribunal shall consist of a chairman and two national members.

The chairman shall be a jurist of repute who is neither a British subject nor a citizen of the United States. He shall be chosen by the Governments, or, in the event of failure to reach agreement within nine months after the exchange of ratifications of this convention, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article 49 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on October 18, 1907.

The two national members shall be jurists of repute who have not been associated, directly or indirectly, in the present controversy. One member shall be chosen by each of the Governments.

The Governments may each designate a scientist to assist the Tribunal.

**Article III.**

The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

1. Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

2. In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and, if so, to what extent?

3. In the light of the answer to the preceding Question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?

4. What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

**Article IV.**

The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned.

**Article V.**

The procedure in this adjudication shall be as follows:

1. Within nine months from the date of the exchange of ratifications of this agreement, the Agent for the Government of the United States shall present to the Agent for the Government of Canada a statement of the facts, together with the supporting evidence, on which the Government of the United States rests its complaint and petition.

2. Within a like period of nine months from the date on which this agreement becomes effective, as aforesaid, the Agent for the Government of Canada shall present to the Agent for the Government of the United States a statement of the facts, together with the supporting evidence, relied upon by the Government of Canada.

3. Within six months from the date on which the exchange of statements and evidence provided for in paragraphs 1 and 2 of this article has been completed, each Agent shall present in the manner prescribed by paragraphs 1 and 2 an answer to the statement of the other with any additional evidence and such argument as he may desire to submit.

**Article VI.**

When the development of the record is completed in accordance with Article V hereof the Governments shall forthwith cause to be forwarded to each member of the Tribunal a complete set of the statements, answers, evidence and arguments presented by their respective Agents to each other.

**Article VII.**

After the delivery of the record to the members of the Tribunal in accordance with Article VI the Tribunal shall convene at a time and place to be agreed upon by the two Governments for the purpose of deciding upon such further procedure as it may be deemed necessary to take. In determining upon such further procedure and arranging subsequent meetings, the Tribunal will consider the individual or joint requests of the Agents of the two Governments.

**Article VIII.**

The Tribunal shall hear such representations and shall receive and consider such evidence, oral or documentary, as may be presented by the Governments or by interested parties, and for that purpose shall have power to administer oaths. The Tribunal shall have authority to make such investigations as it may deem necessary and expedient, consistent with other provisions of this convention.

**Article IX.**

The Chairman shall preside at all hearings and other meetings of the Tribunal and shall rule upon all questions of evidence and procedure. In reaching a final determination of each or any of the Questions, the Chairman and the two members shall each have one vote, and, in the event of difference, the opinion of the majority shall prevail, and the dissent of the Chairman or member, as the case may be, shall be recorded. In the event that no two members of the Tribunal agree on a question, the Chairman shall make the decision.

**Article X.**

The Tribunal, in determining the first question and in deciding upon the indemnity, if any, which should be paid in respect to the years 1932 and 1933, shall give due regard to the results of investigations and inquiries made in subsequent years. Investigators, whether appointed by or on behalf of the Governments, either jointly or severally, or the Tribunal, shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the properties upon which damage is claimed to have occurred or to be occurring, and their reports may, either jointly or severally, be submitted to and received by the Tribunal for the purpose of enabling the Tribunal to decide upon any of the Questions
ARTICLE XI.

The Tribunal shall report to the Governments its final decisions, together with the reasons on which they are based, as soon as it has reached its conclusion in respect to the Questions, and within a period of three months after the conclusions of proceedings. Proceedings shall be deemed to have been concluded when the Agents of the two Governments jointly inform the Tribunal that they have nothing additional to present. Such period may be extended by agreement of the two Governments.

Upon receiving such report, the Governments may make arrangements for the disposition of claims for indemnity for damage, if any, which may occur subsequently to the period of time covered by such report.

ARTICLE XII.

The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal.

ARTICLE XIII.

Each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal and the expenses of its national member and scientific assistant.

All other expenses, which by their nature are a charge on both Governments, including the honorarium of the neutral member of the Tribunal, shall be borne by the two Governments in equal moieties.

ARTICLE XIV.

This agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place at Ottawa as soon as possible.

In witness whereof, the respective plenipotentiaries have signed this Convention and have hereunto affixed their seals.

Done in duplicate at Ottawa this fifteenth day of April, in the year of our Lord, one thousand, nine hundred and thirty-five.

[seal] Pierre de L. Boal.

TRAIL SMELTER ARBITRAL TRIBUNAL.

DECISION


This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April 15, 1935, duly ratified by the two parties, and ratified exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention")

By Article II of the Convention, each Government was to choose one member of the Tribunal, "a jurist of repute", and the two Governments were to choose jointly a Chairman who should be a "jurist of repute and neither a British subject nor a citizen of the United States".

The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A. E. Greenhill of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?
The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the District of Columbia, on August 16, 17, 18, 19, 1937; and in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the Tribunal “to report to the Governments its final decisions . . . and within a period of three months after the conclusion of the proceedings”, i.e., on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of the two Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

The Tribunal is prepared now to decide finally Question No. 1, propounded to it in Article III of the Convention; and it hereby reports its final decision on Question No. 1, its temporary decision on Questions No. 2 and No. 3, and provides for a temporary régime thereunder and for a final decision on these questions on Question No. 4, within three months from October 1, 1940.

Wherever, in this decision, the Tribunal has referred to decisions of American courts or to American law, it has acted pursuant to Article IV, as follows: “The Tribunal shall apply the law and practice prevailing in dealing with cognate questions in the United States of America . . .”

In all the consideration which the Tribunal has given to the problems presented to it, and in all the conclusions which it has reached, it has been guided by that primary purpose of the Convention expressed in the words of Article IV, that the Tribunal “shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned”, and further expressed in the opening paragraph of the Convention as to the “desirability and necessity of effecting a permanent settlement” of the controversy.

The controversy is between two Governments involving damage occurring in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada), for which damage the latter has assumed by the Convention an international responsibility. In this controversy, the Tribunal is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of “parties concerned”, in Article IV and of

“interested parties”, in Article VIII of the Convention and although the damage suffered by individuals may, in part, “afford a convenient scale for the calculation of the reparation due to the State” (see Judgment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28).

Part One.

By way of introduction to the Tribunal’s decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the International Boundary Line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley between these two ranges is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary on the American side of the line and on the east side of the river, is a place known as Boundary; and four or five miles south of the boundary on the east bank of the river is a farm named after its owner, Stroh farm. These three places are specially noted since they are the locations of automatic sulphur dioxide recorders installed by one or other of the Governments. The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies, and automatic sulphur dioxide recorders have been installed here and at a point on the west bank northerly of Northport. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southwest to northwest; entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about seventeen miles, the town of Bosburg. Three miles south of Bosburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and in area.
At Marble and to the south, various other creeks enter the river from the west side—Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks above mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1936 inclusive averaged slightly below seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The average crop-year precipitation over the same period is slightly over sixteen inches, with a variation from a minimum of 10.10 inches in 1929 to a maximum of 24.01 in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1932, 5.43 inches; in 1933, 3.03 inches; in 1934, 2.74 inches; in 1933, 2.02 inches; in 1929, 4.44 inches. The average snowfall was reported in 1935 by United States Government agents as fifty-eight inches at Northport. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74 per cent at 5 a.m. and an average minimum of 26 per cent at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934, 1935, and 1936, at Northport was as follows:

<table>
<thead>
<tr>
<th>Month</th>
<th>1934</th>
<th>1935</th>
<th>1936</th>
</tr>
</thead>
<tbody>
<tr>
<td>January</td>
<td>32</td>
<td>31</td>
<td>29</td>
</tr>
<tr>
<td>February</td>
<td>33</td>
<td>34</td>
<td>33</td>
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<tr>
<td>March</td>
<td>34</td>
<td>33</td>
<td>32</td>
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<tr>
<td>April</td>
<td>36</td>
<td>35</td>
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<td>May</td>
<td>38</td>
<td>37</td>
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<td>June</td>
<td>39</td>
<td>38</td>
<td>37</td>
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<tr>
<td>July</td>
<td>38</td>
<td>37</td>
<td>36</td>
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<td>August</td>
<td>35</td>
<td>34</td>
<td>33</td>
</tr>
<tr>
<td>September</td>
<td>33</td>
<td>32</td>
<td>31</td>
</tr>
<tr>
<td>October</td>
<td>30</td>
<td>29</td>
<td>28</td>
</tr>
<tr>
<td>November</td>
<td>26</td>
<td>25</td>
<td>24</td>
</tr>
</tbody>
</table>

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is treated in detail in a later part of this decision and need not be considered further at this point.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the city of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. The population of Northport, according to the United States Census in 1900, was 787; in 1910, it was 476; in 1920, it was 906; and in 1930, it was 391. The population of the area which may be termed, in general, the "Northport Area," according to the United States Census in 1910, was 1,448; in 1920, it was 2,142; and in 1930, it was 1,121. The population of this area as divided into the Census Precincts was as follows:

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<tr>
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</thead>
<tbody>
<tr>
<td>Northport</td>
<td>845</td>
<td>692</td>
<td>1,993</td>
<td>510</td>
</tr>
<tr>
<td>Nigger Creek</td>
<td>27</td>
<td>97</td>
<td>29</td>
<td></td>
</tr>
<tr>
<td>Frontier</td>
<td>103</td>
<td>71</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>Cummins</td>
<td>244</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Doyle</td>
<td>187</td>
<td>290</td>
<td>195</td>
<td></td>
</tr>
<tr>
<td>Deep Creek</td>
<td>65</td>
<td>119</td>
<td>87</td>
<td></td>
</tr>
<tr>
<td>Flat Creek</td>
<td>52</td>
<td>126</td>
<td>137</td>
<td></td>
</tr>
<tr>
<td>Williams</td>
<td>71</td>
<td>103</td>
<td>60</td>
<td></td>
</tr>
</tbody>
</table>

(1) It will be noted that the precincts immediately adjacent to the boundary line were Frontier, Nigger Creek and Boundary; and that Frontier and Nigger Creek Precincts were at the present time included in the Northport Precinct.

The area of all land in farms in the above precincts, according to the United States Census of Agriculture in 1925 was 21,511 acres; in 1930, 28,644 acres; and in 1935, 24,772 acres. The area in crop land in 1925 was 3,474 acres; in 1930, 4,285 acres; and in 1933, 4,568 acres. The farm population in 1925 was 969; in 1930, 603; and in 1935, 466.

In the precincts nearest the boundary line, viz., Boundary and Northport (including Frontier and Nigger Creek prior to 1935 Census), the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; and in 1935, 5,666 acres. The area in crop land in 1925 was 756 acres; in 1930, 1,227 acres; and in 1935, 963 acres. The farm population in 1925 was 149; in 1930, 193; and in 1935, 145.

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter," operated by the Lelo Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company, which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although, as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over wood fires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, during the Great War, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent over a more or less restricted area by the operation of this smelter plant.

The record and evidence placed before the Tribunal does not disclose in detail claims for damages on account of fumigations which were made between 1896 and 1908, but it does appear that there was considerable litigation in Stevens County courts based on such claims. It also appears in evidence that prior to 1908, the company had purchased smoke easements from sixteen owners of land in the vicinity covering 2,330 acres. It further appears that from 1916 to 1921, claims for damages were made and suits
were brought in the courts, and additional smoke easements were purchased from thirty-four owners of land covering 5,556.7 acres. These various smoke easements extended to lands lying four or five miles north and three miles south and three miles east of Northport and on both sides of the river, and they extended as far as the boundary line.

In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

The most important industry in the area in the past has been the lumber industry. It had its beginning with the building of the Spokane & Northern Railway. Several sawmills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. It appears from the record in 1929 that, within a radius covering some thirty-five thousand acres surrounding Northport, fifteen out of eighteen sawmills had been abandoned and only three of the small type were in operation. The causes of this condition are in dispute. A detailed description of the forest conditions is given in a later part of this decision and need not be further discussed here.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of the light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that “taken as a unit, the crop range of these soils is wide and embraces the crops suited to the climate conditions. Under good cultural operations, yields are good.” At the same time, it must be noted that a land cleared from forest growth; most of the farms contain an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year (with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early as 1917, proved a failure.

In 1896, a smelter was started under American auspices near the locality known as Trail. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian Company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on this continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased product resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air; and it is claimed by one Government (though denied by the other) that the added height of the stacks increased the area of damage in the United States. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1903. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that: one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or SO₂.)

From 1925, at least, to the end of 1931, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter.

As early as 1925 (and there is some evidence earlier) suggestions were made to the Trail Smelter that damage was being done to property in the northern part of Stevens County. The first formal complaint was made, in 1926, by one J. H. Stroh, whose farm (mentioned above) was located a few miles south of the boundary line. He was followed by others, and the Smelter Company took the matter up seriously and made a more or less thorough and complete investigation. This investigation convinced the Trail Smelter that damage had been and was being done, and it proceeded to negotiate with the property owners who had made complaints or claims with a view to settlement. Settlements were made with a number of farmers by the payment to them of different amounts. This condition of affairs seems to have lasted during a period of about two years. In June, 1928, the County Commissioners of Stevens County adopted a resolution relative to the fumigations; and on August 25, 1928, there was brought into existence an association known as the "Citizens' Protective Association". Due to the creation of this association or to other causes, no settlements were made thereafter between the Trail Smelter and individual claimants, as the articles of association contained a provision that "no member herein shall make any settlement for damages sought to be secured herein, unless the written consent of the majority of the Board of Directors shall have been first obtained".
It has been contended that either by virtue of the Constitution of the State of Washington or of a statute of that State, the Trail Smelter (a Canadian corporation) was unable to acquire ownership or smoke easements over real estate, in the State of Washington, in any manner. In regard to this statement, either as to the fact or as to the law, the Tribunal expresses no opinion and makes no ruling.

The subject of fumigations and damage claimed to result from them was first taken up officially by the Government of the United States in June, 1927, in a communication from the Consul General of the United States at Ottawa, addressed to the Government of the Dominion of Canada.

In December, 1927, the United States Government proposed to the Canadian Government that problems growing out of the operation of the Smelter at Trail should be referred to the International Joint Commission, United States and Canada, for investigation and report, pursuant to Article IX of the Convention of January 11, 1909, between the United States and Canada as it relates to the International Joint Commission and report. Following an extensive correspondence between the two Governments, they joined in a reference of the matter to that Commission under date of August 7, 1928. It may be noted that Article IX of the Convention of January 11, 1909, provides that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

The questions referred to the International Joint Commission were five in number, the first two of which may be noted: First, the extent to which property in the State of Washington has been damaged by fumes from Smelter at Trail, B.C.; second, the amount of indemnity which would compensate United States interests in the State of Washington for past damages.

The International Joint Commission sat at Northport to take evidence and to hear interested parties in October, 1928; in Washington, D.C., in April, 1929; at Nelson in British Columbia in November, 1929; and final sittings were held in Washington, D.C., on January 22 and February 12, 1930. Witnesses were heard; reports of the investigations made by scientists were put in evidence: counsel for both the United States and Canada were heard, and briefs submitted; and the whole matter was taken under advisement by the Commission. On February 28, 1931, the Report of the Commission was signed and delivered to the proper authorities. The report was unanimous and need not be considered in detail.

Paragraph 2 of the report, in part, reads as follows:

"In view of the anticipated reduction in sulphur fumes discharged from the Smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect of such fumes, up to and including the first day of January, 1922. The Commission finds and determines that all past damages and all damages up to, and including the first day of January next, is the sum of $35,000,000. Said sum, however, shall not include any damage occurring after January 1, 1932."

In paragraph 4 of the report, the Commission recommended a method of indemnifying persons in Washington State for damage which might be caused by operations of the Trail Smelter after the first of January, 1932, as follows:

"Upon the complaint of any persons claiming to have suffered damage by the operations of the company after the first of January, 1932, it is recommended by the Commission that in the event of any such claim not being adjusted by the company within a reasonable time, the Governments of the United States and Canada shall determine the amount of such damage, if any, and the amount so fixed shall be paid by the company forthwith.

This recommendation, apparently, did not commend itself to the interested parties. In any event, it does not appear that any claims were made after the first of January, 1932, as contemplated in paragraph 4 of the report.

In paragraph 5 of the report, the Commission recommended that the Consolidated Mining and Smelting Company of Canada, Limited, should proceed to erect and put in operation certain sulphuric acid units for the purpose of reducing the amount of sulphur discharged from the stacks. It appears, from the evidence in the present case, that the General Manager of the company had made certain representations before the Commission as to the intentions of the company in this respect. There is a conflict of testimony as to the extent to which these representations, but it is unnecessary now to consider the matter further, since, whatever they were, the company proceeded after 1930 to make certain changes and additions. With the intension and purpose of lessening the sulphur contents in the smoke emissions at the stacks, the following installations (amongst others) have been made in the plant since 1931: three 112 tons sulphuric acid plants in 1931; ammonia and ammonium sulphate plant in 1931; two units for reduction and absorption of sulphur in the zinc smelter, in 1936 and 1937, and an absorption plant for gas from the lead roasters in June, 1937. In addition, in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop-growing season has been in operation, particularly since May, 1934. It is to be noted that the chief sulphur contents are in the gases from the lead smelter, but that there is still a certain amount of sulphur content in the fumes from the zinc smelter. As a result of the above, as well as of depressed business conditions, the tons of sulphur emitted into the air from the plants fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931, and to 3,400 tons in 1932. The emission of sulphur rose in 1933 to 4,300 tons, and in 1934 to nearly 6,300 tons, and in 1935 to 8,800 tons. In 1936, it fell to 5,600 tons; and in January to July, 1937 inclusive, it was 4,750 tons.

Two years after the signing of the International Joint Commission's Report of February 28, 1931, the United States Government on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring, and diplomatic negotiations were renewed. Correspondence was exchanged between the two countries, and although that correspondence it is sufficient here to say, that it resulted in the signing of the present Convention.

Consideration of the terms of that Convention is given more in detail in the later parts of the Tribunal's decision.
The first question under Article III of the Convention which the Tribunal is required to decide is as follows:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor.

In the determination of the first part of this question, the Tribunal has been obliged to consider three points, viz., the existence of injury, the cause of the injury, and the damage due to the injury.

The Tribunal has interpreted the word "occurred" as applicable to damage caused prior to January 1, 1932, in so far as the effect of the injury made itself felt after that date. The words "Trail Smelter" are interpreted as meaning the Consolidated Mining and Smelting Company of Canada, Limited, its successors and assigns.

In considering the second part of the question as to indemnity, the Tribunal has been mindful at all times of the principle of law which is set forth by the United States courts in dealing with cognate questions, particularly by the United States Supreme Court in Story Parchment Company v. Paterson Parchment Paper Company (1931), 282 U.S. 555 as follows: "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damages may not be determined by mere speculation or guess, i.e., will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only a probable one." (See also the decision of the Supreme Court of Michigan in Allison v. Chandler, 11 Michigan 542, quoted with approval by the United States Supreme Court, as follows: "But shall the injured party in an action of tort, which may happen to furnish no element of certainty, he allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained, but it would be the certainty of injustice. Juries are allowed to act upon probable and inferential, as well as direct and positive proof.")

The Tribunal has first considered the items of indemnity claimed by the United States in its Statement (p. 52) "on account of damage occurring since January 1, 1932, covering: (a) Damages in respect of cleared land and improvements thereon; (b) Damages in respect of unclerded land and improvements thereon; (c) Damages in respect of livestock; (d) Damages in respect of property in the town of Northport; (g) Damages in respect of business enterprises".

With respect to Item (a) and to Item (b), viz., "Damages in respect of cleared land and improvements thereon", and "Damages in respect of unclerded land and improvements thereon", the Tribunal has reached the conclusion that damage due to fumigations has been proved to have occurred since January 1, 1932, and to the extent set forth hereafter.

Since the Tribunal has concluded that, on all the evidence, the existence of injury has been proved, it becomes necessary to consider next the cause of injury. This question resolves itself into two parts—first, the actual caus-
It appears from a careful study and comparison of recorder data furnished by the two Governments, that on numerous occasions fumigations occur practically simultaneously at points down the valley many miles apart—this being especially the fact during the growing season from April to October. It also appears from the data furnished by the different recorders, that the rate of gas attenuation down the river does not show a constant trend, but is more rapid in the first few miles below the boundary and more gradual further down the river. The Tribunal finds it impossible satisfactorily to account for the above conditions on the basis of the theory presented to it. The Tribunal finds it further difficult to explain the times and durations of the fumigations on the basis of any probable surface-wind conditions.

The Tribunal is of opinion that the gases emerging from the stacks of the Trail Smelter find their way into the upper air currents, and are carried by these currents in a fairly continuous stream down the valley so long as the prevailing wind at that level is in that direction. The upper air conditions at Northport, as stated by the United States Weather Bureau in 1929 (quoted in Canadian Document A 1, page 9) are as follows:

The 5 a.m. balloon runs show the prevailing direction, since the Weather Bureau was established in Northport, to be northeast to an altitude of 600 metres above the surface. The average velocity, up to 600 metres level, is from 2 to 5 miles per hour. Above the 600 metres level the prevailing direction is southwest and gradually shifts into the west-southwest and west. The average velocities gradually increase from 5 miles per hour to about 30 miles per hour at the highest elevation, about 700 metres.

It thus appears that the velocity and persistence of the upper air currents is greater than that of the surface winds. The Tribunal is of opinion that the fumigations which occur at various points along the valley are caused by the mixing with the surface atmosphere of this upper air stream, of which the height has as yet to be ascertained more fully. This mixing follows well recognized meteorological laws and is controlled mainly by two factors of major importance. These are: (a) differences in temperature between the air near the surface and that at higher levels—in other words, the temperature gradient of the atmosphere of the region; and (b) differences in the velocity of the upper air currents and of those near the ground.

A careful study of the time, duration, and intensity of the fumigations recorded at the various stations down the valley reveals a number of striking and significant facts. The first of these is the coincidence in point of time of the fumigations. The most frequent fumigations in the late spring, summer, and early autumn are diurnal, and occur during the early morning hours. These usually are of short duration. A characteristic curve expressing graphically this type of fumigation, rises rapidly to a maximum and then falls less rapidly but fairly sharply to a concentration below the sensitivity of the recorder. The dominant influence here is evidently the heating action of the rising sun on the atmosphere at the surface of the earth. This gives rise to temperature differences which may and often do lead to a mixing of the gas-carrying atmosphere with that near the surface. When this occurs with sufficient intensity, a fumigation is recorded at all stations at which the sulphur dioxide reaches a concentration that is not too low to be determined by the recorder. Obviously this effect of the rising sun may be
different on the east and the west side of the valley, but the possible bearing of this upon fumigations in the valley must await further study.

Another type of fumigation occurs with especial frequency during the winter months. These fumigations are not so definitely diurnal in character and are usually of longer duration. The Tribunal is of the opinion that these are due to the existence for a considerable period of a sufficient velocity of the gas-carrying air current to cause a mixing of this with the surface atmosphere. Whether or not this mixing is of sufficient extent to produce a fumigation will depend upon the rate at which the surface air is diluted by surface winds which serve to bring in air from outside the contaminated area. The fact that fumigations of this type are more common during the night, when the surface winds often subside completely, bears out this opinion. A fumigation with a lower velocity of the gas-carrying air current would then be possible.

The conclusions above, together with a detailed study of the intensity of the fumigations at the various stations from Columbia Gardens down the valley, have led to deductions in regard to the rate of attenuation of concentration of sulphur dioxide with increasing distance from the Smelter which seems to be in accord both with the known facts and the present theory. The conclusion of the Tribunal on this phase of the question is that the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur dioxide is lower and falls off more gradually and less rapidly.

The attention of the Tribunal has been called to the fact that fumigations in the area of probable damage sometimes occur during rainy weather or other periods of high atmospheric humidity. It is possible that this is more than a mere coincidence and that such weather conditions are, in general, more favorable to a fumigation, but the Tribunal is not prepared at present to offer an opinion on this subject.

The above conclusions have a bearing both upon the cause and upon the degree of damage as well as upon the area of probable damage.

The Tribunal will now proceed to consider the different classes of damage to cleared and to uncleared land.

(1) With regard to cleared land used for crops, the Tribunal has found that damage through reduction in crop yield due to fumigation has occurred in varying degrees during each of the years, 1932 to 1936; and it has found no proof of damage in the year 1937.

It has found that damage has been confined to an area which differed from year to year but which did not (with the possible exception of a very small number of farms in particularly unfavorable locations) exceed in the year of most extensive damage the following limits: the two precincts of Boundary and Northport, with the possible exclusion of some properties located on the western end of Boundary Precinct and at the western end of Northport Precinct; those parts of Cummins and Doyle Precincts on or close to the benches of the river; the part of Marble Precinct, north of the southern limit of Sections 22, 23 and 24 of T. 39, R. 39, and the part of Flat Creek Precinct, located on or close to the benches of the river (all precincts being as defined by the United States Census of Agriculture of 1935).

The properties owned by individual farmers alleged by the United States to have suffered damage are divided by the United States in its itemized schedule of damages, into three classes: (a) properties of "farmers residing on their farms"; (b) properties of "farmers who do not reside on their farms"; (ab) properties of "farmers who were driven from their farms"; (c) properties of large owners of land. The Tribunal has not adopted this division.

The Tribunal has adopted as the measure of indemnity to be applied on account of damage in respect of cleared land used for crops, the measure of damage which the American courts apply in cases of nuisance or trespass of the type here involved, viz., the amount of reduction in the value of use or rental value of the land caused by the fumigations. In the case of farm land, such reduction in the value of the use is, in general, the amount of the reduction of the crop yield arising from injury to crops, less cost of marketing the same, the latter factor being under the circumstances of this case of negligible importance. (See Ralston v. United Verde Copper Co., 37 Federal Reporter 2d, 180, and 46 Federal Reporter 2d, 1.) Failure of farmers to increase their seeded land in proportion to such increase in other localities, may also be taken into consideration.

The difference between probable yield in the absence of any fumigation and actual crop yield, varying as it does from year to year and from place to place, is necessarily a somewhat uncertain amount, incapable of absolute proof; and the Tribunal has been obliged to base its estimate of damage largely on the fumigation records, meteorological data, statistical data as to crop yields inside and outside the area of probable damage, and other Census records.

As regards the problems arising out of abandonment of properties by their owners, it is pointed out that practically all of such properties, listed in the question sent out by the former Agent of the United States, Mr. Metzger, appear to have been abandoned prior to the year 1932. However, in order to deal with both of this problem and with the problem arising out of failure of farmers to increase their seeded land, the Tribunal, not having to adjudicate on individual claims, estimated, on the basis of the statistical data available, the average acreage on which it is reasonable to say that crops would have been seeded and harvested during the period under consideration but for the fumigations.

As regards the special category of cleared lands used for orchards, the Tribunal is of the opinion that no damage to orchards by sulphur dioxide fumigation within the damaged area during the years in question has been proved.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, it may be contended that special damage has occurred for which indemnity should be awarded by reason of impairment of the soil contents through increased acidity caused by sulphur dioxide fumigations acting directly on the soil or indirectly through increased sulphur content of the streams and other waters. Evidence has been given in support of this contention. The Tribunal is of the opinion that such injury to the soil up to this date, due to increased acidity and affecting harmfully the production of crops or otherwise, has not been proved—with one exception, as follows: There is a small area of farming property adjacent to the boundary, west of the river, that was injured by serious increase of acidity of soil due to fumigations. Such injury, though caused, in part, prior to January 1, 1932, may have produced a continuing condition which cannot be considered as a loss for a limited time; in other words, in this respect the nuisance may be considered to have a more permanent effect, in which case, under American law (Seguwick on Damages 9th Ed. (1920) Sections 932, 947), the measure of damage was not the mere reduction in the value of the use of the land but...
the reduction in the value of the land itself. The Tribunal is of opinion that such injury to the soil itself can be cured by artificial means, and it has awarded indemnity with this fact in view on the basis of the data available.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, the Tribunal, having in mind, within the area as determined above, a group of about forty farms in the vicinity of the boundary line, has awarded indemnity for special damage for reduction in value of the use or rental value by reason of the location of the farmers in respect to the fumigations. (See Baltimore and Potomac R. R. v. Fifth Baptist Church (1883), 108 U.S. 317.)

The Tribunal is of opinion that there is no justification, under doctrines of American law, for assessing damages to improvements separately from the land in the manner contended for by the United States. Any injury to improvements (other than physical injury) is to be compensated in the award of indemnity for general reduction in the value of the use or rental value of the property.

There is a contention, however, that special damage has been sustained by some owners of improvements on cleared land, in the way of rust and destruction of metal work. There was some slight evidence of such damage, and the Tribunal has included indemnity therefor in its final award; but since there is an entire absence of any evidence as to the extent or monetary amount of such injury, the indemnity cannot be considered as more than a nominal amount for each of such owners.

(2) With respect to damage to cleared land not used for crops and to all uncleared (other than uncleared land used for timber), the Tribunal has adopted as the measure of indemnity, the measure of damages applied by American courts, viz., the amount of reduction in the value of the use or rental value of the land. The Tribunal is of opinion that the basis of estimate of damages contested for by the United States, viz., applying to the value of uncleared land a ratio of loss measured by the reduced crop yield on cleared land, has no sanction in any decisions of American courts.

(A) As regards these lands in their use as pasture lands, the Tribunal is of opinion that there is no evidence of any marked susceptibility of wild grasses to fumigations, and very little evidence to prove the respective amounts of uncleared land devoted to wild grazing grass and barren or shrub land, or to prove the value thereof, which would be necessary in order to estimate the value of the reduction of the use of such land. The Tribunal, however, has awarded a small indemnity for damage to about 200 acres of such lands in the immediate neighborhood of the boundary. It has been contended that the death of trees and shrubs due to fumigation has had an injurious effect on the water storage capacity of the soil and has even created some soil erosion. The Tribunal is of opinion that while there may have been some erosion of soil and impairment of water storage capacity in a limited area near the boundary, it is impossible to determine whether such damage has been due to fires or to mortality of trees and shrubs caused by fumigation.

(B) As regards uncleared land in its use as timberland, the Tribunal has found that damage due to fumigation has occurred to trees during the years 1932 to 1937 inclusive, in varying degrees, over areas varying not only from year to year but also from species to species. It has not seemed feasible to give a determination of the geographical extent of the damage except in so far as it may be stated broadly, that a territory coinciding in extent with the Bayle cruises (hereinafter described) may be considered as an average area, although the contours of the actually damaged area do not coincide for any given species in any given year with that area and the intensity of the damage in a given year and for a given species varies, of course, greatly, according to location.

In comparing the area covered by the Bayle cruises with the Hedgecock maps of injury to conifers for the years under consideration, the Tribunal is of opinion that damage near the boundary line has occurred in a somewhat broader area than that covered by the Bayle cruises, but that on the other hand, injury, except to larch in 1936, seems to have been confined below Marble to the immediate vicinity of the river.

It is evident that for many years prior to January 1, 1932, much of the forests in the area included in the present Northport and Boundary Precincts had been in a poor condition. West and east of the Columbia River, there had been the scene of a number of serious fires; and the operations of the Northport Smelting and Refining Company adjacent to the dispute area from 1898 to 1901, from 1901 to 1908, and from 1916 to 1921, had undoubtedly had an effect, as is apparent from the decisions in suits in the courts of the State of Washington on claims for damages from fumigations in this area. It is uncontested that heavy fumigations from the Trail Smelter which destroyed and injured trees occurred in 1930 and 1931; and there were also serious fumigations in earlier years. In the Canadian Document A 1, termed "The Dears' Report," being a report made to the International Joint Commission in September, 1929, it is stated (pp. 29, 31):

Since a cruise of the timber in the Northport area has not been made by a forest engineer of either Government, this report does not make any recommendations for settlements of timber damage. However, a brief statement as to the timber situation is submitted.

Present condition. Practically the entire region was covered with timber when it was first settled. Probably 90 per cent of the merchantable timber has now been removed. The timber on about one-third of the area has been cut-over in part, that is to say only the more valuable species have been logged, and on a large part of the rest of the area that has been cut-over are stands too small to cut at time of logging. These so-called residual stands, together with the remaining virgin timber, make up the timber resources of the Northport area at the present time. Heavy toll of these has been taken this season by two large forest fires still smouldering as this report is being written... Government forest pathologists are working to determine the zone of economic injury to timber, but their task, a difficult one at best, is incomplete. Much additional data must be collected and after that all must be compiled and analyzed, hence no attempt is made to submit a map with this report delineating the zone of injury to forest trees. Admittedly, however, serious damage to timber has already taken place and reproduction is impaired.

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"The Deans’ Report" further mentioned a cruise of timber made by the Consolidated Mining and Smelting Co., in 1927 and 1928, "by a forest engineer from British Columbia", and that "it is our opinion that the timber estimate and evaluation are quite satisfactory. However, before settlements are made for such smoke damage, the work should be checked by a forest engineer, preferably of the American Government since it was first done by a Canadian.... It is believed, however, that a satisfactory check can be made by an expert and an assistant in about three months.... The check cruise should be made not later than the summer of 1930."

It is to be further noted that in the official document of the State of Washington entitled Forest Statistics. Stevens County, Washington, Forest Survey Release No. 5, A June, 1937. Progress Release, there appears a map entitled Forest Survey. Stevens County, Washington, 1935, on which four types of forest lands are depicted by varied colorings and linings, and most of the lands in the area now in question are described as—"Principally Non-Restocked Old Burnts and Cut-Overs; Rocky and Subalpine Areas" and "Principally Immature Forest—Recent Burns and Cut-Overs". And these terms are defined as follows (page 23): "Woodland—that portion of the forest land neither immediately nor potentially productive of commercial timber. Included in this classification are: subalpine—stands above the altitude range of merchantability; rocky, non-commercial—area too steep, sterile, or rocky to produce merchantable timber. This description of timber as inaccessible, from the standpoint of logging, is further confirmed by the report made by G. J. Bayle (the forest engineer referred to in "The Deans’ Report") of cruises made by him prior to 1932 (Canadian Document C.4, pp. 5,6) to the effect that much of the timber is "far away from transportation", "of very little, if any, commercial value"; "sale price would not bring the cost of operating", "scattered", "located on steep slopes". On page 9 of the Forest Survey Release No. 5, above referred to, it is further stated:

As a consequence of the recent serious fires principally in the northern portion of the county, 32,402 acres of timberland have recently been deforested, many of which are restocking. Also concentrated in the north end of the county are 77,650 deforested acres representing approximately 6 per cent of the timberland area on which the possibilities of natural regeneration are slight. Much of this latter deforestation is thought to be the effect of altered smelter fume damage.

(a) The Tribunal has adopted as the measure of indemnity, to be applied on account of damage in respect of uncleared land used for merchantable timber, the measure of damages applied by American courts, viz., that since the destruction of merchantable timber will generally impair the value of the land itself, the measure of damage should be the reduction in the value of the land itself due to such destruction of timber; but under the leading American decisions, however, the value of the merchantable timber destroyed is, in general, deemed to be substantially the equivalent of the reduction in the value of the land (see Sedgeek on Damages, 9th Ed. 1920, Section 9574). The Tribunal is unable to accept the method contended for by the United States of estimating damage to uncleared timberland by applying to the value of such land as stated by the farmers (after deducting value of the timber) a ratio of loss measured by the reduced crop yield on cleared land. The Tribunal is of opinion, here as elsewhere in this decision, that, in accordance with American law, it is not restricted to the method proposed by the United States in the determination of amount of damages, so long as its findings remain within the amount of the claim presented to it.

As, in estimating damage to timberland which occurred since January 1, 1932, it was essential to establish the amount of timber in existence on January 1, 1932, an unnecessarily difficult task has been placed upon the Tribunal, owing to the fact that the United States did not make a timber cruise in 1930 (as recommended by "The Deans’ Report"); and neither the United States nor the Dominion of Canada caused any timber cruise to be made as of January 1, 1932. The cruises by witnesses supporting the claim of the United States in respect of lands owned by the State of Washington were made in 1927-1928 and in 1937. The cruises by Bayle (a witness for the Dominion of Canada) were made, partially in 1927-1928 and partially in 1936 and 1937. The affidavits of landowners filed by United States claimants in 1929 contain only figures for a date prior to such filing. Since the Bayle cruise of 1927-1928 appears to be the most detailed and comprehensive evidence of timber in the area of probable damage, the Tribunal has used it as a basis for estimate of the amount and value of timber existing January 1, 1932, after making due allowance for the heavy destruction of timber by fire, fumigation, insects, and otherwise, which occurred between the making of such cruise of 1927-1928 and January 1, 1932, and after making allowance for trees which became of merchantable size between said dates. The Tribunal has also used the Bayle cruises of 1936 and 1937 as a basis for estimates of the amount and value of timber existing on January 1, 1932.

(b) With regard to damage due to destruction and impairment of growing timber (not of merchantable size), the Tribunal has adopted the measure of damages applied by American courts, viz., the reduction in value of the land itself due to such destruction and impairment. Growing timberland has a value for firewood, fences, etc., as well as a value as a source of future merchantable timber. No evidence has been presented by the United States as to the locations or as to the total amounts of such growing timber existing on January 1, 1932, or as to its distribution into types of conifers—yellow pine, Douglas fir, or other trees. While some destruction or impairment, deterioration, and retardation of such growing timber has undoubtedly occurred since such date, it is impossible to estimate with any degree of accuracy the amount of damage. The Tribunal has, however, taken such damage into consideration in awarding indemnity for damage to land containing growing timber.

(c) With respect to damage due to the alleged lack of reproduction, the Tribunal has carefully considered the contentions presented. The contention made by the United States that fumigation prevents germination of seed is, in the opinion of the Tribunal, not sustained by the evidence. Although the experiments were far from conclusive, Hedgecock’s studies tend to show, on the contrary, that, while seedlings were injured after germination owing to drought or to fumes, the actual germination did take place.

With regard to the contentions made by the United States of damage due to failure of trees to produce seed as a result of fumigation, the Tribunal is of opinion that it is not proved that fumigation prevents trees from producing sufficient seeds, except in so far as the parent-trees may be destroyed or deteriorated themselves. This view is confirmed by the Hedgecock studies on cone production of yellow pine. There is a rather striking correlation between the percentage of good, fair, and poor trees found in the Hedgecock Census studies and the percentages of trees bearing a normal amount of cones, trees bearing few cones, and trees bearing no cones in the Hedgecock cone
production studies. In so far, however, as lack of production since January 1, 1932, is due to death or impairment of the parent-trees occurring before that date, the Tribunal is of opinion that such failure of reproduction both was caused and occurred prior to January 1, 1932, with one possible exception as follows: From standard American writings on forestry, it appears that seeds of Douglas fir and yellow pine rarely germinate more than one year after they are shed, but if a tree was killed by fumigation in 1931, germination from its seeds might occur in 1932. It appears, however, that Douglas fir and yellow pine only produce a good crop of seeds once in a number of years. Hence, the Tribunal concludes that the loss of possible reproduction from seeds which might have been produced by trees destroyed by fumigation in 1931 is too speculative a matter to justify any award of indemnity.

It is fairly obvious from the evidence produced by both sides that there is a general lack of reproduction of both yellow pine and Douglas fir over a fairly large area, and this is certainly due in some extent to fumigations. But, with the data on hand, it is impossible to ascertain to what extent this lack of reproduction is due to fumigations or to other causes such as fires occurring repeatedly in the same area or destruction by logging of the core-bearing trees. It is further impossible to ascertain to what extent lack of reproduction due to fumigations can be traced to mortality or deterioration of the parent-trees which occurred since the first of January, 1932. It may be stated, in general terms, that the loss of reproduction due to the forest being fumigated will only become effective when the amount of fumigation per acre falls below a certain maximum. But the data on hand do not enable the Tribunal to say where and to what extent a depletion below this minimum occurred through fumigations in the years under consideration.

An even approximate appraisal of the damage is further complicated by the fact that there is evidence of reproduction of lodgepole pine, cedar, and larch, even close to the boundary and in the Columbia River Valley, at least in some locations. This substitution may not be due entirely to fumigations, as it appears from standard American works on conifers that reproduction of yellow pine is often patchy; that when yellow pine is substantially destroyed in a given area, it is generally supplanted by another species of trees; and that lodgepole pine in particular has a tendency to invade and take full possession of yellow pine territory when a fire has occurred. While the other species are inferior, their reproduction is, nevertheless, a factor which has to be taken into account; but here again quantitative data are entirely lacking. It is further to be noted that the amount of rainfall is an important factor in the reproduction of yellow pine, and that where the normal annual rainfall is but little more than eighteen inches, yellow pine does not appear to thrive. It appears in evidence that the annual precipitation at Northport, in a period of fourteen years from 1923 to 1936, averaged slightly below seventeen inches. With all these considerations in mind, the Tribunal has, however, taken lack of reproduction into account to some extent in awarding indemnity for damage to uncleared land in use for timber.

On the basis of the foregoing statements as to damage and as to indemnity for damage with respect to cleared land and uncleared land, the Tribunal has awarded with respect to damage to cleared land and to uncleared land (other than uncleared land used for timber), an indemnity of sixty-two thousand dollars ($62,000); and with respect to damage to cleared land, used for timber an indemnity of sixteen thousand dollars ($16,000)—being a total indemnity of seventy-eight thousand dollars ($78,000). Such indemnity is for the period from January 1, 1932, to October 1, 1937.

There remain for consideration three others items of damage claimed in the United States Statement: (Item c) “Damages in respect of livestock”; (Item d) “Damages in respect of property in the town of Northport”; (Item g) “Damages in respect of business enterprises”.

With regard to “damages in respect of livestock”, claimed by the United States, the Tribunal is of opinion that the United States has failed to prove that the presence of fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since January 1, 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield.

With regard to “damages in respect of property in the town of Northport”, the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property.

With regard to “damages in respect of business enterprises”, the court, for the United States in his Answer and Argument (p. 412) stated: “The business men unquestionably have suffered loss of business and impairment of the value of good will because of the reduced economic status of the residents of the damaged area.” The Tribunal is of opinion that damage of this nature “due to reduced economic status” of residents in the area is too indirect, remote, and uncertain to be appraised and not such for which an indemnity can be awarded. None of the cases cited by counsel (pp. 412-423) sustain the proposition that indemnity can be obtained for an injury to or reduction in a man’s business due to inability of his customers or clients to spend money or import goods caused by a nuisance. Such damage, even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity. The Tribunal is of opinion that if damage to business enterprises has occurred since January 1, 1932, the burden of proof that such damages was due to fumes from the Trail Smelter has not been sustained and that an award of indemnity would be purely speculative.

The United States in its Statement (pp. 49-50) alleges the discharge by the Trail Smelter, not only of “smoke, sulphurous fumes, gases”, but
also of "waste materials", and says that "the Trail Smelter disposes of slag in such a manner that it reaches the Columbia River and enters the United States in that stream", with the result that the "waters of the Columbia River in Stevens County are injuriously affected", thereby. No evidence was produced on which the Tribunal could base any findings as regards damage, if any, of this nature. The Dominion of Canada has contended that this item of damage was not within the meaning of the words "damage caused by the Trail Smelter", as used in Article III of the Convention. It would seem that this contention is based on the fact that the preamble of the Convention refers exclusively to a complaint of the Government of the United States to the Government of Canada "that fumes discharged from the Smelter . . . have been causing damage in the State of Washington" (see Answer of Canada, p. 8). Upon this contention and its legal validity, the Tribunal does not feel that it is incumbent upon it to pass at the present time.

(7) The United States in its Statement (p. 52) presents two further items of damage claimed by it, as follows: (Item c) which the United States terms "damages in respect of the wrong done the United States in violation of sovereignty"; and (Item f) which the United States terms "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935".

With respect to (Item c), the Tribunal finds it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Convention, for the following reason: By the Convention, the high contracting parties have submitted to this Tribunal the questions of the existence of damage caused by the Trail Smelter in the State of Washington, and of the indemnity to be paid therefor, and the Dominion of Canada has assumed under Article XII, such undertakings as will ensure due compliance with the decision of this Tribunal. The Tribunal finds that the only question to be decided on this point is the interpretation of the Convention itself. The United States in its Statement (p. 59) itemizes under the claim of damage for "violation of sovereignty" only money expended for "the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail". The Tribunal is of opinion that it was not within the intention of the parties, as expressed in the words "damage caused by the Trail Smelter" in Article III of the Convention, to include such moneys expended. This interpretation is confirmed by a consideration of the proceedings and of the diplomatic correspondence leading up to the making of the Convention. Since the United States has not specified any other damage based on an alleged violation of its sovereignty, the Tribunal does not feel that it is incumbent upon it to decide whether, in law and in fact, indemnity for such damage could have been awarded if specifically alleged. Certainly, the present controversy does not involve any such type of facts as the persons appointed under the Convention of January 23, 1934, between the United States of America and the Dominion of Canada felt to justify them in awarding to Canada damages for violation of sovereignty in the I'm Alone award of January 5, 1935. And in other cases of international arbitration cited by the United States, damages awarded for expenses were awarded, not as compensation for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government.

In his oral argument, the Agent for the United States, Mr. Sherley, claimed repayment of the aforesaid expenses of investigations on a further and separate ground, viz., as an incident to damages, saying (Transcript, p. 5157): "Costs and interest are incident to the damage, the proof of the damage which occurs through a given act complained of", and again (Transcript, p. 5158): "The point is this, that it goes as an incident to the award of damage." The Tribunal is unable to accept this view. While in cases involving merely the question of damage to individual claimants, it may be appropriate for an international tribunal to award costs and expenses as an incident to other damages proven (see cases cited by the Agent for the United States in the Answer and Argument, pp. 431, 437, 435-465, and at the oral argument in Transcript, p. 5153), the Tribunal is of opinion that such costs and expenses should not be allowed in a case of arbitration and final settlement of a long pending controversy between two independent Governments, such as this case, where each Government has incurred expenses and where it is to the mutual advantage of the two Governments that a just conclusion and permanent disposition of an international controversy should be reached.

The Agent for the United States also cited cases of litigation in courts of the United States (Answer and Argument, p. 439, and Transcript, p. 5152), in which expenses incurred were ordered by the court to be paid. Such cases, the Tribunal is of opinion, are inapplicable here.

The Tribunal is, therefore, of opinion that neither as a separable item of damage nor as an incident to other damages should any award be made for that which the United States terms "violation of sovereignty".

(8) With respect to (Item f), "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935", the Tribunal is of opinion that no payment of such interest was contemplated by the Convention and that by payment within the term provided by Article I thereof, the Dominion of Canada has completely fulfilled all obligations with respect to the payment of the sum of $350,000. Hence, such interest cannot be allowed.

In conclusion, the Tribunal answers Question 1 in Article III, as follows: Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter.

The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision.
PART THREE.

As to Question No. 2, in Article III of the Convention, which is as follows:

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

the Tribunal decides that until the date of the final decision provided for in Part Four of this present decision, the Trail Smelter shall refrain from causing damage in the State of Washington in the future to the extent set forth in such Part Four until October 1, 1940, and thereafter to such extent as the Tribunal shall require in the final decision provided for in Part Four.

PART FOUR.

As to Question No. 3, in Article III of the Convention, which is as follows:

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

the Tribunal is unable at the present time, with the information that has been placed before it, to determine upon a permanent régime, for the operation of the Trail Smelter. On the other hand, in view of the conclusions at which the Tribunal has arrived (as stated in an earlier part of this decision) with respect to the nature, the cause, and the course of the fumigations, and in view of the mass of data relative to sulphur emissions at the Trail Smelter, and relative to meteorological conditions and fumigations at various points down the Columbia River Valley, the Tribunal feels that the information now available does enable it to predict, with some degree of assurance, that a permanent régime based on a more adequate and intensive study and knowledge of meteorological conditions in the valley, and an extension and improvement of the methods of operation of the plant and its control in closer relation to such meteorological conditions, will effectively prevent future significant fumigations in the United States, without unreasonably restricting the output of the plant.

To enable it to establish a permanent régime based on the more adequate and intensive study and knowledge referred to, the Tribunal establishes the following temporary régime.

(1) For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, the Tribunal will appoint two Technical Consultants, and in case of vacancy will appoint the successor. Such Technical Consultants to be appointed in the first place shall be Reginald S. Dean and Robert E. Swain, and they shall cease to act as Advisers to the Tribunal under the Convention during such trial period.

(2) The Tribunal directs that, before May 1, 1938, a consulting meteorologist, adequately trained in the installation and operation of the necessary type of equipment, be employed by the Trail Smelter, the appointment to be subject to the approval of the Technical Consultants. The Tribunal directs that, beginning May 1, 1938, such meteorological observations as may be deemed necessary by the Technical Consultants shall be made, under their direction, by the meteorologist, the scientific staff of the Trail Smelter, or otherwise. The purpose of such observations shall be to determine, by means of captive balloons and otherwise, the weather conditions and the height, velocity, temperature, and other characteristics of the gas-carrying and other air currents and of the gas emissions from the stacks.

(3) The Tribunal further directs that beginning May 1, 1938, there shall be installed and put in operation and maintained by the Trail Smelter, for the purpose of providing information which can be used in determining present and prospective wind and other atmospheric conditions, and in making a prompt application of those observations to the control of the Trail Smelter plant operation:

(a) Such observation stations as the Technical Consultants deem necessary.

(b) Such equipment at the stacks as the Technical Consultants may find necessary to give adequate information of gas conditions and in connection with the stacks and stack effluents.

(c) Sulphur dioxide recorders, stationary and portable (the stationary recorders not to exceed three in number).

(d) The Technical Consultants shall have the direction and authority over the location in both the United States and the Dominion of Canada, and over the installation, maintenance and operation of all apparatus provided for in Paragraph 2 and Paragraph 3. They may require from the meteorologist and from the Trail Smelter regular reports as to the operation of all such apparatus.

(e) The Technical Consultants may require regular reports from the Trail Smelter as to the methods of operation of its plant in such form and at such times as they shall direct; and the Trail Smelter shall conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal, based on the result of the data obtained during the period hereinafter named; and the Technical Consultants and the Tribunal may change or modify at any time its or their instructions as to such operations.

(f) It is the intent and purpose of the Tribunal that the administration of the observations, experiments, and operations above provided for shall be as flexible as possible, and subject to change or modification by the Technical Consultants and by the Tribunal, to the end that conditions as they at any time may exist, may be changed as circumstances require.

(f) The Technical Consultants shall make report to the Tribunal at such dates and in such manner as it shall prescribe as to the results obtained and conclusions formed from the observations, experiments, and operations above provided for.

(5) The observations, experiments, and operations above provided for shall continue on a trial basis through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940, and the winter seasons of 1938-1939 and 1939-1940 and until October 1, 1940, unless the Tribunal shall find it practicable or necessary to terminate such trial period at an earlier date.

(6) At the end of the trial period above provided for, or at the end of such shorter trial period as the Tribunal may find to be practicable or necessary, the Tribunal in a final decision will determine upon a permanent régime and upon the indemnity and compensation, if any, to be paid under the Convention. Such final decision under the agreements for extension,
(7) The Tribunal shall meet at least once in the year 1939, to consider reports and to take such action as it may deem necessary.

(8) In case of disagreement between the Technical Consultants, they shall refer the matter to the Tribunal for its decision, and all persons and the Trail Smelter affected hereunder shall act in conformity with such decision.

(9) In order to lessen, as far as possible, the fumigations during the interval of time extending from May 1, 1938, to October 1, 1938 (during which time or during part of which time, it is possible that the observations and experiments above provided for may not be in full operation), the Tribunal directs that the Trail Smelter shall be operated with the following limitations on the sulphur emissions—it being understood that the Tribunal is not at present ready to make such limitations permanent, but feels that they will for the present probably reduce the chance or possibility of injury in the area of probable damage.

(a) For the periods April 25 to May 10 and June 22 to July 6, which are periods of greater sensitivity to sulphur dioxide for certain crops and trees in that area, not more than 100 tons per day of sulphur shall be emitted from the stacks of the Trail Smelter.

(b) As a further precaution, and for the entire period until October 1, 1938, the sulphur dioxide recorder at Columbia Gardens and the sulphur dioxide recorder at the Stroh farm (or any other point approved by the Technical Consultants) shall be continuously operated, and observations of relative humidity shall also be taken at both recorder stations. When, between the hours of sunrise and sunset, the sulphur dioxide concentration at Columbia Gardens exceeds one part per million for three consecutive 20-minute periods, and the relative humidity is 60 per cent or higher, the Trail Smelter shall be notified immediately; and the sulphur emission from the stacks of the plant maintained at 5 tons of sulphur per hour or less until the sulphur dioxide concentration at the Columbia Gardens recorder station falls to 0.5 parts per million.

(c) This regulation may be suspended temporarily at any time by order of the Technical Consultants or of the Tribunal, if in its opinion it shall interfere with any particular program of investigation which is in progress.

(10) For the carrying out of the temporary regime herein prescribed by the Tribunal, the Dominion of Canada shall undertake to provide for the payment of the following expenses thereof: (a) the Tribunal will fix the compensation of the Technical Consultants and of such clerical or other assistants as it may find necessary to employ; (b) statements of account shall be rendered by the Technical Consultants to the Tribunal and approved by the Chairman in writing; (c) the Dominion of Canada shall deposit to the credit of the Tribunal from time to time in a financial institution to be designated by the Chairman of the Tribunal, such sums as the Tribunal may find to be necessary for the payment of the compensation, travel, and other expenses of the Technical Consultants and of the clerical or other assistants; (d) written report will be made by the Tribunal to the Dominion of Canada of all the sums received and expended by it, and any sum not expended shall be refunded by the Tribunal to the Dominion of Canada at the conclusion of the trial period.
DECISION
REPORTED ON MARCH 11, 1941, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA, UNDER THE CONVENTION SIGNED APRIL 15, 1935.

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

By Article II of the Convention, each Government was to choose one member of the Tribunal and the two Governments were to choose jointly a chairman who should be neither a British subject nor a citizen of the United States. The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A.E. Greenshields of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. In November, 1940, Victor H. Gottschalk of Washington, D.C., was designated by the United States as alternate to Reginald S. Dean. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The Tribunal herewith reports its final decisions.

The controversy is between two Governments involving damage occurring, or having occurred, in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada). In this controversy, the Tribunal did not sit and is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", in Article IV and of "interested parties", in Article VIII of the Convention and although the damage suffered by individuals did, in part, "afford a convenient scale for the calculation of the reparation due to the State" (see Judgment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28). (Cf. what was said by the Tribunal in the decision reported on April 16, 1938, as regards the problems arising out of abandonment of properties, Part Two, Clause (1).)

As between the two countries involved, each has an equal interest that if a nuisance is proved, the indemnity to damaged parties for proven damage shall be just and adequate and each has also an equal interest that unproven or unwarranted claims shall not be allowed. For, while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian interests might be claimed to be injured by an American corporation. As has well been said: "It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry."

Considerations like the above are reflected in the provisions of the Convention in Article IV, that "the desire of the high contracting parties is "to reach a solution just to all parties concerned"". And the phraseology of the questions submitted to the Tribunal clearly evinces a desire and an intention that, to some extent, in making its answers to the questions, the Tribunal should endeavor to adjust the conflicting interests by some "just solution" which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as feasible, prevent damage in the United States, and as would enable indemnity to be obtained, if in spite of such restrictions and limitations, damage should occur in the future in the United States.

In arriving at its decision, the Tribunal has had always to bear in mind the further fact that in the preamble to the Convention, it is stated that it is concluded with the recognition of "the desirability and necessity of effecting a permanent settlement". The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence, oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the district of Columbia, on August 16, 17, 18, 19, 1937; in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the
Tribunal “to report to the Governments its final decisions . . . . within a period of three months after the conclusion of the proceedings”, i.e. on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of the two the Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

On April 16, 1938, the Tribunal reported its “final decision” on Question No. 1, as well as its temporary decisions on Questions No. 2 and No. 3, and provided for a temporary régime thereunder. The decision reported on April 16, 1938, will be referred to hereinafter as the “previous decision”.

Concerning Question No. 1, in the statement presented by the Agent for the Government of the United States, claims for damages of $1,849,156.16 with interest of $250,855.01—total $2,101,011.17—were presented, divided into seven categories, in respect of: (a) cleared and improvements; (b) of uncured land and improvements; (c) live stock; (d) property in the town of Northport; (e) wrong done the United States in violation of sovereignty, measured by cost of investigation from January 1, 1932, to June 30, 1935; (f) interest on $350,000 accepted in satisfaction of damage to January 1, 1932, but not paid on that date; (g) business enterprises. The area claimed to be damaged contained “more than 140,000 acres”, including the town of Northport.

The Tribunal disallowed the claims of the United States with reference to items (e), (d), (a), (f) and (g) but allowed them, in part, with respect to the remaining items (a) and (b).

In conclusion (end of Part Two of the previous decision), the Tribunal answered Question No. 1 as follows:

Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per cent per annum will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter. The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision.

Answering Questions No. 2 and No. 3, the Tribunal decided that, until a final decision should be made, the Trail Smelter should be subject to a temporary régime (described more in detail in Part Four of the present decision) and a trial period was established to a date not later than October 1, 1940, in order to enable the Tribunal to establish a permanent régime based on a “more adequate and intensive study”, since the Tribunal felt that the information that had been placed before it did not enable it to determine at that time with sufficient certainty upon a permanent régime.

In order to supervise the conduct of the temporary régime and in accordance with Part Four, Clause (1) of the previous decision, the Tribunal appointed two Technical Consultants, Dr. R. S. Dean and Professor R. E. Swain. As further provided in said Part Four (Clause 7), the Tribunal met at Washington, D.C., with these Technical Consultants from April 24, 1939, to May 1, 1939, to consider reports of the latter and determine the further course to be followed during the trial period (see Part Four of the present decision).

It had been provided in the previous decision that a final decision on the outstanding questions would be rendered within three months from the termination of the trial period therein prescribed, i.e., from October 1, 1940, unless the trial period was ended sooner. The trial period was not terminated before October 1, 1940. As the Tribunal deemed it necessary after the intervening period of two and a half years to receive supplementary statements from the Governments and to hear counsel again before determining upon a permanent régime, a hearing was set for October 1, 1940.

Owing, however, to disruption of postal communications and other circumstances, the supplementary statement of the United States was not transmitted to the Dominion of Canada until September 25, 1940, and the public meeting was, in consequence postponed.

The Tribunal met at Boston, Massachusetts, on September 26 and 27, 1940, for adoption of additional rules of procedure. It met at Montreal, P.Q., with its scientific advisers, from December 3 to December 8, 1940, to consider the Final Report they had rendered in their capacity as Technical Consultants (see Part Four of this decision). It held its public meeting and heard arguments of counsel in Montreal, from December 9 to December 12, 1940.

The period within which the Tribunal shall report its final decisions was extended by agreement of the two Governments until March 12, 1941.

I.

By way of introduction to the Tribunal's decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the international boundary line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley proper is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary, on the east side of the river and on the south side of its affluent, the Pend-d'Oreille,
are two places respectively known as Waneta and Boundary; the former is on the Canadian side of the boundary, the latter on the American side; four or five miles south of the boundary, and on the west side of the river, is a farm, named after its owner, Fowler Farm (Section 22, T. 40, R. 40), and on the east side of the river, another farm, Stroh Farm, about five miles south of the boundary.

The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southeast to northwest and entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about sixteen miles, the town of Bossburg. Three miles south of Bossburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and area.

At Marble and to the south, various other creeks enter the river from the west side—Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea-level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward, the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1940 inclusive averaged somewhat above seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The rainfall in the growing-season months of April, May and June at Northport has been in 1938, 2.30 inches; in 1939, 3.78 inches, and in 1940, 3.24 inches. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74% at 5 a.m. and an average minimum of 26% at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934 to 1940 inclusive, at Northport was as follows: in the months of November, December, January and February, the lowest temperature was -19° (in January, 1937), and the highest was 60° (in November, 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935 and March, 1939), and the highest was 104° (in September, 1938).

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is further treated in Part Four of this decision and, in detail, in the Final Report of the Technical Consultants.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. In 1900, the population of this town was 787. It fell in 1910 to 476 but rose again, in 1920, to 906. In 1930, it had fallen to 391. The population of the precincts nearest the boundary line, viz., Boundary and Northport (including Frontier and Nigger Creek Precincts prior to 1931) was 919 in 1910; 1,304 in 1920; 649 in 1930 and 651 in 1940. In these precincts, the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; in 1935, 5,666 acres and in 1940, 7,175 acres. The area in crop land in 1925 was 798 acres; in 1930, 1,227 acres; in 1935, 963 acres and in 1940, about 900 acres. In two other precincts east of the river and south of the boundary, Cummins and Doyle, the population in 1940 was 293, the area in farms was 6,884 acres and the area in crop land was about 1,738 acres.

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter", operated by the LeRoi Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company, which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted by it was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over wood fires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent by over a more or less restricted area by the operation of this smelter plant. In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

1 For the Precinct of Boundary, the acreage of crop land, idle or fallow, was omitted from the reports received by the Tribunal of the 1940 Census figures, the statement being made that it was "omitted to avoid disclosure of individual operations."

2 For the Precinct of Cummins, the acreage of crop failure and of crop land, idle or fallow, is only approximately correct, the census figures making similar omissions and for the same reason.
The most important industry in the area formerly was the lumber industry. It had its beginning with the building of the Spokane and Northern Railway. Several sawmills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber industry is now of small size. On about 37,000 acres on which timber was cut in 1927-1928 and in 1936 in the general area, it may be doubtful whether there is today more than 40,000 thousands of board feet of merchantable timber.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of a light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that “taken as a unit, the crop range of these soils is wide and embraces the crps suited to the climate conditions. Under good cultural operations, yields are good.” At the same time, it must be noted that a large portion of this area is not primarily suited to agriculture. In a report of the United States Department of Agriculture, in 1913, it is stated that “there is approximately one-third of the land in the Upper Columbia Basin unsuited for agricultural purposes, either because it is too stony, too rough, too steep, or a combination of these factors. To utilize this large proportion of land and to meet the wood needs of an increasing population, the Upper Columbia Basin is forced to consider seriously the problem of reforestation and conservation.” Much of the farming land, especially on the benches, is land cleared from forest growth; most of the farms contain from an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut green for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year (with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early 1917, proved a failure.
The same Part I, Paragraph (g) gave a definition of "damage":

The word "damage", as used in this document shall mean and include such damage as the Governments of the United States and Canada may deem appreciable, and for the purposes of paragraphs (a) and (c) hereof, shall not include occasional damage that may be caused by SO₂ fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions. Provided, however, that any damage in the State of Washington howsoever caused by said fumes on or after January 1, 1932, shall be the subject of indemnity by the company to any interests so damaged.

Paragraph 2 read, in part, as follows:

In view of the anticipated reduction in sulphur fumes discharged from the smelter at Trail during the present year, as heretofore referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect to such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

This report failed to secure the acceptance of both Governments. A sum of $350,000 has, however, been paid by the Dominion of Canada to the United States.

Two years after the filing of the above report, the United States Government, on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring and diplomatic negotiations were entered into which resulted in the signing of the present Convention. The Consolidated Mining and Smelting Company of Canada, Limited, proceeded after 1930 to make certain changes and additions in its plant, with the intention and purpose of lessening the sulphur contents of the fumes, and in an attempt to lessen injurious fumigation, a new system of control over the emission of fumes during the crop growing season came into operation about 1934. To the three sulphuric acid plants in operation since 1932, two others have recently been added. The total capacity is now of 600 tons of sulphuric acid per day, permitting, if these units could run continually at capacity, the fixing of approximately 200 tons of sulphur per day. In addition, from 1936, units for the production of elemental sulphur have been put into operation. They are present in this plant with a total production capacity of 140 tons of sulphur per day. The capacity of absorption of sulphur dioxide is now 600 tons of sulphur dioxide per day (300 tons from the zinc plant and 300 tons from the lead plant gases). As a result, the maximum possible recovery of sulphur dioxide, with all units in full operation has been brought to a figure which is about equal to the amount of that gas produced by smelting operations at the plant in 1939. However, the normal shutdown of operating units for repairs, the power supply, the availability of the general market situation are factors which influence the amount of sulphur dioxide generated.

In 1939, 260 tons, and in 1940, 216 tons, of sulphur per day were oxidized to sulphur dioxide in the metallurgical processes at the plant. Of the above,

for 1939, 253 tons, and for 1940, 298 tons per day, of the sulphur which was oxidized to sulphur dioxide was utilized. One hundred and seven tons

NORTHPORT

(Fumigations in Hours and Minutes at the Concentrations Noted in First Column)

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and 127 tons of sulphur per day for those two years, respectively, were emitted as sulphur dioxide to the atmosphere.

The tons of sulphur emitted into the air from the Trail Smelter fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931 and 3,400 tons in 1932 as a result both of sulphur dioxide beginning to be absorbed and of depressed business conditions. As depression receded, this monthly average rose in 1933 to 4,000 tons, in 1934 to nearly 6,300 tons and in 1935 to 6,800 tons. In 1936, however, it had fallen to 5,600 tons; in 1937, it further fell to 4,850 tons; in 1938, still further to 4,230 tons to reach 3,250 tons in 1939. It rose again, however, to 3,875 tons in 1940.

During the period since January 1, 1932, automatic recorders for registering the presence of sulphur dioxide in the air, as well as the length of fumigations and the maximum concentration in parts per million (p.p.m.) and one hundredth of parts per million, were maintained by the United States on the east side of the river at Northport from 1932 to 1937; and at Boundary in 1932, 1933, and in parts of 1934 and 1935; at Evans, south of Northport, from 1932 to 1934 and parts of 1935; and at Marble, in 1932 and 1935 and part of 1934; and the United States had at various times in 1939 and 1940 a portable recorder at Fowler Farm. The Dominion of Canada maintained recorders at Stroh Farm from 1932 to 1937 and from January to May 1938, and at a point opposite Northport on the west side of the River from 1937 to 1940—both of these records being in United States territory; and in Canadian territory, at Waneta, June to December, 1936, January to March, 1939, and June to December 1940, and at Columbia Gardens from May 1937 to December 1940.

Data compiled from the Northport recorder during the growing seasons from April to September, 1938, 1939, and 1940, and from the Waneta recorder during the growing seasons while it was operated from June to September 1938 and 1940, and April to September, 1939, show the number of hours and minutes in each month during which fumes were present at the various concentrations of .11 to .25, .26 to .50, and above .50.

PART TWO.

The first question under Article III of the Convention is: "(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?" This question has been answered by the Tribunal in its previous decision, as to the period from January 1, 1932 to October 1, 1937, as set forth above. Concerning this question, three claims are now propounded by the United States.

I.

The Tribunal is requested to "reconsider its decision with respect to expenditures incurred by the United States during the period January 1, 1932, to June 30, 1936". It is claimed that "in this respect the United States is entitled to be indemnified in the sum of $89,655, with interest at the rate of five per centum per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision".

This claim was dealt with in the previous decision (Part Two, Clause (7)) and was disallowed.

The indemnity found by the Tribunal to be due for damage which had occurred since the first day of January, 1932, up to October 1, 1937, i.e., $78,000, was paid by the Dominion of Canada to the United States and received by the latter without reservations. (Record, Vol. 56, p. 6468.) The decision of the Tribunal in respect of damage up to October 1, 1937, was thus compiled with in conformity with Article XII of the Convention. If it were not, in itself, final in this respect, the decision would have assumed a character of finality through this action of the parties.

But this finality was inherent in the decision. Article XI of the Convention says: "The Tribunal shall report to the Governments its final decisions . . . as soon as it has reached its conclusions in respect to the questions . . ." and Article XII of the Convention, "The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal."

There can be no doubt that the Tribunal intended to give a final answer to Question I for the period up to October 1, 1937. This is made abundantly clear by the passage quoted above, in particular by the words: "This decision is not subject to alteration or modification by the Tribunal hereafter."

It might be argued that the words "as soon as it reached its conclusions in respect to the questions" show that the "final decisions" mentioned in Article XI of the Convention were not to be final until all the questions should have been answered.

In proceeding as it did the Tribunal did not act exclusively on its own interpretation of the Convention. It stated to the Governments its intention of granting damages for the period down to October 1, 1937, whilst ordering further investigations before establishing a permanent régime. It is with this understanding that both Governments, by an exchange of letters between the Minister of the United States at Ottawa and the Secretary of State of the Dominion of Canada (March 14, 1938, March 22, 1939), concurred in the extension of time requested. This interpretation of Article XI of the Convention, moreover, is not in contradiction with the intention of the parties as expressed in the Convention. It was not foreseen at the time that further investigations might be needed, after the hearings had been ended, as proved to be the case. But the duty was imposed upon the Tribunal to reach a solution just to all parties concerned. This result could not have been achieved if the Tribunal had been forced to give a permanent decision as to a régime on the basis of data which it and both its scientific advisers considered inadequate and unsatisfactory. And, on the other hand, it is obvious that equity would not have been served if the Tribunal, having come to the conclusion that damage had occurred after January 1, 1937, had withheld its decision granting damages for more than two and one half years.

The Tribunal will now consider whether its decision concerning Question No. 1, up to October 1, 1937, constitutes res judicata.

As Dr. James Brown Scott (Hague Court Reports, p. XXI) expressed it: " . . . In the absence of an agreement of the contending countries excluding the character of finality in the provisions to be applied, international law is the law of an international tribunal." In deciding in conformity with international law an international tribunal may, and, in fact, frequently does apply national law, but an international tribunal will not depart from the rules of international law in favor of divergent rules of
national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based. This would particularly seem to be the case in matters of procedure. In this respect attention should be paid to the rules of procedure adopted by this Tribunal with the concurrence of both Agents on June 22, 1937, wherein it is said (Article 16): "With regard to any matter as to which express provision is not made in these rules, the Tribunal shall proceed as international law, justice and equity may require." Undoubtedly such provisions could not prevail against the Convention, but they show, at least, how, in the common opinion of the Tribunal and of the Agents, Article IV of the Convention was understood at the time. According to the latter, the Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice. This text does not bind the Tribunal to apply national law and practice to the exclusion of international law and practice.

It is further to be noted that the words "the law and practice followed in the United States" are qualified by "in dealing with cognate questions". Unless these latter words are disregarded, they mean a limitation of the reference to national law. What this limitation is, becomes apparent when one refers to the questions set forth in the previous article. These questions are questions of damage caused by smelter fumes, of indemnity therefor, of measures or régime to be adopted or maintained by the Smeltery with or without indemnity or compensation. They may be questions of law or questions of practice. The practice followed, for instance, in injunctions dealing with problems of smelter fumes may be followed in so far as the nature of an arbitral tribunal permits. But general questions of law and practice, such as the authority of the res judicata and the exceptions thereto, are not "cognate questions" to those of Article III.

This interpretation is confirmed by the correspondence exchanged between parties, as far as it is part of the record. On February 22, 1934, the Canadian Government declared (letter of the Secretary of State for External Affairs to the Minister of the United States at Ottawa) that it "would be entirely justified to use the word "damage" in place of "injury" and further, to define the word actually used by a definition to be incorporated in the Convention or else by reference to the general principles of the law which are applied by the courts in the two countries in dealing with cognate matters.

This passage shows that the "cognate questions" parties had in mind in drafting the Convention were primarily those questions which in cases between private parties, find their answer in the law of nuisances.

That the sanctity of res judicata attaches to a final decision of an international tribunal is an essential and settled rule of international law. If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.

Numerous and important decisions of arbitral tribunals and of the Permanent Court of International Justice show that this is, in effect, a principle of international law. It will be sufficient, at this stage, to refer to some of the more recent decisions.

In the decisions of an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration concerning the Peus Funds of California (October 14, 1902, Hague Court Reports, 1916, p. 3) the question was whether the claim of the United States on behalf of the Archbishop of San Francisco and the Bishop of Monterey was governed by the principle of res judicata by virtue of the arbitral award of Sir Edward Thornton. This question was answered in the affirmative.

The Fabian case (French-Venezuelan Claims Commission, Ralston’s Report, Decision of Umpire Plumeley, p. 110) is of particular interest for the present case. There had been an award by the President of the Swiss Confederation allowing part of a claim by France on behalf of Fabian against Venezuela and disallowing the rest. As the terms of reference to the second arbitral tribunal were broader than to the first, it was contended by the claimants "that of the sums denied allowance by the Honorable Arbitrator of Bern there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this Commission". The first Arbitrator had eliminated all claims based on alleged arbitrary acts (faits du prince) of executive authorities as not being included in the matter submitted to his jurisdiction which he found limited by treaty to "denial of justice", a concept which he interpreted as confined to acts and omissions of judicial authorities. It was argued, on behalf of claimants, that "the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that: a declaration of incompetency can never produce the effect of res judicata upon the foundation of the law". Umpire Plumeley rejected these contentions. "In the interest of peace", a limitation had been imposed upon diplomatic action by a treaty the meaning of which had been "finally and conclusively" settled "as applied to the Fabian controversy" by the first award. The definition of denial of justice and the determination of the responsibility of the respondent Government were not questions of jurisdiction. And the Umpire concluded that "the compromise arranged between the honorable Governments... followed by the award of the Honorable President of the Swiss Confederation... were 'acting together' a complete, final and conclusive disposition of the entire controversy on behalf of Fabian"

Again in the case of the claim of the Orinoco Steamship Company between the United States and Venezuela, an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration (October 25, 1910, American Journal of International Law, V, p. 230) emphasized the importance in international disputes of the principle of res judicata. The first question for the arbitral tribunal to decide was whether the decision previously rendered by an umpire in this case "in view of all the circumstances and under the principles of international law" was "void, and whether it must be considered to be conclusive as to preclude a re-examination of the case on its merits". As we will presently see, the tribunal held that the decision was partially void for excess of power. This, however, was rigidly limited and the principle affirmed as follows: "... it is assuredly in the interest of peace
and the development of the institution of international arbitration so essential to the well-being of nations, that, in principle, such a decision be accepted, respected and carried out by the parties without reservation."

In three successive advisory opinions, regarding the delimitation of the Polish Czechoslovak frontier (Question of Jaworzina, No. 8, Series B, p. 38), the delimitation of the Albanian frontier at the Monastery of Saint Naoum (No. 9, Series B, p. 21, 22), and the Polish Postal service in the Free City of Danzig (No. 11, Series B, p. 24), the Permanent Court of International Justice based its appreciation of the legal effects of international decisions of an arbitral character on the underlying principle of res judicata.

This principle was affirmed in the judgment of the Court on the claim of Belgium against Greece on behalf of the Société Commerciale de Belgique (Series A/B, No. 76, p. 174), wherein the Court said: "...since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, final and without appeal", and since the Court has received no mandate from the parties in regard to them, it can neither confirm nor annul them either wholly or in part.

In the well-known case of Frelinghuyzen v. Key (10 U.S. 63, 71, 72), the Supreme Court of the United States, speaking of an award of the United States Mexican Claims Commission, under the Convention of July 4, 1868, whereby (Art. V) parties agreed, inter alia, to consider the result of the proceedings as a "full, perfect, and final settlement of every claim", said: "As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two Governments or otherwise."

There is no doubt that in the present case, there is res judicata. The three traditional elements for identification: parties, object and cause (Permanent Court of International Justice, Judgment 11, Series A, No. 13, Dissenting Opinion by M. Anzilotti, p. 23) are the same. (Cf. Permanent Court of International Justice, Series B, No. 11, p. 30.)

Under the Statute of the Permanent Court of International Justice whereby (Article 59) "The decision of the Court has no binding force except between the parties and in respect of that particular case", the Permanent Court of International Justice, in an interpretative judgment (Judgment No. 11, Series A, No. 13, pp. 18, 20—Chorzów Case), expressed the opinion that the force of res judicata was inherent even in what was an incidental decision on a preliminary point, the ownership of the Oberschlesische Company. The minority judge, M. Anzilotti, pointed out that "under a generally accepted rule which is derived from the very conception of res judicata, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the parties' claims are not binding in the same case" (pp. 26). Later in the same decision (Judgment 11, Series A, No. 13, Dissenting Opinion of M. Ehrlich, pp. 73, 76). M. Ehrlich, the dissenting national judge appointed by Poland, adopted this statement. But M. Anzilotti (Judgment 11, Series A, No. 13, Dissenting Opinion, p. 27) did not expressly answer in the negative the question which he formulated, namely: "Does this general rule also cover the case of an action for indemnity following upon a declaratory judgment in which the preliminary question has been decided?" It is true that, when the case came again on the question of indemnity (Judgment 13, Series A, No. 17, pp. 31, 32), the Court seems to have avoided—as M. Ehrlich pointed out—the assertion that there was res judicata and reserved the effect of its incidental decision "as regards the right of ownership under municipal law". But the Court said: "... it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment (the previous Judgment No. 7 wherein it was decided that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with international law) and in relation to the claim for reparation based on the same judgment", thus admitting in effect (M. Anzilotti now concurring) that it was bound by its previous decision.

In the present case, the decision was not preliminary or incidental. Neither was it a decision on a question of jurisdiction. There is some authority (Tiedemann v. Poland, Recueil des Décisions des Tribunaux Arbitraux Mixtes, Tome VII (1928), p. 702), in support of the contention that a decision upon the question of jurisdiction only, may, under certain circumstances, be reversed by the same court; and it might be argued, as, in fact, was done by France in the Fabiani case, that a decision merely denying jurisdiction cannot ever constitute res judicata as regards the merits of the case at issue. But assuming the first contention to be correct as the second undoubtedly is, that would not affect the issue in the present case. Here, as in the Fabiani case, the decision was not one denying jurisdiction.

The United States does not contend that the previous decision is void for excess of power, but asks for reconsideration and revision, as far as the costs of investigation are concerned, on account of a material error of law (Record, p. 6540). In the absence of agreement between parties, the first question concerning a request tending to revision of a decision constituting res judicata is: can such a request ever be granted in international law, unless special powers to do so have been expressly given to the tribunal?

The Convention for the Pacific Settlement of Disputes signed at The Hague, October 18, 1907 (Article 83) says: "The parties can reserve in the compromis the right to demand the revision of the award." In that case only, does the article apply. But, on the other hand, the Statute of the Permanent Court of International Justice (Article 61) does not require the grant of such special powers to the Court.

In the Jaworzina case (Advisory Opinions, Series B, No. 8, p. 37), the Permanent Court of International Justice expressed the opinion that the Conference of Ambassadors, which had acted in a quasi-arbitral capacity, did not retain the power to modify its decision, as it had fulfilled the task entrusted to it by giving the latter. In the case of Saint Naoum Monastery, however (Advisory Opinions, Series B, No. 9, p. 21), the Court seemed less positive as to the possibility of a revision in the absence of an express reservation to that effect.

Arbitral decisions do not give to the question an unanimous answer. Thus, in the United States Mexican Mixed Claims Commission of 1868, whilst Umpire Lieber, on a motion for rehearing, re-examined the case, Umpire Thornton, in the Weil, LaBrà, and other cases, refused a rehearing, inter alia, on the ground that the provisions of the Convention in effect debarred him from rehearing cases which he had already decided (Moore, International Arbitrations, 1329, 1357). In the single case of Schreck, however, he granted a request of one of the Agents to reconsider his decision. The case also of A. A. Green (Moore, International Arbitrations, 1358) was reconsidered by the Umpire and that of G. Moore (Moore, International Arbitrations, 1357) by the two Commissioners. In the Lazare case (Haiti v. United States), the Arbitrator, Mr. Justice Strong, refused a rehearing, "solely for
the reason”, that in his opinion, his “power over the award was an end” when it “had passed from his hands and been filed in the State Department.” (Moore, International Arbitrations, 1793.) In the Sabotage cases, before the American-German Mixed Claims Commission, the Umpire, Mr. Justice Roberts, granted a rehearing, although there was no express provision in the agreement empowering the Commission to do so (December 13, 1933, Documents, p. 1122, American Journal of International Law, 1940, pp. 154, 164). Without final decision, the case, not the, the previous decision did not give final answers to all the questions. The Tribunal, by that decision, did not become functus officio. Part of its task was yet before it when the request for revision was presented. Under those circumstances, the difficulties and uncertainties do not arise that might present themselves where an arbitral tribunal, having completed its task and finally adjourned, would be requested to reconsider its decision.

The Tribunal, therefore, decides that, at this stage, at least, the Convention does not deprive it the power to grant a revision. (Gf. D. V. Sandler, Evidence before International Tribunals, 1939, p. 299.)

The second question is whether revision should be granted; and this question subdivides itself into two separate parts: first, whether the petition for revision should be entertained, and second, if entertained, whether the previous decision should be revised in view of the considerations presented by the United States.

It is the rule under the Hague Convention for the Pacific Settlement of Disputes (Article 83) that the question whether a revision should be entertained must be dealt with separately. Such is also the rule according to Article 61 of the Statute of the Permanent Court of International Justice. It is true that, in the case of the Orinoco Steamship Company, the arbitral tribunal did not consider separately the question whether the previous award was void and the question of the merits; but the decision, in that respect, does not seem to conform to the compromises which clearly separated the two questions.

In the Sabotage cases and in other cases before the Mixed Claims Commission, United States and Germany, a contrary practice had prevailed. But when the question of revision came to a head, the Umpire, Mr. Justice Roberts (decision of December 13, 1933, Documents, p. 1115; American Journal of International Law, 1940, pp. 157-158), said: “I am convinced as the matter is now viewed in retrospect that it would have been fairer to both the parties, definitely to pass in the first instance upon the question of the Commission’s power... Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence. The American Agent has... filed a very large quantity of evidence which... I have thought it improper to examine.” As the position apparently required further elucidation, a motion was presented to determine “whether the next hearing shall be merely of a preliminary nature” (Documents, p. 1159). The Umpire decided that it should, saying: “Germany insists that the preliminary question be determined separately. I am of opinion this is her right.”

The Tribunal is of opinion that this procedure should be followed. As said above, the petition is founded upon an alleged error in law. It is contended by the United States that the Tribunal erred in the interpretation of the Convention when it decided that the monies expended for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail could not be included within the “damage caused by the Trail Smelter” (Article III (1) of the Convention, Record, p. 6030). Statements by the Tribunal that the controversy did not involve “any such type of facts as the persons appointed” in the I’m Alone case “felt to justify them in awarding to Canada damages for violation of sovereignty” and that in cases where a private claim was espoused “damages awarded for expenses were awarded, not as compensation for violation of national sovereignty, but as compensation for expenses incurred by the individual in prosecuting their claims for wrongful acts by the offending Government” were also challenged, although petitioner added that possibly further statements might be regarded as dicta. (Record, p. 6040.) It was further argued that the solution adopted by the Tribunal was not a “solution just to all parties concerned”, as required by Article IV of the Convention.

According to the Hague Convention (Article 83), a request tending to the revision of an award can only be made on the ground of the discovery of some new fact not calcualated to exercise a decisive influence upon the award and which at the time the decision was closed was unknown to the Tribunal and to the party demanding the revision.

It is noteworthy that, at the first Hague Conference, the United States Delegation submitted a proposal whereby every party was entitled to a second hearing before the same judges within a certain period of time “if it declares that it can call new witnesses or raise questions of law not raised or decided at the first hearing”. This proposal was, however, considered as weakening unduly the principle of res judicata. The text, as it now stands, was adopted as a compromise which the American view and the views of those who, such as de Martens, were opposed to any revision. The Statute of the Permanent Court of International Justice (Article 61) substantially coincides with the Hague Convention: “An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming revision, always provided that such ignorance was not due to negligence.” In presenting this text, the report of the Advisory Committee of Jurists (Praxis Verhau, p. 744) said very aptly: “The right of revision is a very important right and affects adversely in the matter of res judicata a point which for the sake of international peace should be considered as finally settled. Justice, however, has certain legitimate requirements.” These requirements were provided for in the text which enables the court to bring its decision in harmony with justice in cases where, through no fault of the claimant, essential facts remained undisclosed or where fraud was subsequently discovered. No error of the court is considered as a possible basis for revision, either by the Hague Convention or by the Statute of the Permanent Court of International Justice.

The Permanent Court of International Justice left open, in the Saint Naoum case (Series B, p. 21), the question whether, in the absence of express provision, an award could be revised “in the event of the existence of an essential error being proved or of new facts being relied on”.

Except for those cases where a second hearing before the same or another Tribunal was agreed upon between the Governments or their Agents in the case, there are few cases of awards where rehearing or revision was granted.

In the Green case, quoted above (Moore, International Arbitrations, 1358), the Umpire granted a rehearing because certain evidence which was before the Commissioners was not transmitted to him. In the case George
Moore, also quoted above (Moore, International Arbitrations, 1537), a new document was produced. In the latter case, the Commissioners stated that it was their practice to grant revision where new evidence was such as ought undoubtedly to produce a change in the minds of the Commission except where there might be some gross lack of justice which would probably be done to the defendant Government. In the single case of Schreck, also quoted above (Moore, International Arbitrations, 1537), Umpire Thornton reconsidered the decision of the Learned Agents of the claimant Government, and in this case, the revision was granted because he found that he had clearly committed an error in law. Because a claimant was born in Mexico, he had taken for granted that he had Mexican nationality. "The Agent of the United States produced the appropriate law of Mexico, by which it appeared that the assumption was clearly erroneous."

In the case of the Orinoco S. S. Company, where it will be remembered, the question before the arbitral tribunal was whether the award in a previous arbitration was void, the defendant State, Venezuela, argued that the decision was not void as the compromise was valid, there had been no excess of power, nor alleged corruption of the judges, nor any "essential error" in the decision.

There were several claims the rejection of which by the Umpire in the first arbitration, Mr. Barge, was considered separately. The main claim had been disallowed on three grounds: the first was the interpretation of a contract between the Venezuelan Government and a concessionaire; the second was the so-called Calvo clause; and the third was lack of compliance both with the contract and with the Venezuelan law in notifying to the Venezuelan Government the cession of the contract.

Under the terms of reference, the first arbitrators were to decide "on a basis of absolute equity without regard to objections of a technical nature or to the provisions of local legislation". It was clearly apparent from the circumstances of the case that the second and third grounds were entirely irreconcilable with these terms. Nevertheless, the second arbitral tribunal did not upset the findings of Umpire Barge as regards the main claim. The second award said:

Whereas the appreciation of the facts of the case and the interpretation of the documents were within the competence of the Umpire and, as his decisions, when based on such interpretation, are not subject to revision by this Tribunal, whose duty it is, not to say if the case has been well or ill judged, but whether the award must be annulled; that an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of The Hague of 1899 and 1907 made it their object to avert, would be the general rule.

Other and much smaller claims, however, had been disallowed exclusively on grounds two and three. Here the decision was considered void for excess of power.

The Sabotage cases were re-opened on the allegation that the decisions had been induced by fraud and the decisions were revised when this was proved. This obviously falls within the limits set up both by the Hague Convention and by the Statue of the Permanent Court of International Justice. The following passage of the decision of the Umpire, Mr. Justice Roberts, relied upon by the petitioner in this case, is therefore in the nature of a dictum:

I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to re-open and correct a decision to accord with the facts and the applicable legal rules.

This statement may be entirely justified by circumstances special to the Mixed Claims Commission, in particular by the practice followed ab initio by this Commission, particularly with the concurrence, until the Sabotage cases reached their last stages, of the Umpire, the Commissioners and the Agents, but in so far as it does not refer to the correction of possible errors arising from a slip or accidental omission, it does not express the opinion generally prevailing as to the position in international law, stated for instance in the following passage of a recent decision: "... in order to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or in both. It is only lack of knowledge on the part of the judge and of one of the parties of a material and decisive fact which may in law give rise to the revision of a judgment" (De Neuville e. Disconto Gesellschaft, Rezueil des Decisions des Tribunaux Arbitraux Mixtes, t. VII, 1928, 629).

A mere error in law is no sufficient ground for a petition tending to revision.

The formula "essential error" originated in a text voted by the International Law Institute in 1876. From its inception, its very authors were divided as to its meaning. It is thought significant that the arbitral tribunal in the Orinoco case avoided it; the Permanent Court in the Saint Naum case alluded to it. The Government of the Kingdom of the Serbs, Croats and Slovenes alleged essential error both in law and in fact (Series C, No. 5, II, p. 57. Pleadings by Mr. Spalaikevich), but what the Court had in mind in the passage quoted above (see p. 36 of the present decision), was only a possible error in fact. The paragraph where this passage appears begins with the words: "This decision has also been criticized on the ground that it was based on erroneous information or adopted without regard to certain essential facts."

The Tribunal is of opinion that the proper criterion lies in a distinction between "essential" errors in law and other such errors, but between "manifest" errors, such as that in the Schreck case or such as would be committed by a tribunal that would overlook a relevant treaty or base its decision on an agreement admittedly terminated, and other errors in law. At least, this is as far as it might be permissible to go on the strength of precedents and practice. The error of interpretation of the Convention alleged by the petitioner in revision is not such a "manifest" error. Further criticisms need not be considered. The assumption that they are justified would not suffice to upset the decision.

For these reasons, the Tribunal is of opinion that the petition must be denied.

II (a).

The Tribunal is requested to say that damage has occurred in the State of Washington since October 1, 1937, as a consequence of the emission of sulphur dioxide by the smelters of the Consolidated Mining and Smelting Company.
Company at Trail, B.C., and that an indemnity in the sum of $34,807 should be paid therefor.

It is alleged that acute damage has been suffered, in 1938-1940, in an area of approximately 6,000 acres and secondary damage, during the same period, in an area of approximately 27,000 acres. It is also alleged that damage has been suffered in the town of Northport, situated in the latter area. On the basis of investigations made in 1939 and 1940, the area of acute damage is claimed to extend on the west bank of the Columbia River to a point approximately due north of the mouth of Deep Creek, the average width of this area on this bank being about 13 miles, and on the eastern bank of the river, to a point somewhat to the south of the northern limit of Section 20, T. 40, R. 41, the width of this area on that bank varying from approximately 14 miles at the border to 1 mile at its lower end. The area of secondary damage is claimed to extend on both banks of the river to about one mile below Northport; it extends laterally, at the boundary, westward to the western limit of Section 2, T. 40, R. 40, and eastward to the eastern limit of Section 1, T. 40, R. 41; it extends along Cedar Creek above Section 14, T. 40, R. 41, along Nigger Creek to the middle of Section 9, T. 40, R. 40, along Little Sheep Creek to the middle of Section 10, T. 40, R. 39, along Big Sheep Creek to the western limit of Section 15, T. 40, R. 39, and along Deep Creek, to the southeastern corner of Section 14, T. 39, R. 40. It is to be noted that the area of damage alleged by the United States in its original statement of case was about 144,000 acres.

Damage is claimed, as to the area of acute damage, on the basis of $0.8525 per acre on all lands whether cleared or not cleared and whether used for crops, timber or other purposes. It is equally claimed, as to the area of secondary damage, on the basis of $1.0511, on all lands. It is alleged that damage occurred, in 1932-1937, in the area of acute damage to the extent of $17,050; in the area of secondary damage, to the extent of $189,200 and in the town of Northport, to the extent of $8,750. The damage for 1938-1940 is supposed to be 0.3 of the first amount in the area of acute damage, and 0.15 of the second and the third amount, respectively, in the area of secondary damage and in the town of Northport.

The request for an indemnity in the sum of $34,807 is based on the final paragraph of Part Two of the previous decision, quoted above, where it is said that the Tribunal would determine in its final decision the fact of the existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor.

The present report covers the period until October 1, 1940. The Tribunal has considered not only the pertinent evidence (including data from the recorders located by the United States and by Canada) introduced at the hearings at Washington, D.C., Spokane and Ottawa in 1937, but also the following: (a) the Reports of the Technical Consultants appointed by the Tribunal to superintend the experimental period from April 16, 1938, to October 1, 1940, as well as their reports of the personal investigations in the area at various times within that period; (b) the candid reports of his investigations in the area in 1939 and 1940 by the scientist for the United States, Mr. Griffin; (c) the monthly sulphur balance sheets of the operations of the smelter; (d) all data from the recorders located at Columbia Gardens, Wairia, Northport, and Fowler's Farm; (e) the census data and all other evidence produced before it.

The Tribunal has examined carefully the records of all fumigations specifically alleged by the United States as having caused or been likely to cause damage, as well as the records of all other fumigations which may be considered likely to have caused damage. In connection with each such instance, it has taken into detailed consideration, with a view of determining the fact or probability of damage, the length of the fumigation, the intensity of concentration, the combination of length and intensity, the frequency of fumigation, the time of day of occurrence, the conditions of humidity or drouth, the season of the year, the altitude and geographical locations of place subjected to fumigation, the reports as to personal surveys and investigations and all other pertinent factors.

As a result, it has come to the conclusion that the United States has failed to prove that any fumigation between October 1, 1937, and October 1, 1940, has caused injury to crops, trees or otherwise.

II (b).

The Tribunal is finally requested to as to Question I to find with respect to expenditures incurred by the United States during the period July 1, 1936, to September 1, 1940, that the United States is entitled to be indemnified in the sum of $38,657.79 with interest at the rate of five per cent per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision.

So far as claim is made for indemnity for costs of investigations undertaken between July 1, 1936, and October 1, 1937, it cannot be allowed for the reasons stated above with reference to costs of investigations from January 1, 1932, to June 30, 1936. The Tribunal, therefore, will now consider the question of the costs of investigations made since October 1, 1937.

Under Article XIV, the Convention took effect immediately upon exchange of ratifications. Ratifications were exchanged at Ottawa on August 3, 1935. Thus, the Convention was in force at the beginning of the period covered by this claim. Under the Convention (Article XIII) each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal. Whatever may have been the nature of the expenditures previously incurred, the Tribunal finds that monies expended by the United States in the investigation, preparation and proof of its case after the Convention providing for arbitral adjudication, including the aforesaid provision of Article XIII, had been concluded and had entered into force, were in the nature of expenses of the presentation of the case. An indemnity cannot be granted without reasonable proof of the existence of an injury, of its cause and of the damage due to it. The presentation of a claim for damages includes, by necessary implication, the collection in the field of the data and the preparation required for their presentation as evidence in support of the statement of facts provided for in Article V of the Convention.

It is argued that where injury has been caused and the continuance of this injury is reasonably feared, investigation is needed and that the cost of this investigation is as much damageable consequence of the injury as damage to crops and trees. It is argued that the indemnity provided for in Question No. 1 necessarily comprises monies spent on such investigation.

There is a fundamental difference between expenditure incurred in mending the damageable consequences of an injury and monies spent in ascertaining the existence, the cause and the extent of the latter.

These are not part of the damage, any more than other costs involved in seeking and obtaining a judicial or arbitral remedy, such as the fees of
counsel, the travelling expenses of witnesses, etc. In effect, it would be quite impossible to frame a logical distinction between the costs of preparing expert reports and the cost of preparing the statements and answers provided for in the procedure. Obviously, the fact that these expenditures may be incurred by different agencies of the same government does not constitute a basis for such a logical distinction.

The Convention does not warrant the inclusion of the cost of investigations under the heading of damage. On the contrary, apart from Article XII, both the text of the Convention and the history of its conclusion disprove any intention of including them therein.

The damage for which indemnity should be paid is the damage caused by the Trail Smelter in the State of Washington. Investigations in the field took place there and it happens that experiments were conducted in that State. But these investigations were conducted by Federal agencies. The ‘damage’—assuming ex hypothesi that monies spent on the salaries and expenses of the agents should be so termed—was therefore caused, not in one State in particular, but in the entire territory of the Union.

The word ‘damage’ is used in several passages of the Convention. It may not have everywhere the same meaning but different meanings should not be given to it in different passages without some foundation either in the text itself or in its history. It first occurs in the preamble where it is said that ‘fumes discharged from the Smelter ... have been causing damage in the State of Washington’. It then appears in Article I, where it is said that the $50,000 to be paid to the United States will be ‘in payment of all damage which occurred in the United States ... as a result of the operation of the Trail Smelter’. In Article III itself, the word appears twice. The Tribunal is asked ‘whether damage caused by the Trail Smelter in the State of Washington has occurred’ and ‘whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent’.

Article X secures to qualified investigators access to the properties ‘upon which damage is claimed to have occurred or to be occurring’. Finally, Article XI deals with ‘indemnity for damage ... which may occur subsequently to the period of time covered by the report of the Tribunal’.

The underlying trend of thought strongly suggests that, in all these passages, the word ‘damage’ has the same meaning, and in the text of the Convention.

The preamble states that the damage complained of is damage caused by fumes in the State of Washington and there is every reason to admit that this, and this alone, is what is meant by the same word when it is used again in the text of the Convention.

Although no part of the report of the Joint Commission was formally adopted by both Governments, there is no doubt that, when the sum of $350,000 mentioned in Article I was agreed upon, parties had in mind the indemnity suggested by that Commission. It was, at least, in fact, a partial acceptance of the latter’s suggestions. (See letters of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934, and of the latter to the former of February 17, 1934.) There is also no doubt that, in the sum of $50,000 suggested by the Commission, no costs of investigation were included. This is conclusively proved by Paragraphs 2 and 3 of the Report of the International Joint Commission where it is recommended that this sum should be held by the Treasury of the United States as a trust fund to be distributed to the persons

"damaged by ... fumes" by an appointee of the Governor of the State of Washington and where it is said that no allowance was included for indemnity for damage to the lands of the Government of the United States.

It was argued in connection on behalf of the United States that, whilst the terms of reference to the International Joint Commission spoke of the "extent to which property in the State of Washington has been damaged", the terms of reference of the arbitral Tribunal do not contain the same limitation to property. It is, however, to be noted that, whilst no indemnity was actually claimed for damage to the health of the inhabitants, the existence of such damage was asserted by interested parties at the time. (See letter of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934.) The difference in the terms of reference may further be accounted for by the circumstance that the case was presented to this Tribunal, not as a sum of individual claims for damage to private properties, espoused by the Government, but as a single claim for damage to the national territory.

If, under the Convention, the monies spent by the United States on investigations cannot be looked upon as damage, no indemnity can be claimed therefor, under the latter, even if such expenses could not properly be included in the "expenses of the presentation and conduct" of the case. If there were a gap in the Convention, the claim ought to be disallowed, as it is in the spirit of the Convention.

When a State espouses a private claim on behalf of one of its nationals, expenses which the latter may have incurred in prosecuting or endeavoring to establish his claim prior to the espousal are sometimes included and, under appropriate conditions, may legitimately be included in the claim. They are costs, incidental to damage, incurred by the national in seeking local remedies or redress, as it is, as a rule, his duty to do, if, or account of injury suffered abroad, he wants to avoid himself of the diplomatic protection of his State. The Tribunal, however, has not been informed of any case in which a Government has sought before an international jurisdiction or been allowed by an international award or judgment indemnity for expenses by it in preparing the proof for presenting a national claim or private claims which it had espoused; and counsel for the United States, on being requested to cite any precedent for such an adjudication, have stated that they know of no precedent. Cases cited were instances in which expenses allowed had been incurred by the injured national, and all except one prior to the presentation of the claim by the Government.

In the absence of authority established by settled precedents, the Tribunal is of opinion that, where an arbitral tribunal is requested to award the expenses of a Government incurred in preparing proof to support its claim, particularly a claim for damage to the national territory, the intent to enable the Tribunal to do so should appear, either from the express language of the instrument which sets up the arbitral tribunal or as a necessary implication from its provision. Neither such express language nor implication is present in this case.

It is to be noted from the above, that even if the Tribunal had the power to reopen the case as to the expenditures by the United States from January 1, 1932, to October 1, 1937, the Tribunal would have reached the same conclusion as to such expenditures and would have been obliged to affirm its decision made in the Report filed on April 16, 1938.

Since the Tribunal has, in its previous decision, answered Question No. 1 with respect to the period from the first day of January, 1932, to the first day of October, 1937, it now answers Question No. 1 with respect to the period from the first day of October, 1937, to the first day of October, 1940, as follows:

1. No damage caused by the Trail Smelter in the State of Washington has occurred since the first day of October, 1937, and prior to the first day of October, 1940, and hence no indemnity shall be paid therefor.

PART THREE.

The second question under Article III of the Convention is as follows:

In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

Damage has occurred since January 1, 1932, as fully set forth in the previous decision. To that extent, the first part of the preceding question has been answered in the affirmative.

As has been said above, the report of the International Joint Commission (1 g) contained a definition of the word “damage” excluding “occasional damage that may be caused by SO2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions”, as far, at least, as the duty of the Smelter to reduce the presence of that gas in the air was concerned.

The correspondence between the two Governments during the interval between that report and the conclusion of the Convention shows that the problem thus raised was what parties had primarily in mind in drafting Question No. 2. Whilst Canada wished for the adoption of the report, the United States stated that it could not acquiesce in the proposal to limit consideration of damage to damage as defined in the report (letter of the Minister of the United States of America to Ottawa to the Secretary of State for External Affairs of the Dominion of Canada, January 30, 1934). The view was expressed that “so long as fumigations occur in the State of Wash-

Ducktown Sulphur, Copper and Iron Company, Limited. Although dealing with a suit against private companies, the decisions were on questions cognate to those here at issue. Georgia stated that it had in vain sought relief from the State of Tennessee, on whose territory the smelters were located, and the court defined the nature of the suit by saying: "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity, the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

On the question whether an injunction should be granted or not, the court said (206 U.S. 239):

It (the State) has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air . . . . It is not lightly to be presumed to give up quasi-sovereign rights for pay and . . . if that be its choice, it may insist that an injunction against them shall be stopped. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account . . . it is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphuric acid gas, that the forests on its mountains be they better or worse, and whatever domestic destruction they may have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source . . . Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

Later on, however, when the court actually framed an injunction, in the case of the Ducktown Company (237 U.S. 474, 477) (an agreement on the basis of an annual compensation was reached, with the most important of the two smelters, the Tennessee Copper Company), they did not go beyond a decree "adequate to diminish materially the present probability of damage to its (Georgia's) citizens".

Great progress in the control of fumes has been made by science in the last few years and this progress should be taken into account.

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, if the State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by them, together with the régime hereinafter prescribed, will, in the opinion of the Tribunal, be "just to all parties concerned", as long as, at least, the present conditions in the Columbia River Valley continue to prevail.

Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is,
therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

The Tribunal, therefore, answers Question No. 2 as follows: (2) So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such manner as the Governments, acting under Article XI of the Convention, should agree upon.

PART FOUR.

The third question under Article III of the Convention is as follows: "In the light of the answer to the preceding question, what measures or régime, if any, should be adopted and maintained by the Trail Smelter?"

Answering this question in the light of the preceding one, since the Tribunal has, in its previous decision, found that damage caused by the Trail Smelter has occurred in the State of Washington since January 1, 1922, and since the Tribunal is of opinion that damage may occur in the future unless the operations of the Smelter shall be subject to some control, in order to avoid damage occurring, the Tribunal now decides that a régime or measure of control shall be applied to the operations of the Smelter and shall remain in full force unless and until modified in accordance with the provisions hereinafter set forth in Section 3, Paragraph VI of the present part of this decision.

SECTION I.

The Tribunal in its previous decision, deferred the establishment of a permanent régime until more adequate knowledge had been obtained concerning the influence of the various factors involved in fumigations resulting from the operations of the Trail Smelter.

For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, during which studies could be made of the meteorological conditions in the Columbia River Valley, and of the extension and improvements of the methods for controlling smelter operations in closer relation to such meteorological conditions, the Tribunal, as said before, appointed two Technical Consultants, who directed the observations, experiments and operations through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940 and the winter seasons of 1938-1939 and 1939-1940. The Tribunal appointed as Technical Consultants the two scientists who had been designated by the Governments to assist the Tribunal, Dr. R. S. Dean and Professor R. E. Swain.

The previous decision directed that during the trial period, a consulting meteorologist, to be appointed with the approval of the Technical Consultants, should be employed by the Trail Smelter. On May 1, 1939, Dr. J. Patterson was thus appointed. On May 1, 1939, Dr. Patterson resigned to take up meteorological service in the Canadian Air Force, and Dr. E. W. Hewson was given leave from the Dominion Meteorological Service and appointed in his stead.

The previous decision further directed the installation, operation and maintenance of such observation stations, of such equipment at the stacks and of such sulphur dioxide recorders (the permanent recorders not to exceed three in number) as the Technical Consultants would deem necessary.

The Technical Consultants were empowered to require regular reports from the Trail Smelter as to the methods of operation of its plant and the latter was to conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal; these instructions could and, in fact, were modified from time to time on the result of the data obtained.

As further provided in the previous decision, the Technical Consultants regularly reported to the Tribunal which, as said before, met in 1939 to consult verbally with them about the temporary régime.

The previous decision finally prescribed that the Dominion of Canada should undertake to provide for the payment of the expenses resulting from this temporary régime.

On May 4, 1938, the Tribunal authorized and directed the employment of Dr. John P. Nielsen, an American citizen, engaged for three years in postgraduate work at Stanford University, in chemistry and plant physiology, as an assistant to the Technical Consultants; Dr. Nielsen continued in this capacity until October 1, 1938.

Through the authority vested in it by the Tribunal, this technical staff was enabled to study the influence of meteorological conditions on dispersion of the sulphurous gases emitted from the stacks of the smelter. This involved the establishment, operation, and maintenance of standard and newly designed meteorological instruments and of sulphur-dioxide recorders at carefully chosen localities in the United States and the Dominion of Canada, and the design and construction of portable instruments of various types for the observation of conditions at numerous surface locations in the Columbia River Valley and in the atmosphere over the valley. Observations on height, velocity, temperature, sulphur dioxide content, and other characteristics of the gas-carrying air currents, were made with the aid of captive balloons, pilot balloons and airplane flights. The observations were begun in May, 1938, and after information as to the inter-relation between meteorological conditions and sulphur-dioxide distribution had been obtained, the observations were continued throughout several experimental régimes of smelter operation during 1939 and 1940.

Periodic examination of crops and timber in the area claimed to be affected were made at suitable times by members of the technical staff.

The full details of the projects undertaken, the methods of study used, and the results obtained may be found in the final report entitled Meteorological Investigations near Trail, B.C., 1938-1940, by Reginald S. Dean and Robert E. Swain (an elaborate document of 374 pages accompanied by numerous scientific charts, graphs and photographs, copies of which have been filed with the two Governments and have been made a part of the record by the Tribunal).

The Tribunal expresses the hope that the two Governments may see fit to make this valuable report available to scientists and smelter operators generally, either by printing or other form of reproduction.
Section 2.

The investigations during the experimental period make it clear that in the carrying out of a régime, automatic recorders should be located and maintained for the purpose of aiding in control of the emission of fumes at the Smelter and to provide data for observation of the effect of the controls on fumigations.

The investigations carried out by the Technical Consultants have confirmed the idea that the dissipation of the sulphur dioxide gas emitted from the Smelter takes place by eddy-current diffusion. The form of the attenuation curve for sulphur dioxide with distance from the Smelter is, therefore, determined by this mechanism of gas dispersion.

Analysis of the recorder data collected since May, 1938, confirms the conclusion of the Tribunal stated in its previous decision to the effect that "the concentration of sulphur dioxide falls off very rapidly, point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur-dioxide is lower and falls off more gradually and less rapidly." The position of the knee in this attenuation curve is somewhat affected by wind velocity and direction, and by other factors.

From an examination of the recorded data, it appears that the Columbia Gardens recorder located 6 miles below the Smelter, is above the knee of the attenuation curve. The Waneta recorder, 10 miles below the Smelter, is still in the region of very rapid decrease of sulphur dioxide while the Northport recorder, 19 miles below the Smelter, is well below the knee of the curve. There is very little variation in the average ratio of concentrations between the various recorders. For example, the average ratio for the years 1932 to 1935, between Columbia Gardens and Northport, was 1 to 35, while the average ratio for the experimental period from May, 1938, to November, 1940, was 1 to .59. The individual variations from this ratio are relatively small. The ratio between Columbia Gardens and Waneta for the period 1932 to 1935 was 6 and that for the period May 1938, to November 1940, was .75. The individual variations of the ratio between Columbia Gardens and Waneta are, however, much greater than those between Columbia Gardens and Northport. It is accordingly found that the Columbia Gardens recorder and the Northport recorder give as complete a picture of the attenuation of sulphur dioxide with distance as can be obtained with any reasonable number of recorders.

It may be fairly assumed that the sulphur dioxide concentration at Columbia Gardens will fall off quite rapidly with distance away from the Smelter, and that a concentration very close to that recorded at Northport will be reached several miles above Northport. Concentrations recorded at intermediate points are functions of a number of variables other than distance from the Smelter. It may be generally assumed that the concentration in the neighborhood of the border will be from .6 to .75 of that recorded at Columbia Gardens. Individual variations, however, are likely to be somewhat greater than this, and in unusual instances concentrations near the border may be substantially equal to those at Columbia Gardens.

Although as a result of the investigations carried out by the Technical Consultants, the conclusion might be warranted that the Waneta recorder could be discontinued, it has, nevertheless, been decided to have it main-
tained for a limited period of further investigations, particularly as it was removed from its present location during one winter season of the trial period. As an alternative to Waneta, a location suggested by the United States, Gunderson Farm (on the west bank of the river in Section 12, T. 40, R. 40), was considered. The difficulties inherent in servicing a recorder in that location, particularly in winter, would not be compensated, it was thought, by any appreciable advantages. It was further considered that Waneta—a location practically identical to that of Boundary which the United States' scientists had selected in the past—putting out as it does almost into the middle of the Columbia Valley where it swerves to the west, is one of the best sites that could be chosen for a recorder in that vicinity. The Tribunal, having gone into the matter with great care, is convinced that this choice is not adversely affected by the vicinity of the narrow gorge of the Pend-d'Oreille River.

(b)

The year is divided into two parts, which correspond approximately with the summer and winter seasons: viz., the growing season which extends from April 1 through the summer to September 30, and the non-growing season which extends from October 1 through the winter to April 1. Atmospheric conditions in the Columbia River Valley during the summer vary widely from those in the winter. During the summer, or growing season, the air is generally in active movement with little tendency toward extended periods of calm, and smoke from the Smelter is rapidly dispersed by the frequent changes in wind direction and velocity and the higher degree of atmospheric turbulence. During the winter, or non-growing season, calm conditions may prevail for several days and smoke from the Smelter may be dispersed only very slowly.

In general, a similar variation in atmospheric stability occurs during the day. The air through the early morning hours until about nine o'clock is not subject to very rapid movement, but from around ten o'clock in the morning until late at night there is usually more wind and turbulence, with the exception of a quiet spell which often occurs in the late afternoon.

During the growing season, there is furthermore a marked diurnal variation of wind changes whose maximum frequency occurs at noon for the general direction from north to south and at seven o'clock in the evening for the general direction from south to north. This diurnal variation of wind changes does not occur so frequently during the non-growing season.

During the growing season, the descent of sulphur dioxide to the earth's surface is more likely to occur at some hours than at others. About ten to ten o'clock in the morning and ten o'clock in the evening are generally the hours of maximum fumigations, and this morning fumigation occurs with such regularity that it has been the practice of the Smoke Control Office at the Smelter for some time to cut down the emission of sulphur to the atmosphere during the early morning hours and to keep it down until eight to ten o'clock in the morning. The amount and duration of the cut are determined after an analysis of the wind velocity and direction, and of the conditions of turbulence or diffusion of the smoke. This is a fundamental feature of the program of smoke control, and the main reason for its success is that it prevents accumulations of sulphur dioxide which tend to descend from higher elevations when the early morning sun disturbs the thermal balance by heating the earth's surface. This early morning diurnal fumigation reaches
all recorders in the valley almost simultaneously, the intensity being usually highest near the Smelter. The concentration of sulphur dioxide during this type of fumigation rises as a rule very rapidly to a maximum in a few minutes and then drops off exponentially, only traces often remaining after two or three hours. A similar diurnal fumigation, usually of shorter duration, is occasionally observed in the early evening due to a disturbance of the thermal balance as the sun sets.

Sulphur dioxide sampling by airplane has indicated that in calm weather and especially in the early morning hours, the effluent gases hold to a fairly well-defined pattern in the early stages of their dispersion. The gases rise about 400 feet above the top of the two high stacks, then level out and spread horizontally along the main axis of the prevailing wind movement. During the relatively quiet conditions frequently found in the early morning, an atmospheric stratum carrying fairly high concentrations of sulphur dioxide and spreading over a large area may be formed.

With the rising sun, the radiant heating of the atmosphere near the surface may disturb the thermal balance, resulting in the descent of the sulphur dioxide which had accumulated in the upper layers at approximately 2,400 feet elevation above mean sea level, and extending either upstream or down-stream from the Smelter, depending on wind direction. This readily explains the simultaneous appearance of sulphur dioxide at various distances from the Smelter.

During the non-growing season, the non-diurnal type of fumigation predominates. In this type, the sulphur dioxide leaving the stacks is carried along in a general drift of air, diffusing more or less uniformly as it advances. From two to eight hours are usually required for the smoke to get from Trail to Northport when the drift is down river. Such fumigations are not recorded simultaneously on the various recorders but the gas is first noted nearest the Smelter and then in succession at the other recorders. The concentration at a given recorder often shows very little variation as long as it lasts, which might be for several days depending entirely upon wind velocity and direction.

It is an interesting fact that the agricultural growing season and the non-growing season coincide almost exactly with the periods in which diurnal and non-diurnal fumigations respectively, are dominant. The transition from diurnal to non-diurnal fumigations and vice versa occurs in September and April. Diurnal fumigations sometimes occur during the non-growing season but with much less frequency and regularity than during the growing season, and at a later hour because of the later sunrise in winter. Similarly, the non-diurnal type sometimes occurs during the growing season. Its manifestations are then the same as during the winter, the chief difference being that it rarely lasts as long.

Sulphur dioxide recorders can be used to assist in smoke control during both the growing and non-growing season. They are more useful in the latter season, however, because in a non-diurnal fumigation, the gas usually appears at Columbia Gardens some time before it reaches Northport, and high concentrations recorded at the former location serve as warnings that more sulphur dioxide is being emitted than can adequately be dispersed under the prevailing atmospheric conditions. This information may lead to a decrease in the amount of sulphur dioxide emitted from the Smelter in time to avoid serious consequences. With the diurnal type of fumigations, on the other hand, high concentrations of sulphur dioxide may descend from the upper atmosphere to the surface with little or no warning, and the only adequate protection against this type of fumigation is to prevent accumulations of large amounts of sulphur dioxide, either up or down stream, at or just before the periods when diurnal fumigations may be expected.

Observations over a period of years have indicated that there is little likelihood of gas being carried across the international boundary if the wind in the gas-carrying levels, approximately 2,400 feet above mean sea level, is in a direction not included in the 135° angle opening to the westward starting with north, and has a velocity sufficient to insure that no serious accumulation of smoke occurs. A recording cup anemometer and an anemovane suspended 300 feet above the surface, 1,900 feet above mean sea level, from a cable between the tops of the zinc stack and a neighboring lower stack, indicate the velocity and direction of the wind reliably except when the velocity or direction of the wind at this level differs from that in the gas-carrying level 500 feet or more higher. An attempt has been made to use the geostrophic wind forecasts made by the Weather Bureau at Vancouver for predicting the velocity and direction of the wind at these higher levels, but the results, although promising, have not yet been sufficiently certain to warrant the use of geostrophic winds as a factor in smoke control. (For further details, see Report of the Technical Consultants.)

A very significant factor in determining how much sulphur dioxide can safely be emitted by the Smelter is the rate of eddy current diffusion. When the rate of diffusion is low, smoke may accumulate in parts of the valley. Such accumulations frequently occur up-stream from the Smelter when there is a light up-river breeze.

The main factors governing the rate of diffusion of sulphur dioxide are the turbulence and lapse rate of the air. Turbulence is used instead of the more homely term gustiness to express the action of eddy currents in the air stream. Turbulence, therefore, is expressed in terms of changes in wind velocity over definite intervals of time, and may be measured by observations on standard anemometers, as has been done during the early stages of these meteorological studies. It has been found, however, that different observers using this method of measurement were not in agreement when the changes in velocity occurred rapidly and were of great intensity. It was furthermore found that the sensitivity of standard anemometers was not sufficient to give the desired precision. A number of modifications have been made which have led finally to the design and construction of an instrument called the Bridled Cup Indicator, which is more sensitive than any of the other instruments used, and is also free from personal error in the reading of the instrumental record.

There are several limitations to the application of the turbulence criterion. On a number of occasions, marked fumigations have occurred when the instrument showed that the turbulence was good or excellent. On every occasion of that sort which has been studied, pilot balloon observations revealed that there was a strong down-river wind from the surface of the
valley floor to about 2,500 feet above mean sea level. At about 4,000 feet, however, the height to which the valley sides reached, conditions were calm or very nearly so. Ordinarily, with good turbulence, the sulphur dioxide would be rapidly diffused upward and rise above the sides of the valley without difficulty. The non-turbulent condition at 4,000 feet associated with the calm layer acts effectively as a blanket, preventing the escape of the gas through the top of the valley. The turbulence in the lower layers serves then only to distribute the sulphur dioxide more or less uniformly in the valley. There is no exit through the top, and the gas moves down the valley with no lateral diffusion, in much the same way as if it were flowing along in a giant pipe. This type does not occur very frequently, but when it does, the sulphur dioxide recorder at Columbia Gardens must be used to prevent the building up of high concentrations in the valley. That is the type of fumigation which can be controlled most readily by means of such a recorder.

Another difficulty with the turbulence condition is that, especially during the daytime in summer, the turbulence recorder may indicate very little turbulence, but the diffusion may nevertheless be quite satisfactory. That is because turbulence does not cover all aspects of diffusion and some other factors, such as the lapse rate, must be taken into account.

Lapse rate, which is the technical term for the change of temperature in any given unit interval of height, is inter-related with wind velocity and turbulence, but each may contribute separately in the slow carrying upward of smoke by means of convection currents. Unfortunately, the measurement of lapse rate and its application in smoke control have not yet been fully developed. (For further details, see Final Report of the Technical Consultants.)

The behavior of the air in the valley is influenced also by other general meteorological conditions. For example, experience has shown that when the relative humidity of the air is high, particularly during periods of rain or snow, caution must be used in emitting sulphur dioxide to the atmosphere. Again, when the barometer is steady, weather conditions such as wind direction and velocity, diffusion conditions, etc., are not liable to change. Similarly, unfavorable conditions are likely to persist until the barometer changes noticeably. This suggests a generalization which will be found to hold not only for barometric changes but also for most of the other factors that have been found to influence sulphur dioxide distribution; that fumigations occur chiefly during the period of disturbance that accompanies transitional stages in meteorological conditions.

It has been found by the Technical Consultants that meteorological conditions at the Smelter sometimes prevail under which the instrumental readings at the level where the instruments now are or may be located do not fully reflect the degree of turbulence in the atmosphere at the higher gas-carrying levels. Under those conditions, it is possible that visual observations by trained observers may sometimes determine the turbulence more accurately. Where by such visual observations the conclusion shall be reached that the turbulence at higher levels is definitely better than at the level of the instruments, the load can sometimes be safely increased from the maximum allowable as determined by the instruments under the régime herein prescribed. Conversely, where by such visual observations the conclusion shall be reached that the turbulence at higher levels is definitely worse than at the level of the instruments, it will be the duty of the Smelter (and to its advantage in lessening risk of injurious fumigation) to reduce the load from the maximum allowable as determined by the instruments under the régime herein prescribed.

The Tribunal in the régime has taken into consideration this factor of visual observations, to a limited extent and in the non-growing season only. If further experience shall show in the future that more use can be made of this factor, the clause of the régime providing for a method of its alteration may be utilized for a future development of this factor: provided it shall appear that it can be done without risk of injury to territory south of the boundary.

The Tribunal is of opinion that the régime should be given an uninterupted test through at least two growing periods and one non-growing period. It is equally of opinion that thereafter opportunity should be given for amendment or suspension of the régime, if conditions should warrant or require. Should it appear at any time that the expectations of the Tribunal are not fulfilled, the régime prescribed in Section 3 (infra) can be amended according to Paragraph VI thereof. This same paragraph may become operative if scientific advance in the control of fumes should make it possible and desirable to improve upon the methods of control hereinafter prescribed; and should further progress in the reduction of the sulphur content of the fumes make the régime, as now prescribed, appear as unduly burdensome in view of the end defined in the answer to Question No. 2, this same paragraph can be invoked in order to amend the régime accordingly. Further, under this paragraph, the régime may be suspended if the elimination of sulphur dioxide from the fumes should reach a stage where such a step could clearly be taken without undue risks to the United States interests.

Since the Tribunal has the power to establish a régime, it must equally possess the power to provide for alteration, modification or suspension of such régime. It would clearly not be a "solution just to all parties concerned" if its action in prescribing a régime should be unchangeable and incapable of being made responsive to future conditions.

The foregoing paragraphs are the result of an extended investigation of meteorological and other conditions which have been found to be of significance in smoke behavior and control in the Trail area. The attempt made to solve the sulphur dioxide problem presented to the Tribunal has finally found expression in a régime which is now prescribed as a measure of control. The investigations made during the past three years on the application of meteorological observations to the solution of this problem at Trail have built up a fund of significant and important facts. This is probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke. Some factors, such as atmospheric turbulence and
the movement of the upper air currents have been applied for the first time to the question of smoke control. All factors of possible significance, including wind directions and velocity, atmospheric temperatures, lapse rates, turbulence, geostrophic winds, barometric pressures, sunlight and humidity, along with atmospheric sulphur dioxide concentrations, have been studied. As said above, many observations have been made on the movements and sulphur dioxide concentrations of the air at higher levels by means of piloted and captive balloons and by airplane, by night and by day. Progress has been made in breaking up the long winter fumigations and in reducing their intensity. In carrying finally over to the non-growing season with a few minor modifications a régime of demonstrated efficiency for the growing season, there is a sound basis for confidence that the winter fumigations will be kept under control at a level well below the threshold of possible injury to vegetation. Likewise, for the growing season a régime has been formulated which should throttle at the source the expected diurnal fumigations to a point where they will not yield concentrations below the international boundary sufficient to cause injury to plant life. This is the goal which this Tribunal has set out to accomplish.

The Tribunal has carefully considered the suggestions made by the United States for a régime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period. It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a régime would unduly and unnecessarily hamper the operations of the Trail Smelter and would not constitute a "solution fair to all parties concerned".

SECTION 3.

In order to prevent the occurrence of sulphur dioxide in the atmosphere in amounts, both as to concentration, duration and frequency, capable of causing damage in the State of Washington, the operation of the Smelter and the maximum emission of sulphur dioxide from its stacks shall be regulated as provided in the following régime.

I. Instruments.

A. The instruments for recording meteorological conditions shall be as follows:

(a) Wind Direction and Wind Velocity shall be indicated by any of the standard instruments used for such purposes to provide a continuous record and shall be observed and transcribed for use of the Smoke Control Office at least once every hour.

(b) Wind Turbulence shall be measured by the Bridled Cup Turbulence Indicator. This instrument consists of a light horizontal wheel around whose periphery are twenty-two equally-spaced curved surfaces cut from one-eighth inch aluminium sheet and shaped to the same-sized blades or cups. This wind-sensitive wheel is attached to an aluminium sleeve rigidly screwed to one end of a three-eighth inch vertical steel shaft supported by almost frictionless bearings at the top and bottom of the instrument frame. The shaft of the wheel is bridled to prevent continuous rotation and is so

constrained that its angle of rotation is directly proportional to the square of the wind velocity. One complete revolution of the anemometer shaft corresponds to a wind velocity of 36 miles per hour and, with eighteen equally spaced contact points on the commutator, one make and one break in the circuit is equivalent to a change in wind velocity of two miles per hour, recorded on a standard anemograph. (For further detail, see the Final Report of the Technical Consultants, p. 209.)

The instruments noted in (a) and (b) above, shall be located at the present site near the zinc stack of the Smelter or at some other location not less favorable for such observations.

(c) Atmospheric temperature and barometric pressure shall be determined by the standard instruments in use for such meteorological observations.

B. Sulphur dioxide concentrations shall be determined by the standard recorders, which provide automatically an accurate and continuous record of such concentrations.

One recorder shall be located at Columbia Gardens, as at present installed with arrangements for the automatic transcription of its record to the Smoke Control Office at the Smelter. A second recorder shall be maintained at the present site near Northport. A third recorder shall be maintained at the present site near Waneta, which recorder may be discontinued after December 31, 1942.

II. Documents.

The sulphur dioxide concentrations indicated by the prescribed recorders shall be reduced to tabular form and kept on file at the Smelter. The original instrumental recordings of all meteorological data herein required to be made shall be preserved by the Smelter.

A summary of Smelter operation covering the daily sulphur balances shall be compiled monthly and copies sent to the Governments of the United States and of the Dominion of Canada.

III. Stacks.

Sulphur dioxide shall be discharged into the atmosphere from smelting operations of the zinc and lead plants at a height no lower than that of the present stacks.

In case of the cooling of the stacks by a lengthy shut down, gases containing sulphur dioxide shall not be emitted until the stacks have been heated to normal operating temperatures by hot gases free of sulphur dioxide.

IV. Maximum Permissible Sulphur Emission.

The following two tables and general restrictions give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.
### Growing Season

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<thead>
<tr>
<th>Turbulence</th>
<th>Bad</th>
<th>Fair</th>
<th>Good</th>
<th>Excellent</th>
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<tr>
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<td>(3) Wind not favorable</td>
<td>(4) Wind favorable</td>
<td>(5) Wind not favorable</td>
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<td>6</td>
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<td>11</td>
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<tr>
<td>3 a.m. to 3 hrs. after sunrise</td>
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<td>2</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>3 hrs. after sunrise to 3 hrs. before sunset</td>
<td>2</td>
<td>6</td>
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<td>9</td>
</tr>
<tr>
<td>3 hrs. before sunset to sunset</td>
<td>2</td>
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<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Sunset to midnight</td>
<td>3</td>
<td>7</td>
<td>6</td>
<td>9</td>
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</table>

### Non-Growing Season

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<th>Good</th>
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</thead>
<tbody>
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<td>(2) Wind favorable</td>
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<td>(5) Wind not favorable</td>
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</tr>
<tr>
<td>Sunset to midnight</td>
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<td>6</td>
<td>11</td>
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</tbody>
</table>

**General Restrictions and Provisions:**

(a) If the Columbia Gardens recorder indicates 0.5 part per million or more of sulphur dioxide for two consecutive twenty minute periods during the growing season, and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

If the Columbia Gardens recorder indicates 0.5 part per million or more of sulphur dioxide for three consecutive twenty minute periods during the non-growing season and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

(b) In case of rain or snow, the emission of sulphur shall be reduced by two (2) tons per hour. This regulation shall be put into effect immediately when precipitation can be observed from the Smelter and shall be continued in effect for twenty (20) minutes after such precipitation has ceased.

(c) If the slag retreatment furnace is not in operation the emission of sulphur shall be reduced by two (2) tons per hour.

(d) If the instrumental reading shows turbulence excellent, good or fair, but visual observations made by trained observers clearly indicate that there is poor diffusion, the emission of sulphur shall be reduced to the figures given in column (1) if wind is not favorable, or column (2) if wind is favorable.

(e) When more than one of the restricting conditions provided for in (a), (b), (c), and (d) occur simultaneously, the highest reduction shall apply.

(f) If, during the non-growing season, the instrumental reading shows turbulence fair and wind not favorable but visual observations by trained observers clearly indicate that there is excellent diffusion, the maximum permissible emission of sulphur may be increased to the figures in column (5). The general restrictions under (a), (b), (c) and (e), however, shall be applicable.

Whenever the Smelter shall avail itself of the foregoing provisions, the circumstances shall be fully recorded and copy of such record shall be sent to the two Governments within one month.

(g) Nothing shall relieve the Smelter from the duty of reducing the maximum sulphur emission below the amount permissible according to the tables and the preceding general restrictions and provisions, as the circumstances may require for the prudent operation of the plant.

### V. Definition of Terms and Conditions

(a) **Wind Direction and Velocity**—The following directions of wind shall be considered favorable provided they show a velocity of five miles per hour or more and have persisted for thirty minutes at the point of observation, namely north, east, south, southwest, and intermediate directions, that is any direction not included in the one hundred and thirty-five (135) degree angle opening to the westward starting with north.

All winds not included in the above definition shall be considered not favorable.

(b) **Turbulence**—The following definitions are made of bad, fair, good, and excellent turbulence. The figures given are in terms of the Bridled Cup Turbulence Indicator for a period of one half hour:

- Bad Turbulence: 0-74
- Fair Turbulence: 75-149
- Good Turbulence: 150-349
- Excellent Turbulence: 350 and above

If at any time another instrument should be found to be better adapted to the measurement of turbulence, and should be accepted for such measure-
ment by agreement of the two Governments, the scale of this instrument shall be calibrated by comparison with the Bridled Cup Turbulence Indicator.

IV. Amendment or Suspension of the Regime.

If at any time after December 31, 1942, either Government shall request an amendment or suspension of the régime herein prescribed and the other Government shall decline to agree to such request, there shall be appointed by each Government, within one month after the making or receipt respectively of such request, a scientist of reputable standing, and the two scientists so appointed shall constitute a Commission for the purpose of considering and acting upon such request. If the Commission within three months after appointment fail to agree upon a decision, they shall appoint jointly a third scientist who shall be Chairman of the Commission; and thereupon the opinion of the majority of the members of the Commission in the absence of any majority opinion, the opinion of the Chairman shall be decisive; the opinion shall be rendered within one month after the choice of the Chairman. If the two scientists shall fail to agree upon a third scientist within the prescribed time, upon the request of either of the Governments, the Commission of two, or three scientists as the case may be, may take such action in compliance with or in denial of the request above referred to, either in whole or in part, as it deems appropriate for the avoidance or prevention of damage occurring in the State of Washington. The decision of the Commission shall be final, and the Governments shall take such action as may be necessary to assure due conformity with the decision, in accordance with the provisions of Article XII of the Convention.

The compensation of the scientists appointed and their reasonable expenditures shall be paid by the Government which shall have requested the advice of the other Government; provided, however, that if the Commission in response to the request of the United States shall find that notwithstanding compliance with the régime in force damage has occurred through fumes in the State of Washington, then the above expenses shall be paid by the Dominion of Canada.

SECTION 4.

While the Tribunal refrains from making the following suggestion a part of the régime prescribed, it is strongly of the opinion that it would be to the clear advantage of the Dominion of Canada, if during the interval between the date of filing of this Final Report and December 31, 1942, the Dominion of Canada would continue, at its own expense, the maintenance of experimental and observational work by two scientists similar to that which was established by the Tribunal under its previous decision, and has been in operation during the trial period since 1938. It seems probable that a continuation of investigations until at least December 31, 1942, would provide additional valuable data both for the purpose of testing the effective operation of the régime now prescribed and for the purpose of obtaining information as to the possibility or necessity of improvements in it.

The value of this trial period has been acknowledged by each Government. In the memorandum submitted by the Canadian Agent, under date of December 28, 1940, while commenting on the expense involved, it is stated (p. 4):

The Canadian Government is not disposed to question in the least the value of the trial period of three years or to underestimate the great benefits that have been derived from the investigations carried on by the Tribunal through its Technical Consultants.

The Agent for Canada at the hearing on December 11, 1940 (Transcript, p. 6318) stated:

We have had the benefit of an admirable piece of research in fumigations conducted by the Technical Consultants, and we have had the advantage of all of their studies of meteorological conditions.

The Counsel for Canada (Mr. Tilley), in a colloquy with the American Member of the Tribunal at the hearing on December 12, 1940 (Transcript, pp. 6493-6494) said:

JUDGE WARREN: We stated very frankly to the Agents that we were prepared in March (1938) to render a final decision but that we thought it would be highly unsatisfactory to both parties to do so unless we had some experimentation.

Mr. TILLEY: There is no doubt about that—quite properly, if I may so say, with deference.

JUDGE WARREN: We were trying to do this for the benefit of both parties. We were prepared to answer the questions.

Mr. TILLEY: Nothing could have been more in the interests of the parties concerned than what you did.

In the memorandum submitted by the United States Agent, under date of January 7, 1949, while explaining the reasons for the inability of the United States to offer concrete suggestions in relation to a proposed régime, other than the régime suggested by the United States, it is stated (p. 11):

It should be understood that the drafting of this Memorandum has not been undertaken in an attempt to minimize the importance of the excellent work performed by meteorologists of the Government of Canada under the direction of the Technical Consultants and their undoubtedly meritorious contribution.

The Counsel for the United States (Mr. Raitis) at the hearing on December 9, stated (Transcript of Record, p. 6080, p. 6089):

I will say at the outset that I believe the meteorological studies which we (were?) conducted have been very helpful. They have been undoubtedly gone into at considerable length with a definite effort to put the finger on the problem which has been confronting us now for some fifteen years. As I say, I think these studies have been most helpful, because up to that time we had more or less only to leave to conjecture what happened when these gases left the stacks; we did not know through any definite experiments what became of this gas problem.
The scientist employed by the United States, Mr. S. W. Griffin, in his report submitted November 30, 1940, relating to the Final Report of the Technical Consultants, stated (p. 3):

Regarding the investigations of the Canadian meteorologists in working out the complicated air movements which take place over this irregular terrain, there can be no doubt of the value of their contribution in adding much to the knowledge, both of a fundamental and detailed character, to that which previously existed.

(p. 5) It remains to be determined whether or not the three year period of experimentation may eventually bring about a permanent abeyance of harmful sulphur dioxide fumigations, south of the international boundary. However this may be, there can be little doubt that the knowledge gained in some of the researches described in the report is sufficiently fundamental in character and broad in application that, if published, the work should be of interest and value to any smelter management engaged in processes which pollute the air with sulphur dioxide.

PART FIVE.

The fourth question under Article III of the Convention is as follows:

What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

The Tribunal is of opinion that the prescribed régime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.

But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows:

(a) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention; (b) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the régime prescribed herein, the reasonable cost of such investigations not in excess of $7,500 in any one year shall be paid to the United States as a compensation, but only if and when the two Governments determine under Article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and not as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under Article XI of the Convention.

PART SIX.

Since further investigations in the future may be possible under the provisions of Part Four and of Part Five of this decision, the Tribunal finds it necessary to include in its report, the following provision:

Investigators appointed by or on behalf of either Government, whether jointly or severally, and the members of the Commission provided for in Paragraph VI of Section 3 of Part Four of this decision, shall be permitted at all reasonable times to inspect the operations of the Smelter and to enter upon and inspect any of the properties in the State of Washington which may be claimed to be affected by fumes. This provision shall also apply to any localities where instruments are operated under the present régime or under any amended régime. Wherever under the present régime or any amended régime, instruments have to be maintained and operated by the Smelter on the territory of the United States, the Government of the United States shall undertake to secure for the Government of the Dominion of Canada the facilities reasonably required to that effect.

The Tribunal expresses the strong hope that any investigations which the Governments may undertake in the future, in connection with the matters dealt with in this decision, shall be conducted jointly.

(Signed) JAN HOSTIE.
(Signed) CHARLES WARREN.
(Signed) R. A. E. GREENSHIELDS.

ANNEX.

1. Letter from the Members of the Tribunal to the Secretary of State of the United States and Secretary of State for External Affairs of Canada, May 6, 1941.

TRAIL SMELTER ARBITRAL TRIBUNAL.
UNITED STATES AND CANADA.

710 MILES BUILDING,
WASHINGTON, D.C.
May 6, 1941.

SIR:

The Trail Smelter Arbitral Tribunal has received from its scientific advisers in that case, a letter dated April 28, 1941, copy of which is here enclosed. The members of the Tribunal think that it is their duty in transmitting this letter to both Governments, to declare that the statement contained therein is the correct interpretation of Clause IV, Section 3 of Part Four of the Decision reported on March 11, 1941.

Respectfully yours,

JAN HOSTIE.
CHARLES WARREN.
R. A. E. GREENSHIELDS.
II. Letter from the Technical Consultants to the Chairman of the Trail Smelter Arbitral Tribunal, April 26, 1941.

REGINALD S. DEAN.

1529 Arlington Drive,
Salt Lake City, Utah,
April 28, 1941.

Dr. Jan F. Hostie,
Trail Smelter Arbitral Tribunal,
710 Mills Building,
Washington, D.C.

Dear Doctor Hostie:

A critical reading of the text of Part IV, Section 3 (IV) of the decision of the Tribunal reported on March 11, 1941, reveals a situation which, after careful consideration, we feel should be brought to your attention. Under the heading "Maximum Permissible Sulphur Emission" it is stated that the two tables and the general restrictions which follow give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.

If a strict interpretation were placed on this statement as it stands, it would lead often to a complete shut-down of all operations at the Smelter. For example, if the turbulence is bad and the wind not favorable, no sulphur may be emitted. Of course, it was intended that these stipulations were to govern Dwight and Lloyd roasting operations. Small amounts of sulphur dioxide will necessarily escape from the blast furnace and other operations in the Smelter, but these have never been specifically designated in any of the régimes which we have laid down, simply because they are insignificant in amount. In the orderly administration of this final régime, all who have been connected with the previous régimes would not fall within the above stipulation. If, however, the strictest possible interpretation were insisted upon the results would not only be disastrous to the Smelter, but clearly outside of the intended scope of the régime. Tail gases have been recognized all along as a normal part of the smelting operation.

The situation would be fully clarified if the following changes were made in the statement on page 74, Section 3 (IV): The following two tables and general restrictions give the maximum hourly permissible emission of untreated sulphur dioxide from the roasting plants expressed as tons per hour of contained sulphur.

I regret that such a possible interpretation of the régime was not noted by us when it was being formulated. It is brought to your attention now in order to put on record this possible misinterpretation of the régime as it is now worded.

Yours sincerely,

ROBERT E. SWAIN,
R. S. DEAN,
Technical Consultants.
Lake Lanoux Arbitration  
(France v. Spain)  
16 November 1957

*Reports of International Arbitral Awards, Vol. XII*
LAKE LANOUX ARBITRATION (FRANCE v. SPAIN)

The three Treaties of Bayonne were completed by an Additional Act of May 26, 1866, in which, inter alia, the following provisions appear:

"The Undersigned, Plenipotentiaries of France and Spain for the International Delimitation of the Pyrenees, duly authorized by their respective Sovereigns, to unite under one Act the Regulations applicable over the whole Frontier in either Country, and relative to the preservation of the Boundary Marks, to Cattle and Pasturage, to Properties divided by the Frontier, and the enjoyment of the Waters common to both, Regulations which, on account of their general character, claim a special place, which they could not find in the Treaties of Bayonne of the 2nd December, 1856, and the 14th April, 1862, nor in that of this day's date, have agreed upon the following articles: — . . ."

"Control and Enjoyment of Waters of Common User between the Two Countries"

"Article 8: All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.

"Flowing waters change jurisdiction at the moment when they pass from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow.

"Article 9: For watercourses which flow from one Country to the other, or which constitute a boundary, each Government recognizes, subject to the exercise of a right of verification when appropriate, the legality of irrigations, of works and of enjoyment for domestic use currently existing in the other State, by virtue of concession, title or prescription, with the reservation that only that volume of water necessary to satisfy actual needs will be used, that abuses must be eliminated; and that this recognition will in no way injure the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid.

"Article 10: If, after having satisfied the actual needs of users recognized on each side respectively as regular, there remains at low tide water available where the frontier is crossed, such water will be shared in advance between the two countries, in proportion to the areas of the irrigable lands belonging to the immediate respective riparian owners, minus land already irrigated.

"Article 11: When in one of the two States it is proposed to construct works or to grant new concessions which might change the course or the volume of a watercourse of which the lower or opposite part is being used by the riparian owners of the other country, prior notice will be given to the highest administrative authority of the Department or of the Province to which such riparian owners are subject by the corresponding authority in the jurisdiction where such schemes are proposed, so that, if they might threaten the rights of the riparian owners of the adjoining Sovereignty, a claim may be lodged in due time with the competent authorities, and thus the interests that may be involved on both sides will be safeguarded. If the work and concessions are to take place in a Commune contiguous to the border, the engineers of the other Country will have the option, upon proper notice given to them reasonably in advance, of agreeing to inspect the site with those in charge of it.

"Article 12: The downstream lands are obliged to receive from the higher lands of the neighbouring country the waters which flow naturally therefrom together with what they carry without the hand of man having contributed thereto. There may be constructed neither a dam, nor any obstacle capable of harming the upper riparian owners, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the downstream lands.

(Petrén, President; Bolla, De Luna, Reuter, De Visscher).

THE FACTS. —This arbitration concerned the use of the waters of Lake Lanoux, in the Pyrenees. Briefly, the French Government proposed to carry out certain works for the utilization of the waters of the lake and the Spanish Government feared that these works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of May 26, 1866, between France and Spain and the Additional Act of the same date. In any event, it was claimed that, under the Treaty, such works could not be undertaken without the previous agreement of both parties.

Lake Lanoux lies on the southern slopes of the Pyrenees, on French territory. It is fed by streams which have their source in French territory1 and which run entirely through French territory only. Its waters emerge only by the Font-Vive stream, which forms one of the headwaters of the River Carol. That river, after flowing approximately 25 kilometers from Lake Lanoux through French territory, crosses the Spanish frontier at Puigcerda and continues to flow through Spain for about 6 kilometers before joining the river Segre, which ultimately flows into the Ebro. Before entering Spanish territory, the waters of the Carol feed the Canal of Puigcerda which is the private property of that town.

The Franco-Spanish frontier was fixed by three successive treaties signed at Bayonne on December 1, 1856, April 14, 1862, and May 26, 1866, respectively. The last of these treaties delimits the frontier from the Valley of Andorra to the Mediterranean Sea. The Treaty of Bayonne of 1866 contains, inter alia, the following provisions:

\[\text{(1957) 12 R.I.A.A. 281; 24 I.L.R. 101}\]

The Undersigned, Plenipotentiaries of France and Spain for the International Delimitation of the Pyrenees, duly authorized by their respective Sovereigns, to unite under one Act the Regulations applicable over the whole Frontier in either Country, and relative to the preservation of the Boundary Marks, to Cattle and Pasturage, to Properties divided by the Frontier, and the enjoyment of the Waters common to both, Regulations which, on account of their general character, claim a special place, which they could not find in the Treaties of Bayonne of the 2nd December, 1856, and the 14th April, 1862, nor in that of this day's date, have agreed upon the following articles: — . . ."

1 His Majesty the Emperor of the French, and Her Majesty the Queen of Spain, wishing to fix in a definitive manner the Frontier common to both States, as well as the Rights, Usages, and Privileges belonging to the Populations bordering the two States between the Department of the Pyrénées-Orientales and the Province of Gironne from the Val d'Andorre to the Mediterranean, in order to complete from one sea to the other the work so happily begun, and followed out in the Treaties of Bayonne of the 2nd December, 1856, and 14th April, 1862, and at the same time and for ever to strengthen order and good relations between Frenchmen and Spaniards in that eastern part of the Pyrenees, in the same manner as on the remainder of the Frontier, from the Mouth of the Bidassoa to the Val d'Andorre, have considered it necessary to insert in a third and last Special Treaty, in continuation of the two above mentioned, the stipulations which they have considered it best to attain that object, and have appointed as their Plenipotentiaries to that effect . . ."
Article 13: When watercourses form the frontier, any riparian owner may, on obtaining any authorization necessary under the law of his Country, make on his bank plantations and construct works of repair and of defence, provided that they do not produce any alteration of the flow of water which would harm his neighbors and that they do not encroach on the bed, that is, the land covered by water at ordinary levels.

As regards the river Raour, which forms the frontier between the territories of Bourg-Madame and Puigcerda, and which, owing to special circumstances, has not any well-defined boundaries, the demarcation of a zone where it shall be forbidden to make plantations or construct works will be proceeded with, taking as a basis what was agreed between the two Governments in 1750 and renewed in 1820, but with the right to introduce modifications, if it can be done without injury to the river system or to adjoining lands, so that, on the execution of the present Additional Act, as little damage as possible is caused to the riparian owners when clearing the bed, which is to be delimited, of the obstacles which they have placed there.

Article 14: If, by falls of earth from the banks, by objects carried down or deposited, or from other natural causes, some deterioration or blockage in the flow of water should result, to the detriment of the riparian owners of the other Country, the individuals affected may apply to the competent jurisdiction for [an order] that repairs and clearance be carried out by whoever may be concerned.

Article 15: When, apart from disputes within the jurisdiction of the ordinary courts, there shall arise between riparian owners of different nationality difficulties or subjects of complaint regarding the use of water, the persons concerned shall each apply to their respective authorities, so that [the latter] shall agree between themselves to resolve the dispute, if it is within their jurisdiction, and in case of lack of jurisdiction or failure to agree, as also in a case where the persons concerned will not accept the decision given, then recourse shall be had to the higher administrative authority of the Department and the Province.

Article 16: The highest administrative authorities of the bordering Departments and Provinces will act in concert in the exercise of their right to make regulations for the general interest and to interpret or modify their regulations whenever the respective interests are at stake, and in case they cannot reach agreement, the dispute shall be submitted to the two Governments.

Article 17: The Prefects and the Civil Governors on both sides of the frontier may, if they deem it expedient, establish in concert, with the approval of their Governments, elected syndicates formed equally of French and Spanish riparian owners, to supervise the carrying out of the regulations and to bring offenders before the competent courts.

Article 18: An international Commission of engineers shall ascertain, on the frontier of the Department of Pyrenees-Orientales with the Province of Girona, and at all points on the frontier where there may be occasion, the present use of water in the respective frontier and, if necessary, other, communes, whether for irrigation, for factories or for domestic use, so as to allocate in each case only the necessary quantity of water, and to remove abuses; it will determine, for each watercourse, at low water and where it crosses the frontier, the volume of water available and the area of irrigable land belonging to the nearby respective riparian owners which have not yet been irrigated; it will proceed to the operations concerning the Raour indicated in Article 13; it will propose measures and precautions requisite for ensuring on either side the due execution -- of the regulations and for avoiding, so far as possible, all strife among the respective riparian owners; finally, if mixed syndicates are established, it will examine what is to be the extent of their competence.

Article 19: As soon as the present Act has been ratified, the Commission of Engineers mentioned in Article 18 may be nominated so that it may proceed immediately to its work, commencing with the Raour and the Vanera, where it is most urgent.

Three further additional Conventions were attached to the Treaties of Bayonne: the first was designed to ensure the execution of the Treaty of December 1, 1856, the second that of April 14, 1862, and the third, entitled "Final Act of the Delimitation of the International Frontier of the Pyrenees", was to ensure the execution of the Treaty of May 26, 1866, and the Additional Act of the same date. In the Final Act were contained various regulations, drawn up under Article 18 of the Additional Act, concerning the use of certain waters. None of these regulations, however, concerns the Carol; nor does it appear that at any subsequent time the waters of that riser were made the subject of any such regulations.

On the other hand, the question of the use of the waters of Lake Lanoux was, on several occasions after 1917, the subject of exchanges of view between the French and Spanish Governments. Thus, when in 1917 the French authorities had a scheme for diverting the waters of Lake Lanoux towards the Ariège and thence towards the Atlantic, the Spanish Government intimated to the French Government that such a scheme would affect Spanish interests and requested that the scheme would not be carried out without previous notice to the Spanish Government and agreement between the two Governments. One effect of this action was that on January 31, 1918, the French Ministry of Foreign Affairs informed the Spanish Ambassador in Paris that the French Minister of Public Works would take no decision concerning the deviation of the waters of Lake Lanoux; towards the Ariège without previously notifying the Spanish authorities. In reply, the Spanish Government intimated, on March 13, 1818, that it regarded the scrupulous maintenance of the status quo as being guaranteed until such time as the French Government should think fit to adopt definitively a plan modifying the current state of affairs, when an amicable and equitable accord should be arrived at between the interested parties acting in conformity with the provisions concerted by the two States.

As schemes for diverting the waters of Lake Lanoux continued to be studied by the French authorities, the Spanish Government, in a communication dated January 15, 1920, to the French Ministry of Foreign Affairs recalled their desire to be consulted and requested that steps be taken to appoint an international commission which, in accordance with the provisions of existing treaties, would examine question in the name of the two Governments and would reach accord on the works to be undertaken so as to safeguard both the French and the Spanish interests involved. As a result of this démarché, the French Ministry of Foreign Affairs on February 29, 1920, communicated to the Spanish Ambassador in Paris the fact that the French Government were entirely in agreement with the Spanish Government in considering that the question of the diversion of the waters of Lanoux could be definitively resolved only with the agreement of the Spanish Government. At the same time the Ministry indicated that the studies then being pursued were not yet completed so that the French Government was not yet able to lay definite proposals before the Spanish Government.

The following years saw a series of exchanges of view regarding the constitution of the International Commission and the task to be confided to it; the French Government wishing to restrict the commission's mandate to taking note of representations made by Spanish users and ascertaining whether they were well-founded, while, in the opinion of the Spanish Government, the Commission should
connection of the Mixed Commission of Engineers. Moreover, the French Government agreed to a meeting of the Mixed Commission of Engineers. However, the French Government had taken the position of Lake Lanoux. The negotiations recommenced on the occasion of a meeting on February 3, 1949, at Madrid, of the International Commission for the Pyrenees, which had been created by an Exchange of Notes, dated May 30 and July 19, 1875, between the French and Spanish Governments. At that meeting, the French delegation and the Commission of Engineers, met on August 29 and 30, at Perpignan, when the French delegation was informed that the French Government had decided to take into consideration the proposal of the International Commission for the Pyrenees in its report to the two Governments. That proposal was accepted by the question of the utilization of the waters of Lake Lanoux and proposed the setting up of a mixed commission of engineers with instructions to study the question and make a report to the two Governments. The French delegation was informed that the French Government had decided to take into consideration the proposal of the International Commission for the Pyrenees in its report to the two Governments. That proposal was accepted by the French delegation and the Commission of Engineers, met on August 29 and 30, at Perpignan, when the French delegation was informed that the French Government had decided to take into consideration the proposal of the International Commission for the Pyrenees in its report to the two Governments. 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French delegation formulated a certain number of proposals linking the execution of the projected works with guarantees for the interests of Spanish riparian owners. As it was not found possible to arrive at an agreement on the project, the French delegation resumed freedom of action within the limits of their rights. The Special Mixed Commission met at Madrid from December 12 to 17, 1955. The French delegation produced details of a scheme which corresponded in substance to the scheme communicated to the Spanish Government by the French delegation at the meeting of the Special Mixed Commission held in January 1954. This scheme, then, envisaged the construction of a large reservoir at the very favourable site of Lake Lanoux, to utilize the waters accumulated there after falling a considerable distance and to use this energy to supply the waters feeding the Canal, the points of view of the two delegations could not be reconciled, and the Commission, not having been able to reach agreement, decided, on March 6, 1956, to terminate its work and report to the two Governments.

Subsequently to the declaration of the French delegation at the meeting of the International Commission for the Pyrenees in November 1955, the French Government, by a Note dated March 21, 1956, informed the Spanish Government of its determination to carry out the schemes already projected before the Special Mixed Commission, on the understanding that such action could not prejudice the water rights of the Spanish side.

The Spanish delegation, however, maintained its basic opposition to any diversion of the waters of Lake Lanoux for the utilization of the waters of the Canal of Puigcerda. This scheme, which would be a breach of the relevant provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date, would have involved the construction of a road and the installation of a hydroelectric power plant. The French scheme included, besides these two guarantees of a technical nature, two other guarantees and one advantage. There would be a mixed Franco-Spanish Commission, with both sides equally represented, to act as an authority for the execution of the works, and for the supervision of the construction and the operation of the scheme. The scheme, which would be a breach of the relevant provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date, would have involved the construction of a road and the installation of a hydroelectric power plant.

The French delegation maintained that a mixed Franco-Spanish Commission should be set up, with the task of drawing up a proposal for the utilization of the waters of Lake Lanoux. The French delegation pointed out that the Special Mixed Commission had already been set up with the task of drawing up a proposal for the utilization of the waters of Lake Lanoux. The French delegation pointed out that the Special Mixed Commission had already been set up with the task of drawing up a proposal for the utilization of the waters of Lake Lanoux. The French delegation pointed out that the Special Mixed Commission had already been set up with the task of drawing up a proposal for the utilization of the waters of Lake Lanoux.
The French Government asked the Tribunal to declare that it was correct in maintaining that in carrying out, without an agreement previously arrived at between the two Governments, works for the utilization of the waters of Lake Lanoux on the conditions laid down in the Compromis (Arbitration Agreement) of November 19, 1956, it was not committing a breach of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date.

The French Memorial summarizes the principles to be derived from the authorities as follows: "As far as this litigation is concerned, the following points may be particularly borne in mind: ... of the latter State do not suffer serious prejudice, no duty to obtain its consent before undertaking the work.

The Spanish Memorial, at pp. 61-78, states that the examination of treaties regulating the rights of co-riparians is a proper method of inquiry into the conception of general international law. The decisions of the German, Swiss and American federal courts are reviewed in the Memorial to indicate that the principle that no substantial change can be brought about by one riparian without the consent of the other is supported in the available opinions of courts having to decide questions analogous to those arising from the use of international rivers.

The principal arguments put forward by the parties were as follows:

On behalf of Spain:
(1) The Electricité de France scheme affects the whole of the water system and the flow of the waters coming from Lake Lanoux and passing through the basin of the Carol, because both are clearly predetermined by any modification of the physical features of that system.

(2) The Electricité de France scheme, if carried out, would transform the waters of the river basin which flow into the Mediterranean after passing through the Carol, into those which flow into the Atlantic. This abstraction of water would produce a modification of the physical features of the hydrographic basin of the Carol, to which Spain is entitled by right of institutions.

(3) The restoration of the equivalent of the abstracted water, as it is projected in the Electricité de France scheme, implies that the water would no longer flow naturally in its own course, the change being substituted and the river would be transformed into a water system which is affected by the will of the riparian State only, and hence the preoccupation for the preservation of the physical features of the river system will be lacking. The restoration of the equivalent of the waters abstracted, which does not yet exist in reality, will not alter the most prejudicial consequences of that transformation, but it would not reduce the effectiveness of the scheme which has been considerably weakened by the physical features of the water system and the flow of the waters coming from Lake Lanoux and passing through the basin of the Carol.

(4) The technical possibility of restoring the equivalent of the waters abstracted, according to the Electricité de France scheme, does not lessen the profound transformation of the system of the waters which results from the concept of community among riparians, whenever a substantial alteration of the system of the waters is contemplated.

(5) The guarantees and the alleged advantages comprised in the Electricité de France scheme (the creation of a Spanish-French Commission to control the construction of the restoration arrangements; the nomination of a Spanish engineer, enjoying consular status, who would then inspect the operation, increased availability of water at the irrigation season, and the creation in Lake Lanoux of a reserve for use in Spain) are not based on a scheme which is supported by the decisions of the German, Swiss and American federal courts, and the system of community established by that international instrument and the two Governments, in breach of Articles 11, 12, 15 and 16 of the Act of May 26, 1866, a system of community destroyed by the unilateral realization of the said scheme.

The principal arguments put forward by the parties were as follows:

On behalf of France:
(1) The Electricité de France scheme affects the whole of the water system and the flow of the waters coming from Lake Lanoux and passing through the basin of the Carol, because both are clearly predetermined by any modification of the physical causes which determine the flow of those waters along the bed of that river.

(2) The Electricité de France scheme is based on the diversion of the waters of the Carol, which flow through the Sègre and the Ebro into the Mediterranean, to carry them into the Arl, by the effect of the total removal of the volume of water which now flows along its natural course.
Demarcation Treaties to which it is complementary—a system which is respected by the Spanish scheme in its appraisal of the interests of France and Spain."

On behalf of France. "(1) The Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date did not have as their object the ‘freezing’ in perpetuity of the natural conditions existing at the time; they confined themselves, in this matter, to laying down rules according to which, should occasion arise, those conditions should be modified.

"(2) The sovereignty of each of the two States on its own territory remains untouched, subject only to the restrictions contained in international instruments in force between them.

"(3) In particular, their right to undertake works of public utility is expressly confirmed.

"(4) The ability of one State to proceed with such works is not made subject to the prior consent of the other State by answer of the provisions of the Acts above cited, and especially not by Article 11 or Article 16 of the Additional Act. The Spanish Government itself so adjudged when, not only without seeking assent but also without consulting the French Government, it authorized the works at Val d’Aran.

"(5) The French Government has observed the rules of procedure designed to preserve, in such matters, all the rights and interests in question.

"(6) The French scheme, with the guarantees and modalities with which it is furnished, will safeguard completely the rights and interests of Spain, whose independence it will not compromise in any way.

"(7) French rights and interests would, on the other hand, be seriously harmed if this scheme were not carried out or even if it were replaced by the Spanish scheme, the economic value of which would be substantially less.

"(8) The French scheme, as it has been conceived, presented and guaranteed, therefore complies fully with the conditions required for its valid execution by the provisions of the Conventions in force between the two States, even in the absence of the consent—which it was not obligatory to obtain—if the Spanish Government."

In reply on behalf of Spain, it was contended:

"(1) The Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date did not intend to crystallize in perpetuity the conditions existing at the time [of their signature]; they were limited to laying down rules in the matter, rules according to which those conditions can be modified. But those rules were conceived and drawn up in a spirit of friendship, of reciprocal confidence, and with a idea of necessary mutual accord, which inform the whole system of ‘community of pasture’ which is latent in the Treaty and underlies the Additional Act.

"(2) The sovereignty of the contracting States over the waters of successive rivers which flow on their territories is not absolute, but is made subject to modifications arrived at between the two parties.

"(3) The rule of priority in recognizing existing legitimate utilization and the rule as to the distribution of the excess volume of water in the summer season, are clear limitations on territorial sovereignty, seeing that they were established for the common, peaceful enjoyment of the waters of rivers flowing on the territory of the two States. And the right of each country to execute works of public utility cannot supersede the right of common utility which flows from those rules, because the concept of municipal law is subordinated to the latter principle of international law.

"(4) The right which each State has to proceed with works of public utility is necessarily subject to agreement with the other State if such works affect the course and the flow of rivers. That follows clearly from Article 11 of the Act, seeing that it contains no mention of possible compensation for resulting damage; but it creates the obligation of giving notice to ‘the competent authorities’ [a qui de droit] (a significantly imprecise expression . . .) so that interests which might be involved should not be harmed. And that necessarily requires the reconciliation, by virtue of the agreement of the Parties, of opposing interests. Article 11, read with Articles 15 and 17 which provide for administrative or governmental collaboration between the two States, confirms the necessity for that agreement, as appears from a proper construction of those provisions. Such agreement is much more desirable when the public utility works affect, not secondary causes like the course and the flow of rivers, but a prime cause, like the physical reason for their flow, or their hydraulic substance, as is the case in the Electricité de France scheme, a matter in which the Spanish Government and the French Government have successively agreed to regard such an agreement as inevitable. For just as the Spanish Government is now defending this point of view in connection with the scheme mentioned, so the French Government itself was fully of the same opinion with regard to the scheme of the Producetora de Fuerzas Motrices, which was based on the diversion of waters in the upper part of the Val d’Aran (see the ‘Ojo de Toro’ case previously cited).

"(5) The rules of procedure, which the French Government has observed, are not sufficient to preserve all the rights and interests in question seeing that the opinion which it was able to give concerning the works is not sufficient in itself, but constitutes merely a notification which allows the other Party to adopt the most appropriate—gratitude to safeguard those rights and interests. That attitude could be silence, acceptance or opposition, and the last named for the purpose of initiating conversations leading to the reconciliation of interests and eventually to agreement. That is why the mere observance of the rules of procedure by the French Government does not mean that it has fulfilled all its obligations under the Act, since to hold that it had done so would be equivalent to accepting as valid the claim that that international instrument only lays down rules of procedure applicable to the modalities of the exercise of sovereignty by the Parties but without properly limiting that sovereignty, whereas, in fact, the limitations comprised in the Act have an essential import, as has been several times demonstrated.
The guarantees and modalities of the French scheme do not safeguard the Spanish rights and interests, although naturally they do not compromise the material independence of the State: the guarantees of the Treaties of Delimitation and their Additional Act, in conformity with the spirit which inspires the Treaties of Delimitation and their Additional Act, given that the necessity for that agreement arises from the correct application of the provisions of that Act.

It is a gratuitous assertion that French rights and interests will be harmed if the French scheme were not carried out and if it were replaced by the Spanish scheme which, it is said, would be more beneficial to the latter, because it has an affront to the spirit of the French scheme which, as the Additional Act does not give full value to that spirit, because it has no regard to the spirit of the French scheme which, as the Additional Act does not give full value to that spirit. The two schemes differ greatly in economic value only of the energy produced by the fact that, according to the Spanish scheme, the Spanish scheme is conceived on the basis of dealing with the waters according to the natural basin which permits a more perfect regularization of the waters for irrigation and ensures that the interests of both Parties will be respected. And that is the other aspect to which the Electricité de France scheme does not give full value, because it has no regard to the spirit of the French scheme which, as the Additional Act does not give full value to that spirit. The two schemes differ greatly in economic value only of the energy produced by the fact that, according to the Spanish scheme, the Spanish scheme is conceived on the basis of dealing with the waters according to the natural basin which permits a more perfect regularization of the waters for irrigation and ensures that the interests of both Parties will be respected. And that is the other aspect to which the Electricité de France scheme does not give full value, because it has no regard to the spirit of the French scheme which, as the Additional Act does not give full value to that spirit.

The functioning of the system would bring about, thanks to the complete restoration of the volume of water diverted, the maintenance of the system of utilization of waters of common use as it was laid down by the French Government. The analysis above of the efficiency of the guarantees offered by the French Government is sufficient to show the working of those guarantees would, in the circumstances, be judged by the French Government as sufficient to make international relations impossible. The restoration of the diverted waters would be not partial but total. That is the very basis of the Electricité de France scheme. That total restoration of the diverted waters is required by the French Government, and it is clear that the French Government has been in circumstances in which the restoration would break to the disadvantage of France, which would arise against the latter a charge of a kind which is quite unjustified and to manifest a spirit of suspicion of a kind which would make international relations impossible.

On that point, which is fundamental to the dispute, the divergence of opinion is complete and it is now for the Tribunal to decide. On one very small part of French territory, no change would be required, except in the conditions laid down, is not forbidden either by the Treaty of May 26, 1886, or by the Additional Act of the same date. The diversion, not of the waters of the basin, as the Spanish pleadings assert, but only of the water brought from Lake Lanoux to that river, will no doubt involve, to only a very small extent, on French territory, a physical modification of the basin. Such a modification is not envisaged by the Tribunal of May 26, 1886, or by the Additional Act of the same date.

In reply on behalf of France, it was contended:

"(1) It is necessary to state once more to indicate the exact material scope of the treaty provisions in force that they were not intended to be applied to the situation which has arisen between the two Governments.

"(2) The diversion of the volume of water diverted will take place above the French frontier. On Spanish territory, neither the course nor the flow of the Carda will suffer the slightest change.

"(3) It cannot be said that the Carda would cease to follow its natural course. Save on one very small part of French territory, no change would be required, except in the conditions laid down, is not forbidden either by the Treaty of May 26, 1886, or by the Additional Act of the same date.

"(4) The functioning of the system would bring about, thanks to the complete restoration of the volume of water diverted, the maintenance of the system of utilization of waters of common use as it was laid down by the French Government. The analysis above of the efficiency of the guarantees offered by the French Government is sufficient to show the working of those guarantees would, in the circumstances, be judged by the French Government as sufficient to make international relations impracticable.

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"(6) In reply on behalf of France, it was contended:

"(1) It is necessary to state once more to indicate the exact material scope of the treaty provisions in force that they were not intended to be applied to the situation which has arisen between the two Governments.

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"(4) The functioning of the system would bring about, thanks to the complete restoration of the volume of water diverted, the maintenance of the system of utilization of waters of common use as it was laid down by the French Government. The analysis above of the efficiency of the guarantees offered by the French Government is sufficient to show the working of those guarantees would, in the circumstances, be judged by the French Government as sufficient to make international relations impracticable.
"(7) The divergence of opinion on the preceding point inevitably entails the same disagreement on this one. The French Government maintains that, for the various reasons it has shown, the execution of its scheme will not modify the system set up by the Additional Act, which nowhere lays down the necessity, in such a case as this, for the previous consent of the other State. It is also pointed out that the Spanish Government in its contentions refers only to the Act and no longer to the Treaty of Bayonne itself."

In addition, the French Government added the following arguments:

"1. The Spanish Memorial excludes, in its juridical discussion, the final provision of Article 9 of the Additional Act which reserves the respective rights of each of the Governments to authorize works of public utility.

"2. It ignores the fact that the French scheme provides for the complete restoration of the volume of water diverted and not, as it several times asserts, a partial restoration.

"3. It is silent on the formal undertakings accepted with regard to this total restoration by the French Government.

"4. It analyses in a manner which is quite insufficient the guarantees offered by the latter.

"5. It does not make it sufficiently clear that the French scheme does not affect the whole of the waters of the basin of the Carol, but only approximately one-quarter of them.

"6. It gives no precise indication of the damage which the execution of the French scheme would cause to Spanish interests."

Further arguments advanced during the oral hearings are dealt with, so far as necessary, in the findings of the Tribunal.

_Held:_ That France must succeed. "In carrying out, without previous agreement between the two Governments, works for the utilization of the waters of Lake Lanoux under the conditions set forth in the [Electricité de France] scheme . . . the French Government would not be committing a breach of the provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date." Nor did the French action contravene any rule of international law. These two instruments comprised inroads on the principle of territorial sovereignty, which must yield to such and other limitations of international law. The conflicting interests aroused by the industrial use of international rivers must be reconciled by mutual concessions embodied in comprehensive agreements. States have a duty to seek to enter into such agreements. The "interests" safeguarded in the Treaties between France and Spain included interests beyond specific legal rights. A State wishing to do that which will affect an international watercourse cannot decide whether another State's interests will be affected; the other State is the sole judge of that and has the right to information on the proposals. Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities. The rules of reason and good faith are applicable to procedural rights and duties relative to the sharing of the use of international rivers; and the subjecting by one State of such rivers to a form of development which causes the withdrawal of some supplies from its basin, are not irreconcilable with the interests of another State.

The Tribunal said: "1. The public works envisaged in the French scheme are wholly situate in France; the most important part if not the whole of the effects of such works will be felt in French territory; they would concern waters which Article 8 of the Additional Act submits to French territorial sovereignty:

"Article 8. All standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.

"Flowing waters change jurisdiction at the moment when they as from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow."

"This text itself imposes a reservation on the principle of territorial sovereignty (except for the modifications agreed upon between the two Governments); some provisions of the Treaty and of the Additional Act of 1 866 contain the most important of these modifications; there may be others. It has been contended before the Tribunal that these modifications should be strictly construed because they are in derogation of sovereignty. The Tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations.

"The question is therefore to determine the obligations of the French Government in this case. The Spanish Government has endeavoured to define them; the problem should be examined by beginning with the Spanish contention.

"2. The argument of the Spanish Government is of a general character and calls for some preliminary remarks. The Spanish Government bases its contention first of all on the text of the Treaty and of the Additional Act of 1866. Its contention thus falls exactly within the jurisdiction of the Tribunal as it has been defined by the _Compromis_ (Article 1). But in addition, the Spanish Government bases its contention on both the general and the traditional features of the regime of the Pyrenean boundaries and on certain rules of international common law in order to proceed to the interpretation of the Treaty and the Additional Act of 1866.

"In another connection, the French Memorial (p. 58) examines the question put to the Tribunal in the light of the 'law of nations'. The French Counter-Memorial (p. 48) does the same thing, but with the following reservation: 'although the question submitted to the Tribunal is clearly confined by the _Compromis_ to the interpretation, in the present case, of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date . . .'. In the oral pleadings the representative of the French Government said: 'The _Compromis_ does not request the Tribunal to find out whether there are general principles of international law applicable in this context' (third session, p. 7),
and: 'A treaty is interpreted in the context of positive international law from the time when it may be applied' (seventh session, P. 6).

"In an analogous case, the Permanent Court of International Justice (Diversion of Water from the Meuse) declared:

"In the course of the proceedings, both written and oral, occasional reference has been made to the application of the general rules of international law as regards rivers. In the opinion of the Court, the points submitted to it by the Parties in the present case do not entitle it to go outside the field covered by the Treaty of 1863.'

"Since the question presented by the Compromis relates solely to the Treaty and to the Additional Act of 866, the Tribunal will apply the following rules for each particular point:

"The clear provisions of law contained in a treaty do not require any interpretation; the text provides an objective rule which covers entirely the subject matter to which it applies; when the provisions call for interpretation this should be done according to international law; international law does not sanction any absolute and rigid method of interpretation; we may therefore take into account the spirit that guided the framing of the Pyrenean Treaties as well as the rules of international common law.

"The Tribunal may deviate from the rules of the Treaty and of the Additional Act of 1866 only if they referred expressly to other rules or had been modified with the clear intention of the Parties.

"3. The present dispute can be reduced to two fundamental questions:"

"(A) Do the works for utilizing the waters of Lake Lanoux in the conditions laid down in the French scheme and proposals mentioned in the Preamble of the Compromis constitute an infringement of the rights of Spain recognized by the principal provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date?

"(B) If the reply to the preceding question be negative, does the execution of the said works constitute an infringement of the provisions of the Treaty of Bayonne of May 26, 1866, and of the Additional Act of the same date, because those provisions would in any event make such execution subject to a prior agreement between the two Governments or because other rules of Article 11 of the Additional Act concerning dealings between the two Governments have not been observed?

"As to question (A):

"4. The Additional Act of May 26, 1866, includes a section headed 'Control and enjoyment of waters of common user between the two countries'. Besides Article 8 already cited, it contains three articles which are fundamental for the present case (9, 10 and 11) and one article (18) which deals with the ensuring of its practical application. Articles 9 and 10 both apply to watercourses 'which flow from one country to the other' (successive watercourses) or which 'constitute a boundary' (contiguous watercourses). By Article 9, each State recognizes the legality of irrigations, of works and of enjoyment for domestic use, by virtue of concessions, of title or by prescription, existing in the other State at the moment when the Additional Act entered into force. Under Article 18, an national Commission of Engineers was charged with the technical operations necessary for the application of Article 9 and other articles of the Additional Act.

"The recognition of the legality of such use is subject to the following conditions:

"(a) Each State may, when appropriate, require the concession, the title or the prescription invoked by the other State to be verified by examination. The recognition of such legality by the State which requires the verification shall cease for any enjoyment which has not passed this latter test.

"(b) The legality of each enjoyment is recognized only to the extent that the water used is necessary to satisfy actual needs.

"(c) The recognition of the legality of an enjoyment is to cease in case of abuses, including abuses other than employment of water in excess of what is necessary to satisfy actual needs.

"5. Article 10 provides that after having satisfied the actual needs of recognized enjoyment, the quantity of water available at low water at the point where it crosses the frontier is calculated and is then shared out in advance according to a predetermined principle of distribution.

"These two Articles, 9 and 10, ought clearly both to be interpreted together without opposing one to the other, because Article 10 deals with 'available water' after the application of Article 9 concerning recognized enjoyment: the two Articles taken together exhaust the object of the regulation.

"This remark is of interest if one approaches the point which raised most controversy between the parties, that is, the reservation of 'the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid'.

"According to the Tribunal, the reservation of the right of each contracting State to execute works of public utility has a general application.

"In any event, if Article 9 gives the upstream State the right, subject to compensation, to deprive in a definitive way users in the downstream State of the enjoyment of waters to which they have a recognized right, it may be asked whether, for the execution of works of public utility, it is equally sufficient for the upstream State to pay, under Article 10, compensation for cutting off, in a definitive manner, the enjoyment by the downstream State of the available part of the water.

"It is certain that, if the right of the upstream State had no legal limit in this sphere, apart from the payment of compensation, the French scheme would satisfy the basic conditions laid down by Article 10.

"The Spanish Government maintains that the French Government did not have the right to deprive the Spanish State definitively of the enjoyment of that part of the water which devolves to it under Article 10. If that were the case, the French scheme would still comply with the terms of Article 11 if it were established that the part of the waters of the Carol directed into the Ariege is less than the volume of water allocated to the riparian owners of the Carol on this side of the frontier as well as to the French State
under Article 10. The Tribunal has not sufficient factual evidence to permit it to decide
the latter point.

"The solution of the problem which has just been examined on the subject of the scope of Article 10 is nevertheless not indispensable for resolving the question put by the Compromis.

"6. In effect, thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters (this is not the subject of any claim founded on Article 9); at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; it may even, by virtue of the minimum guarantee given by France, benefit by an increase in volume assured by the waters of the Ariège flowing naturally to the Atlantic.

"One might have attacked this conclusion in several different ways.

"It could have been argued that the works would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests. Spain could then have claimed that her rights had been impaired in violation of the Additional Act. Neither in the dossier nor in the pleadings in this case is there any trace of such an allegation.

"It could also have been claimed that, by their technical character, the works envisaged by the French project could not in effect ensure the restitution of a volume of water corresponding to the natural contribution of the Lanoux to the Carol, either because of defects in measuring instruments or in mechanical devices to be used in making the restitution. The question was lightly touched upon in the Spanish Counter Memorial (p. 86), which underlined the extraordinary complexity of procedures for control, their "very onerous " character, and the " risk of damage or of negligence in the handling of the watergates, and of obstruction in the tunnel". But it has never been alleged that the works envisaged present any other character or would entail any other risks than other works of the same kind which today are found all over the world. It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters. As we have seen above, the technical guarantees for the restitution of the waters are as satisfactory as possible. If, despite the precautions that have been taken, the restitution of the waters were to suffer from an accident, such an accident would be only occasional and, according to the two Parties, would not constitute a violation of Article 9.

"7. The Spanish Government takes its stand on a different ground. In the arbitration Compromis it had already alleged that the French scheme modifies the natural conditions of the hydrographic basin of Lake Lanoux by diverting its waters into the Ariège and thus making the restoration of the waters of the Carol physically dependent on human will, which would involve the de facto preponderance of one Party in place of the equality of the two Parties as provided by the Treaty of Bayonne of May 26, 1866, and by the Additional Act of the same date.

"The position of the Spanish Government seems to become clearer in the course of the written and of the oral proceedings. In the Memorial (at p. 52) that Government invokes Article 12 of the Additional Act:

"'Article 12. The downstream lands are obliged to receive from the higher lands of the neighbouring country the waters which flow naturally therefrom together with what they carry, without the hand of man having contributed thereto. There may be constructed neither a dam, nor any other obstacle capable of harming the upper riparian owners, to whom it is likewise forbidden to do anything which might increase the burdens attached to the servitude of the downstream lands.'

"According to the Spanish Government, that provision appears to establish the conception that neither of the Parties may, without the consent of the other, modify the natural flow of the waters. The Spanish Counter Memorial (at p. 77) recognizes nevertheless that: 'From the moment when human will intervenes to bring about some hydraulic development, it is an extra-physical element which acts upon the current and changes what Nature has established.' Similarly, the Spanish Government does not give a fixed meaning to the order of Nature; according to the Counter Memorial (at p. 96): (A State has the right to utilize unilaterally that part of a river which runs through it so far as such utilization is of a nature which will not affect the territory of another State only a limited amount of damage, a minimum of inconvenience, as falls within what is implied by good neighbourliness.'

"Actually, it seems that the Spanish argument is twofold and relates, on the one hand, to the prohibition, in the absence of the consent of the other Party, of compensation between two basins, despite the equivalence of what is diverted and what is restored, and, on the other hand, the prohibition, without the consent of the other Party, of all acts which create by a de facto inequality the physical possibility of a violation of rights.

"These two points must now be examined successively.

"8. The prohibition of compensation between the two basins, in spite of equivalence between the water diverted and the water restored, unless the withdrawal of water is agreed to by the other Party would lead to the prevention in a general way of a withdrawal from a watercourse belonging to River Basin A for the benefit of River Basin B, even if this withdrawal is compensated for by a strictly equivalent restitution effected from a watercourse of River Basin B for the benefit of River Basin A. The Tribunal does not overlook the reality, from the point of view of physical geography, of each river basin, which constitutes, as the Spanish Memorial (at p. 53) maintains, a unit. But this observation does not authorize the absolute consequences that the Spanish argument would draw from it. The unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. The water which by nature constitutes a fungible item may be the object of a restitution which does not change its qualities in regard to human needs. A diversion with restitution, such as that envisaged by the French project, does not change a state of affairs organized for the working of the requirements of social life.
The state of modern technology leads to more and more frequent justifications of the fact that waters used for the production of electric energy should not be returned to their natural course. Water is taken higher and higher up and it is carried ever farther, and in so doing it is sometimes diverted to another river basin, in the same State or in another country within the same federation, or even in a third State. Within federations, the judicial decisions have recognized the validity of this last practice (Wyoming v. Colorado . . . [259 U.S. 419]) and the instances cited by Dr. J. E. Berber, Die Rechtsqgellen des internationalen Wassernutzungsrechts, p. 180, and by M. Sausser-Hall, L’Utilisation industrielle des fleuves internationaux, [in] Recueil des Cours de l’Académie de Droit international de la Haye, 1953, vol. 83, p. 544; for Switzerland, [see] Recueil des Arrêts du Tribunal Fédéral, vol. 78, Part 1, pp. 14 et seq.).

The Tribunal therefore is of opinion that the diversion with restitution as envisaged in the French scheme and proposals is not contrary to the Treaty and to the Additional Act of 1866.

9. Elsewhere, the Spanish Government has contested the legitimacy of the works carried out on the territory of one of the signatory States of the Treaty and of the Additional Act, if the works are of such a nature as to permit that State, albeit in violation of its international pledges, to bring pressure to bear on the other signatory. This rule would derive from the fact that the Treaties concerned confirm the principle of equality between States. Concretely, Spain considers that France has not the right to bring about, by works of public utility, the physical possibility of cutting off the flow of the waters of the Lanoux or the restitution of an equivalent quantity of water. It is not the task of this Tribunal to pronounce judgment on the motives or the experiences which may have led the Spanish Government to voice certain misgivings. But it is not alleged that the works in question have as their object, apart from satisfying French interests, the creation of a means of injuring, at least contingently, Spanish interests; that would be all the more improbable since France could only partially dry up the resources that constitute the flow of the Carol, since she would affect also all the French lands that are irrigated by the Carol and since she would expose herself along the entire boundary to formidable reprisals.

“On the other hand, the proposals of the French Government which form an integral part of its project carry the assurance that in no case will it impair the régime thus established” (Annex 12 of the French Memorial). The Tribunal must therefore reply, on the basis of this assurance to the question posed by the Compromis. It cannot be alleged that, despite this pledge, Spain would not have a sufficient guarantee, for there is a general and well-established principle of law according to which bad faith is not presumed. Furthermore, it has not been contended that at any time one of the two States has knowingly violated, at the expense of the other, a rule relating to the control of the water. At any rate, while inspired by a just spirit of reciprocity, the Treaties of Bayonne has only established a legal equality and not an equality in fact. If it were otherwise, they would have had to forbid on both sides of the boundary all installations and works of a military nature which might have given one of the States a de facto preponderance which it might use to violate its international pledges. But we must go still further; the growing ascendency of man over the forces and the secrets of nature has put into his hands instruments which he can use to violate his pledges just as much as for the common good of all; the risk of an evil use has so far not led to subjecting the possession of these means of action to the authorization of the States which may possibly be threatened. Even if we took our stand solely on the ground of neighbourly relations, the political risk alleged by the Spanish Government would not present a more abnormal character than the technical risk which was discussed above. In any case, we do not find either in the Treaty and the Additional Act of May 26, 1866, or in international common law, any rule that forbids one State, acting to safeguard its legitimate interests, to put itself in a situation which would in fact permit it, in violation of its international pledges, seriously to injure a neighbouring State.

“It remains to enquire whether the French scheme conflicts with the basic rules laid down by Article 11. That question will be examined below within the general framework of that Article (see para. 24).”

Subject to this last-mentioned question, the Tribunal replies in the negative to the first question, at para. 3 (A) supra.

“As to question (B):”

“10. In the Compromis, the Spanish Government had already declared that, in its opinion, the French scheme required for its execution the previous agreement of both Governments, in the absence of which the country making the proposal is not at liberty to undertake the works.”

“In the written as well as the oral proceedings, that Government developed this point of view, completing it by the recital of the principles which ought to govern dealings leading to such prior agreement. Two obligations, therefore, would seem to rest upon the State which desires to undertake the works envisaged, the more important being to reach a prior agreement with the other interested State; the other, which is merely accessory thereto, being to respect the other rules laid down by Article 11 of the Additional Act.

“The argument put forward by the Spanish Government is stated on two planes—the Spanish Government takes its stand, on the one hand, on the Treaty and the Additional Act, on the other hand on the system of faceries or compascuit which exists on the Pyrenean frontier, as well as on the rules of international common law. The two latter sources would permit, first of all, the interpretation of the Treaty and the Additional Act of 1866, and then, in a larger perspective, the demonstration of the existence of an unwritten general rule of international law. The latter (it is contended) has precedents which would permit its establishment in the traditions of the system of faceries, in the provisions of the Pyrenean Treaties and in the international practice of States in the matter of the industrial use of international watercourses.

11. Before proceeding to an examination of the Spanish argument, the Tribunal believes it will be useful to make some very general observations on the nature of the obligations invoked against the French Government. To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence. Without doubt, international practice does reveal some special cases in which
this hypothesis has become reality; thus, sometimes two States exercise conjointly jurisdiction over certain territories, in accordance with the rules of international law. However, in certain cases, these Sates' exercise of such joint jurisdiction may be limited or prohibited by agreements or custom. The question then arises as to how such agreements or customs should be interpreted and applied. In the following sections, we will examine this issue, focusing on the interpretation of the rules governing joint jurisdiction.

In effect, in order to appreciate the necessity for prior agreement, one must consider the hypothesis in which the interested States cannot reach agreement. In such a case, it must be admitted that it is not possible to enforce the territorial jurisdiction of one State in the face of the failure of the other State to exercise its rights. However, in certain cases, the failure of a State to exercise its rights may be attributed to circumstances beyond its control, such as natural disasters or political instability. In such instances, it may be necessary to exercise joint jurisdiction in order to maintain stability and security in the affected area.

That is why, in the present case, we will examine in turn whether a prior agreement is necessary and whether the other rules laid down by Article II of the Additional Act have been observed.

A. The necessity for a prior agreement.

1. First, to enquire whether the argument that the execution of the French scheme is subject to the prior agreement of the other State is justified in relation to the system of compasçuits or rather in relation to international common law; the collected evidence would permit, if necessary, the interpretation of the Treaty and the Additional Act of 1866 (Spanish Memorial, p. 81).

2. The Spanish Government endeavored to establish similarly the content of current positive international law. Certain principles which the problem now under examination thus appears to be the rule of law of such a nature, as to prejudice the right of veto, which at the discretion of one State paralyzes the exercise of the territorial jurisdiction of another, if one cannot take the matter any further; it is impossible to enforce the rules of law by the use of a doctrinal vocabulary, and an obligation to those sanctioned by positive law.

3. The Spanish Government endeavored to show the content of the decision of the Permanent Court of International Justice in the Case of Railway Traffic between Lithuania and Poland: P.C.I.J., Series A/B, No. 42, pp. 108 et seq. The most characteristic manifestation of juridical cooperation among States is the existence of various agreements, which are the result of mutual consent. The Spanish argument, to affirm the existence of a general principle of law, or the custom, the recognition of which, inter alia, is embodied in the Treaty and the Additional Act of 1866 (Spanish Memorial, p. 81).

The Spanish Court in its decision August 20, 1941, has decided that the case is one of the special laws, customary in nature, and that the decision is based on positive law.

The Spanish Court, in its decision of August 15, 1941, has decided that the case is one of the special laws, customary in nature, and that the decision is based on positive law.

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But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a prior agreement between the interested States cannot be established as a custom, even less as a general principle of law. The history of the formulation of the rule is very characteristic in this connection. The initial project was based on the obligatory and paramount character of State interests. But this formulation was rejected, and the Convention, in its final form, provides (Article 1) that the present Convention does not in any way alter the freedom of each State, within the framework of international law, to make any use of the natural forces within its territory, in the development of energy resulting from water, without any prior or posterior obligation to share with any other State. The Convention was accepted, and the Treaty concluded at the Treaty of December 2, 1856, between France and Spain provided (Article 8) that, as long as the French scheme is not put into execution, the waters of the river will remain subject to the régime of indivision, in perpetuity.

Customary international law, like the traditional Law of the Pyrenees, does not supply evidence of a kind to orient the reasoning of the French tribunal, even less does it permit us to conclude that there exists a general principle of law or a custom to this effect.

As between Spain and France, the existence of a rule requiring prior agreement for the development of the water resources of an international watercourse can therefore result only from a previous understanding between the States. It is not, therefore, the necessary consequence of the Additional Act of 1866 and then the Agreement of 1869 which was finally entered into. The latter was, according to the second paragraph of Article 8 of the Additional Agreement of May 26, 1869, and for that reason the Tribunal is competent to examine it.

The method of reasoning apparent in the development of the Spanish thesis calls for a more general observation. The necessity for a prior agreement would result from all the circumstances in which the two Governments were in a position to arrive at an agreement which was in accordance with the best interests of both parties, and by exercising its jurisdiction, the Tribunal is not taking the risk of seeing its decision upset. In regard to running waters, it is difficult to make a very great distinction between a communal right of property and a communal right of usage, both of which are in...
international responsibility called into question, if it is established that it did not act within the limits of its rights. The commencement of arbitral proceedings in the present case illustrates perfectly these rules in the functioning of the obligations subscribed to by Spain and France in the Arbitration Treaty of July 10, 1929.

"Pushed to the extreme, the Spanish thesis would imply either the general paralysis of the exercise of State jurisdiction whenever there is a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either of these consequences.

17. The last textual argument relied upon by the Spanish Government relates to Articles 15 and 16 of the Additional Act, which (it is said) establishes the obligation to reach a prior agreement. Their exact scope raised considerable controversy: the French text of Article 16 relates to a "droit de réglementation des intéréts généraux et d'interprétation ou modification de leurs réglements"; the Spanish text, which is wider, refers to matters of common accord ("asuntos de conveniencia general"). In the opinion of the Tribunal, even giving that provision its widest connotation and combining it with the Spanish text of Article 16, it is not sufficient to conclude that the exercise of the powers of the two States would be suspended by the necessity for a prior agreement. Practice shows no trace of such an obligation.

The examination of Articles 15 and 16 of the Additional Act leads therefore to a negative conclusion as regards the obligation to enter into a prior agreement. Positively, one can but admit that these articles do contain a duty of consultation and of good faith which the Spanish Government has in particular restated its own essential thesis concerning the necessity for prior agreement. As the Spanish Memorial has taken on several occasions, the French Government has in particular restated its own position on several occasions, and in the conversations set forth in a report of the meeting of the Spanish Ministry of Foreign Affairs with the Mixed Commission of Engineers (Annex 39 of the Spanish Memorial), the Tribunal considers it formed of its reasoning that the execution of works such as those envisaged in the present case is dependent upon a prior agreement between the two Governments.

18. The Parties have attempted to determine the meaning of the Treaty and of the Additional Act of 1866 by reference to their respective attitudes, notably on the occasion of various projects for an agreement. The Spanish case attaches considerable importance to the Agreement of 1949, to which the Spanish case attaches considerable importance. At the time of the meeting of the session of January 31-February 3, 1949, of the International Commission of the Pyrenees, the question of Lake Lanoux was brought up under the item "other business" on February 2, 1949, the Spanish Government, in a note verbale addressed to the French Government, in a note verbale addressed to the French Government.

As has been recognized by international judicial decisions, both by the Permanent Court of Arbitration (in the case of the North Atlantic Fisheries (1910)) and by the International Court of Justice (in the Anglo-American Fishery Case (1951)), the exercise of rights under international law is appropriate, in order to interpret the meaning of diplomatic documents, to take into account the following principles.

Further, in order for negotiations to proceed in a favourable climate, the Parties must resolve any dispute or controversy regarding the exercise or the limits of their rights. It is normal that the parties should enter into agreement at the beginning of their negotiations, if the judicial system were not in force, this could not be considered legal practice.

The examination of Articles 15 and 16 of the Additional Act are examined later.

"The Agreement of 1949 X.9. But in a special place must be given to an important document in the history of the dispute, the Agreement of 1949.

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5. In a more general way, when a question gives rise to long controversies and to diplomatic negotiations which have been several times begun, suspended, and resumed, it is appropriate to interpret the meaning of diplomatic documents, to take into account the following principles.

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suggested that the installation at Lake Lanoux of water-measuring apparatus constituted a breach of the Agreement. Then France drew up another scheme which would ensure a partial restoration of the water, which was notified in accordance with Article 11 of the Additional Act of May 26, 1866. In response to a demarche by the Spanish Embassy at Paris, the French Government by a Note dated June 27, 1953, agreed to the meeting of the Mixed Commission of Engineers envisaged at the meeting of the International Commission for the Pyrenees in 1953.

In 1954, the Prefect of the Department of Pyrénées Orientales, acting on the instructions of his Government, brought to the notice of the Governor of Gerona that an essential modification had been effected to the scheme, which now provided for the restoration of the diverted water, and he added that the water would not undergo any modification, even if the water system most be suspended in the short term. The Minister of Foreign Affairs was about to be undertaken in regard to Lake Lanoux (Annex 37 of the Spanish Memorial).

In 1954, the French Ministry of Foreign Affairs replied by a note of July 18, 1954, to a Spanish Note of April 9, 1954, which the French Ministry of Foreign Affairs claimed that the Spanish Embassy’s assertions in the penultimate paragraph of its Note of June 27, 1953, were not to be accepted. It stated that the French had been about to undertake no work, but, more precisely, that nothing had been or was about to be undertaken in regard to Lake Lanoux, without making the commencement of the works subject to the results of the labours of the Commission. The French Ministry of Foreign Affairs further adduced the following argument: ‘In view of the circumstances surrounding its conclusion, it is normal to place this agreement within the framework of diplomatic negotiations. It was brought about by an act of the International Commission of Engineers “but, more precisely, that nothing had been or was about to be undertaken in regard to Lake Lanoux, without making the commencement of the works subject to the results of the labours of the Commission.”’ (Annex 41 of the French Memorial).

Examination of the diplomatic correspondence shows that the Parties understood that obligation in the light of its interpretation of the Treaty and of the Additional Acts of 1866. France was not able to form the view that Spain did not have the right to approve the works of the Mixed Commission of Engineers, and the French Ministry of Foreign Affairs, in particular by its Note of April 9, 1954, denied the existence of any such right. Spain, on the other hand, claimed that the French Government had undertaken to execute the proposed works on the basis of a general obligation. Spain had only been invited to contribute with France to the development project, and it was only bound to see that the Carol and the Roubia had not to be diverted to the detriment of Spain, for which reason the French Government could not be required to execute any work which, on the contrary, it had not undertaken. The French Ministry of Foreign Affairs further adduced the following argument: ‘In view of the circumstances surrounding its conclusion, it is normal to place this agreement within the framework of diplomatic negotiations. It was brought about by an act of the International Commission of Engineers “but, more precisely, that nothing had been or was about to be undertaken in regard to Lake Lanoux, without making the commencement of the works subject to the results of the labours of the Commission.”’ (Annex 41 of the French Memorial).

At the same time, the French delegation made it clear that if, within three months from today, the Commission whose meeting is provided for in the preamble of the Additional Act of May 26, 1866, had not been held, and if no new obligations had been entered into in accordance with Article 11 of the Additional Act of May 26, 1866, in response to a demarche by the Spanish Embassy at Paris, the French Government, by a Note dated June 27, 1953, agreed to the meeting of the Mixed Commission of Engineers envisaged at the meeting of the International Commission for the Pyrenees in 1953.

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maintain the status quo therefore appears to be an accessory consequence of the task entrusted to this Commission. The maintenance of the status quo is therefore in some manner a provisional measure which could last only on condition that the Mixed Commission, after its first meeting held at Gerona on August 29, 1946, become dormant after having done no useful work at all. The engagement entered into by the French Government to erect works or to grant new concessions likely to change the course or the volume of a successive watercourse was no longer effective, in accordance with the provisions of Article 11 of the Additional Act imposing on the States such obligations. The French Government has, in regard to the development of Lake Lanoux on a foundation of absolute equality, only to undertake, if it has not been disputed that France has, in regard to the development of Lake Lanoux, the obligation to give prior notice to the competent authorities of the frontier of the works it proposes to execute. The second question is to determine the method by which these interests can be safeguarded. The first method consists in informing, on the part of each State, the riparian State of the intentions which the State has in view, and taking into consideration the opinions of the riparian States concerned. The second method is to set up machinery for dealing with claims and safeguards for all interests involved on either side.

The first method is less difficult to determine than the second. The second question, however, is to ascertain how the interests of the other riparian State with its own. The question is to be determined in the light of the existing conventions and of the tendencies which are manifested in instance of hydroelectric development in current international practice.

The first method, according to the rules of good faith, would seem to be sufficient. The Commission, after its first meeting held at Gerona on August 29, 1946, showed some real activity. But this Commission, after its first meeting held at Gerona on August 29, 1946, shows some real activity. The Mixed Commission of Engineers, however, is under the obligation to take into consideration the various interests involved, and to give satisfaction in this regard. The Commission, therefore, in some manner, a provisional measure which could last only on condition that the Mixed Commission of Engineers showed some real activity. But this Commission, after its first meeting held at Gerona on August 29, 1946, shows some real activity. The French Government, however, is under the obligation to take into consideration the various interests involved, and to give satisfaction in this regard. 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was founded, according to the delegation, on French rights (French Memorial, pp. 117 et seq., 127)

On a theoretical basis the Spanish argument is unacceptable to the Tribunal, for Spain tends to put rights and simple interests on the same plane. Article 11 of the Additional Act makes this distinction and the two Parties have reproduced it in the basic statement of their contention at the beginning of the Compromis:

"Considering that in the opinion of the French Government the carrying out of its scheme will not harm any of the rights or interests referred to in the Treaty of Bayonne of May 26, 6, and in the Additional Act of the same date,

"considering that, in the opinion of the Spanish Government, the carrying out of that scheme will harm Spanish rights and interests"

"France is entitled to exercise her rights; she cannot ignore Spanish interests.

"Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.

"As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the State.

"24. In the case of Lake Lanoux, France has maintained to the end the solution which consists in diverting the waters of the Carol to the Ariege with full restitution. By making this choice France is only making use of a right; the development works of Lake Lanoux are on French territory, the financing of and responsibility for the enterprise fall upon France, and France alone is the judge of works of public utility which are to be executed on her own territory, save for the provisions of Articles 9 and 10 of the Additional Act, which, however, the French scheme does not infringe.

"On her side, Spain cannot invoke a right to insist on a development of Lake Lanoux based on the needs of Spanish agriculture. In effect, if France were to renounce all of the works envisaged on her territory, Spain could not demand that other works in conformity with her wishes should be carried out. Therefore, she can only urge her interests in order to obtain, within the framework of the scheme decided upon by France, terms which reasonably safeguard them.

"It remains to be established whether this requirement had been fulfilled.

"In whatever fashion one regards the course of dealings covering the period 1917-1954, it is beyond doubt that the French position became very flexible and even transformed. From a promise of compensation but without restoration of diverted water, it passed to a partial restoration; then, in 194, to complete restoration. In 1955, in the proposals which are an integral part of the scheme itself, France added to complete restoration the guarantee of a minimum restoration of 20 million cubic metres; that offer was possible only without the framework of the diversion of water from the Atlantic into the Mediterranean, since, moreover, France was going to ensure the complete restoration of the waters of the Carol. In 1956, at the time of the second meeting of experts, in March, France made two new proposals to Spain. The restoring of the water by the French, instead of following the rhythm of the natural feeding of Lake Lanoux, would be modified according to the needs of Spanish agriculture; during the irrigation period, all the water would be diverted into the Carol while during the winter period, on the other hand, France would reduce the flow so as to ensure over the year an equality of water diverted and restored (a system known as 'running account of water'). On the other hand, an inter-annual reserve would permit Spain to draw from a supplementary source in an exceptionally dry year (Annex 11 of the French Memorial, p. 147). On March 5, 1956, the president of the Spanish delegation replied, according to the procès-verbal, as follows:

"The new proposals formulated by the French delegation cannot be taken into consideration because any solution which pre-supposes the diversion of the waters of Lake Lanoux out of their natural course is unacceptable to Spain. He adds that the attitude of the Spanish delegation does not result from a desire to obtain compensation either by an increase in the volume of water guaranteeing Spanish irrigation or by more electric energy, so that it is quite useless to discuss the volume of water proposed by way of compensation, seeing that there is no agreement on the basic question." (French Memorial, p. 156.)

"When one examines the question of whether France, either in the course of the dealings or in her proposals, has taken Spanish interests into sufficient consideration, it must be stressed how closely linked together are the obligation to take into consideration, in the course of negotiations, adverse interests and the obligation to give a reasonable place to these interests in the solution finally adopted. A State which has conducted negotiations with understanding and good faith in accordance with Article 11 of the Additional Act is not relieved from giving a reasonable place to adverse interests in the solution it adopts simply because the conversations have been interrupted) even though owing to the intransigence of its partner. Conversely, in determining the manner in which a scheme has taken into consideration the interests involved, the way in which negotiations have developed, the total number of the interests which have been presented, the price which each Party was ready to pay to have those interests safeguarded, are all essential factors in establishing, with regard to the obligations set out in Article 11 of the Additional Act, the merits of that scheme.

"Having regard to all the circumstances of the case, set out above, the Tribunal is of opinion that the French scheme complies with the obligations of Article 11 of the Additional Act.

"For these reasons:

"The Tribunal decides to reply affirmatively to the question set out in the first Article of the Compromis. In carrying out, without prior agreement between the two Governments, works for the utilization of the waters of Lake Lanoux in the conditions mentioned in the Scheme for the Utilization of the Waters of Lake Lanoux notified to the Governor of the Province of Gerona on January 21, 1954, and brought to the notice of the representatives of Spain on the Commission for the Pyrenees at its session held from November 3 to 14, 1955, and according to the proposals submitted by the French delegation to the Special Mixed Commission on December 13, 1955, the French
Government was not committing a breach of the provisions of the Treaty of Bayonne of May 26, 1866, and the Additional Act of the same date."

[Report: Sentence dg Tribunal arbitral (Affaire du Lac Lanoux), November 16, 1957 (in French).]

1 Set up under a Compromis dated November 19, 1956, pursuant to an Arbitration Treaty of July 10, 1929, between France and Spain,

2 According to the French Memorial, Lake Lanoux, one of the largest Pyrenean lakes, lies at an altitude of approximately 2,174 metres, is about three kilometers in length and 500 metres in width, and has a surface of 86 hectares. Its depth is at some points as great as 53 metres. The volume of water it collects naturally is about 17 million cubic metres. The planned construction of barrage of the height of 45 metres would turn Lake Lanoux into a reservoir capable of storing approximately 70 million cubic metres of water. The water would be channelled through a tunnel toward the Atlantic watershed and directed to a power station where it would be run through a turbine after dropping straight from a height of 780 metres. This project would enable France to produce enough electricity, even during the peak hours, to serve a city of 326,000 inhabitants throughout the year. To return to the Carol River the waters diverted from it, the French project contemplates the construction of a tunnel, 5 kilometers in length, which would take water from the Ariège to the Carol at a rate of approximately 5 cubic metres per second and at a point higher than where the headworks of a canal which serves Spanish users are located. The headworks would lie in French territory. The planned diversion amounts to 25% of the entire flow of the Carol, the waters of which are used in Spain by 18,000 farmers. (Affaire du Lac Lanoux, Memoire du Gouvernement de la Republique Française 3-13 [Paris, 1967].

3 Translation as in Hertslet, The Map of Europe by Treaty (1875), vol. III, p.1647.

4 Ibid., p. 1649.

5 In an official note of May 1, 1922, of the Prime Minister and Minister of Foreign Affairs, M Poincare, France objected to the enlarged jurisdiction of a Mixed Commission, saying that it was "incompatible with her sovereign rights. Every State has in practice the right to carry out its territory, independently, such works as it pleases. In case of alterations of the regime of waters whose counterpart is being used by riparians of another State, it must only subordinate the execution to the safeguarding of the interests of these riparians. These principles are those of natural law. Article 11 of the Treaty of May 26, 1866 has added nothing. It has confined itself to indicating the procedure aimed at ensuring its enforcement in the relations between France and Spain." (Affaire du Lac Lanoux, Contre-Memoire du Gouvernement de la Republique Francaise, p. 6 (Paris, 1957).

The French Counter-Memorial, at p.7, refers to this "natural law" and maintains that, since no alteration of the system or volume of the Carol River was planned, no violation would follow. In addition it indicates the French Government stated that "Ii va de soi" a state must respect the rights and interests of a lower riparian in one of three possible ways, depending on the circumstances: (1) by indemnification in the form of payments or replacement of the waters appropriated; (2) by incorporating in its projects appropriate technical and legal guarantees; (3) even by giving up its project if it cannot avoid a serious injury to the interests in question. Ibid., at p. 29.

6 I.e. those which flow from one State to another; c.f. infra, p. 121.


8 See supra, p.121.

9 Droit de passage commun à plusieurs communautés. villages, etc"—Nouveau Larousse Universel.

10 See also Annual Digest, 1925-1926, No. 269.

11 Ibid., 1931-1932, Case No. 215.


13 I.C.J. Reports, 1951, p. 116; International Law Reports, 1951, Case No. 36.


International Court of Justice

Nuclear Tests
(Australia v. France)
Judgment

I.C.J. Reports 1974
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NUCLEAR TESTS CASE
(AUSTRALIA v. FRANCE)

JUDGMENT OF 20 DECEMBER 1974

1974

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ESSAIS NUCLÉAIRES
( AUSTRALIE c. FRANCE)

ARRÊT DU 20 DÉCEMBRE 1974

Official citation:
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NUCLEAR TESTS CASE
(AUSTRALIA v. FRANCE)

AFFAIRE DES ESSAIS NUCLÉAIRES
(AUTRALIE c. FRANCE)

INTERNATIONAL COURT OF JUSTICE

YEAR 1974

20 December 1974

NUCLEAR TESTS CASE
(AUSTRALIA v. FRANCE)

Questions of jurisdiction and admissibility—Prior examination required of question of existence of dispute as essentially preliminary matter—Exercise of inherent jurisdiction of the Court.

Analysis of claim on the basis of the Application and determination of object of claim—Significance of submissions and of statements of the Applicant for definition of the claim—Power of Court to interpret submissions—Public statements made on behalf of Respondent before and after oral proceedings.

Unilateral acts creative of legal obligations—Principle of good faith.

Resolution of dispute by unilateral declaration giving rise to legal obligation—Applicant’s non-exercise of right of discontinuance of proceedings no bar to independent finding by Court—Disappearance of dispute resulting in claim no longer having any object—Jurisdiction only to be exercised when dispute genuinely exists between the Parties.

JUDGMENT

Present: President LACHS; Judges FORSTER, GROS, BENZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDICK, NAGENDRA SINGH, RUDA; Judge ad hoc Sir Garfield BARWICK; Registrar AQUIARONE.

In the Nuclear Tests case,
between
Australia,
represented by
Mr. P. Brazil, of the Australian Bar, Officer of the Australian Attorney-General’s Department,
as Agent,
3. Pursuant to Article 31, paragraph 2, of the Statute of the Court, the
Government of Australia chose the Right Honourable Sir Garfield Barwick,
Chief Justice of Australia, to sit as judge ad hoc in the case.

4. By a letter dated 16 May 1973 from the Ambassador of France to the
Netherlands, handed by him to the Registrar the same day, the French
Government stated that, for reasons set out in the letter and an Annex
thereto, it considered that the Court was manifestly not competent in
the case, and that it could not accept the Court's jurisdiction; and that ac-

cordingly the French Government did not intend to appoint an agent, and re-
quested the Court to remove the case from its list. Nor has an agent been
appointed by the French Government.

5. On 9 May 1973, the date of filing of the Application instituting pro-
ceedings, the Agent of Australia also filed in the Registry of the Court a
request for the indication of interim measures of protection under Article 33
of the 1928 General Act for the Pacific Settlement of International Disputes
and Article 41 of the Statute and Article 66 of the Rules of Court. By an
Order dated 22 June 1973 the Court indicated, on the basis of Article 41 of
the Statute, certain interim measures of protection in the case.

6. By the same Order of 22 June 1973, the Court, considering that it was
necessary to resolve as soon as possible the questions of the Court's juris-
diction and of the admissibility of the Application, decided that the written
proceedings should first be addressed to the questions of the jurisdiction of
the Court to entertain the dispute and of the admissibility of the Application,
and fixed 21 September 1973 as the time-limit for the filing of a Memorial by
the Government of Australia. The Order of 21 December 1973 extended the
time-limit for a Counter-Memorial by the French Government. The Co-Agent of Australia
having requested an extension to 23 November 1973 of the time-limit fixed
for the filing of the Memorial, the time-limits fixed by the Order of 22 June
1973 were extended, by an Order dated 28 August 1973, to 23 November 1973
for the Memorial and 19 April 1974 for the Counter-Memorial. The Memorial
of the Government of Australia was filed within the extended time-limit fixed
therefor, and was communicated to the French Government. No Counter-
Memorial was filed by the French Government and, the written proceedings
being thus closed, the case was ready for hearing on 20 April 1974, the day
following the expiration of the time-limit fixed for the Counter-Memorial of
the French Government.

7. On 16 May 1973 the Government of Fiji filed in the Registry of the
Court a request under Article 62 of the Statute to be permitted to intervene in
these proceedings. By an Order of 12 July 1973 the Court, having regard to
its Order of 22 June 1973 by which the written proceedings were first to be
addressed to the questions of the jurisdiction of the Court and of the admissi-
ibility of the Application, decided to defer its consideration of the application
of the Government of Fiji for permission to intervene until the Court should
have pronounced upon these questions.

8. On 24 July 1973, the Registrar addressed the notification provided for
in Article 63 of the Statute to the States, other than the Parties to the case,
which were still in existence and were listed in the relevant documents of the
League of Nations as parties to the General Act for the Pacific Settlement
of International Disputes, done at Geneva on 26 September 1928, which
was invoked in the Application as a basis of jurisdiction.

9. The Governments of Argentina, Fiji, New Zealand and Peru requested
that the pleadings and annexed documents should be made available to them
in accordance with Article 48, paragraph 2, of the Rules of Court. The Parties were consulted on each occasion, and the French Government having maintained the position stated in the letter of 16 May 1973, and thus declined to express an opinion, the Court or the President decided to accede to these requests.

10. On 4-6, 8-9 and 11 July 1974, after due notice to the Parties, public hearings were held, in the course of which the Court heard the oral argument, on the questions of the Court's jurisdiction and of the admissibility of the Application, advanced by Mr. P. Brazil, Agent of Australia and Senator the Honourable Lionel Murphy, Q.C., Mr. M. H. Byers, Q.C., Mr. E. Lauterpacht, Q.C., and Professor D. P. O'Connell, counsel, on behalf of the Government of Australia. The French Government was not represented at the hearings.

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of Australia:

in the Application:

"The Government of Australia asks the Court to adjudge and declare that, for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law.

And to Order

that the French Republic shall not carry out any further such tests."

in the Memorial:

"The Government of Australia submits to the Court that it is entitled to a declaration and judgment that:

(a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973;

and

(b) the Application is admissible."

12. During the oral proceedings, the following written submissions were filed in the Registry of the Court on behalf of the Government of Australia:

"The final submissions of the Government of Australia are that:

(a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973;

and

(b) the Application is admissible

and that accordingly the Government of Australia is entitled to a declaration and judgment that the Court has full competence to proceed to entertain the Application by Australia on the merits of the dispute."

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefor made by that Government. The attitude of the French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the Netherlands, and the document annexed thereto. The said letter stated in particular that:

"...the Government of the [French] Republic, as it has notified the Australian Government, considers that the Court is manifestly not competent in this case and that it cannot accept its jurisdiction."

14. As indicated above (paragraph 4), the letter from the French Ambassador of 16 May 1973 also stated that the French Government "respectfully requests the Court to be so good as to order that the case be removed from the list". At the opening of the public hearing concerning the request for interim measures of protection, held on 21 May 1973, the President announced that "this request... has been duly noted, and the Court will deal with it in due course, in application of Article 36, paragraph 6, of the Statute of the Court". In its Order of 22 June 1973, the Court stated that the considerations therein set out did not "permit the Court to accede at the present stage of the proceedings" to that request. Having now had the opportunity of examining the request in the light of the subsequent proceedings, the Court finds that the present case is not one in which the procedure of summary removal from the list would be appropriate.

15. It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

16. The present case relates to a dispute between the Government of Australia and the French Government concerning the holding of atmospheric tests of nuclear weapons by the latter Government in the South Pacific Ocean. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the Fisheries Jurisdiction cases, as follows:
“The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits.” (I.C.J. Reports 1973, pp. 7 and 54.)

It will however be necessary to give a summary of the principal facts underlying the case.

17. Prior to the filing of the Application instituting proceedings in this case, the French Government had carried out atmospheric tests of nuclear devices at its Centre d'expérimentations du Pacifique, in the territory of French Polynesia, in the years 1966, 1967, 1968, 1970, 1971 and 1972. The main firing site has been Mururoa atoll some 6,000 kilometres to the east of the Australian mainland. The French Government has created “Prohibited Zones” for aircraft and “Dangerous Zones” for aircraft and shipping, in order to exclude aircraft and shipping from the area of the tests centre; these “zones” have been put into effect during the period of testing in each year in which tests have been carried out.

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere, and the consequential dissipation in varying degrees throughout the world, of measurable quantities of radioactive matter. It is asserted by Australia that the French atmospheric tests have caused some fall-out of this kind to be deposited on Australian territory; France has maintained in particular that the radio-active matter produced by its tests has been so infinitesimally small that it may be regarded as negligible, and that such fall-out on Australian territory does not constitute a danger to the health of the Australian population. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them.

** * *

19. By letters of 19 September 1973, 29 August and 11 November 1974, the Government of Australia informed the Court that subsequent to the Court's Order of 22 June 1973 indicating, as interim measures under Article 41 of the Statute (inter alia) that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out in Australian territory, two further series of atmospheric tests, in the months of July and August 1973 and June to September 1974, had been carried out at the Centre d'expérimentations du Pacifique. The letters also stated that fall-out had been recorded on Australian territory which, according to the Australian Government, was clearly attributable to these tests.

20. Recently a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific Ocean. The significance of these statements, and their effect for the purposes of the present proceedings, will be examined in detail later in the present Judgment.

** * *

21. The Application founds the jurisdiction of the Court on the following basis:

“(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36 (1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 193:..."

(ii) Alternatively, Article 36 (2) of the Statute of the Court: Australia and the French Republic have both made declarations thereunder.”

22. The scope of the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the “inherent limitations on the exercise of the judicial function” of the Court, and to “maintain its judicial character” (Northern Cameroons, Judgment, I.C.J. Reports 1963, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial...
organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

24. With these considerations in mind, the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of Australia. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute", must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it.

25. The Court would recall that the submission made in the Application (paragraph 11 above) is that the Court should adjudge and declare that "the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law"—the Application having specified in what respect further tests were alleged to be in violation of international law—and should order "that the French Republic shall not carry out any further such tests".

26. The diplomatic correspondence of recent years between Australia and France reveals Australia's preoccupation with French nuclear atmospheric tests in the South Pacific region, and indicates that its objective has been to bring about their termination. Thus in a Note dated 3 January 1973 the Australian Government made it clear that it was inviting the French Government "to refrain from any further atmospheric nuclear tests in the Pacific area and formally to assure the Australian Government that no more such tests will be held in the Pacific area". In the Application, the Government of Australia observed in connection with this Note (and the French reply of 7 February 1973) that:

"It is at these Notes, of 3 January and 7 February 1973, that the Court is respectfully invited to look most closely; for it is in them that the shape and dimensions of the dispute which now so sadly divides the parties appear so clearly. The Government of Australia claimed that the continuance of testing by France is illegal and called for the cessation of tests. The Government of France asserted the legality of its conduct and gave no indication that the tests would stop." (Para. 15 of the Application.)

That this was the object of the claim also clearly emerges from the request for the indication of interim measures of protection, submitted to the Court by the Applicant on 9 May 1973, in which it was observed:

"As is stated in the Application, Australia has sought to obtain from the French Republic a permanent undertaking to refrain from further atmospheric nuclear tests in the Pacific. However, the French Republic has expressly refused to give any such undertaking. It was made clear in a statement in the French Parliament on 2 May 1973 by the French Secretary of State for the Armies that the French Government, regardless of the protests made by Australia and other countries, does not envisage any cancellation or modification of the programme of nuclear testing as originally planned." (Para. 69.)

27. Further light is thrown on the nature of the Australian claim by the reaction of Australia, through its Attorney-General, to statements, referred to in paragraph 20 above, made on behalf of France and relating to nuclear tests in the South Pacific Ocean. In the course of the oral proceedings, the Attorney-General of Australia outlined the history of the dispute subsequent to the Order of 22 June 1973, and included in this review mention of a communiqué issued by the Office of the President of the French Republic on 8 June 1974. The Attorney-General's comments on this document indicated that it merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government's view, of such a nature as to resolve the dispute to its satisfaction. More particularly he reminded the Court that "Australia has consistently stated that it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted ... but no such assurance was given". The Attorney-General continued, with reference to the communiqué of 8 June:

"The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received those assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests. It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests." (Hearing of 4 July 1974.)

It is clear from these statements that if the French Government had given what could have been construed by Australia as "a firm, explicit and binding undertaking to refrain from further atmospheric tests", the applicant Government would have regarded its objective as having been achieved.

28. Subsequently, on 26 September 1974, the Attorney-General of Australia, replying to a question put in the Australian Senate with regard to reports that France had announced that it had finished atmospheric nuclear testing, said:

"From the reports I have received it appears that what the French Foreign Minister actually said was 'We have now reached a stage in
our nuclear technology that makes it possible for us to continue our program by underground testing, and we have taken steps to do so as early as next year ... this statement falls far short of a commitment or undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre ... There is a basic distinction between an assertion that steps are being taken to continue the testing program by underground testing as early as next year and an assurance that no further atmospheric tests will take place. It seems that the Government of France, while apparently taking a step in the right direction, is still reserving to itself the right to carry out atmospheric nuclear tests. In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests should the French Government subsequently decide to hold them.”

Without commenting for the moment on the Attorney-General’s interpretation of the French statements brought to his notice, the Court would observe that it is clear that the Australian Government contemplated the possibility of “an assurance that no further atmospheric tests will take place” being sufficient to protect Australia.

29. In the light of these statements, it is essential to consider whether the Government of Australia requests a judgment by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court’s duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to “substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced” (P.C.I.J., Series A, No. 7, p. 35), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party. Thus in the Fisheries case, the Court said of nine of the thirteen points in the Applicant’s submissions: “These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision”

30. In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court “to adjudge and declare” (a formula similar to those used in the cases quoted in the previous paragraph), the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court’s attention, and public statements made on behalf of the applicant Government. If these clearly circumscribe the object of the claim, the interpretation of the submissions must necessarily be affected. In the present case, it is evident that the fons et origo of the case was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgment. While the judgment of the Court which Australia seeks to obtain would in its view have been based on a finding by the Court on questions of law, such finding would be only a means to an end, and not an end in itself. The Court is of course aware of the role of declaratory judgments, but the present case is not one in which such a judgment is requested.

31. In view of the object of the Applicant’s claim, namely to prevent further tests, the Court has to take account of any developments, since the filing of the Application, bearing upon the conduct of the Respondent. Moreover, as already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court’s attention to the communiqué of 8 June 1974, and making observations thereon. In these circumstances the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.

32. At the hearing of 4 July 1974, in the course of a review of developments in relation to the proceedings since counsel for Australia had
previously addressed the Court in May 1973, the Attorney-General of Australia made the following statement:

“You will recall that Australia has consistently stated it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted. Indeed as the Court will remember such an assurance was sought of the French Government by the Australian Government: by note dated 3 January 1973, but no such assurance was given.

I should remind the Court that in paragraph 427 of its Memorial the Australian Government made a statement, then completely accurate, to the effect that the French Government had given no indication of any intention of departing from the programme of testing planned for 1974 and 1975. That statement will now not be read in light of the matters to which I now turn and which deal with the official communications by the French Government of its present plans.”

He devoted considerable attention to a communiqué dated 8 June 1974 from the Office of the President of the French Republic, and submitted to the Court the Australian Government’s interpretation of that document. Since that time, certain French authorities have made a number of consistent public statements concerning future tests, which provide material facilitating the Court’s task of assessing the Applicant’s interpretation of the earlier documents, and which indeed require to be examined in order to discern whether they embody any modification of intention as to France’s future conduct. It is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government, and one of them was commented on by the Attorney-General in the Australian Senate on 26 September 1974. It will clearly be necessary to consider all these statements, both that drawn to the Court’s attention in July 1974 and those subsequently made.

33. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court’s attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question whether it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim audf alteram partem, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant’s comments, and feeling no obligation to consult the Parties on the basis for its decision finds that the reopening of the oral proceedings would serve no useful purpose.

34. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

“The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974. The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.”

A copy of the communiqué was transmitted with a Note dated 11 June 1974 from the French Embassy in Canberra to the Australian Department of Foreign Affairs, and as already mentioned, the text of the communiqué was brought to the attention of the Court in the course of the oral proceedings.

35. In addition to this, the Court cannot fail to take note of a reference to a document made by counsel at a public hearing in the proceedings, parallel to this case, instituted by New Zealand against France on 9 May 1973. At the hearing of 10 July 1974 in that case, the Attorney-General of New Zealand, after referring to the communiqué of 8 June 1974, mentioned above, stated that on 10 June 1974 the French Embassy in Wellington sent a Note to the New Zealand Ministry of Foreign Affairs, containing a passage which the Attorney General read out, and which, in the translation used by New Zealand, runs as follows:
"France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground tests, as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type."

36. The Court will also have to consider the relevant statements made by the French authorities subsequently to the oral proceedings: on 25 July 1974 by the President of the Republic; on 16 August 1974 by the Minister of Defence; on 25 September 1974 by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October 1974 by the Minister of Defence.

37. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic, when he said:

"... on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect..."

38. On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

39. On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

"We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year."

40. On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added "in the normal course of events", he agreed that he had not. This latter point is relevant in view of the passage from the Note of 10 June 1974 from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand, quoted in paragraph 35 above, to the effect that the atmospheric tests contemplated "will, in the normal course of events, be the last of this type". The Minister also mentioned that, whether or not other governments had been officially advised of the decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

41. In view of the foregoing, the Court finds that France made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests. The Court must in particular take into consideration the President's statement of 25 July 1974 (paragraph 37 above) followed by the Defence Minister's statement on 11 October 1974 (paragraph 40). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events [normalement]".

* *

42. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric nuclear tests should be carried out in the South Pacific, it is first necessary to determine the status and scope on the international plane of these declarations.

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the ques-
tion of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the Temple of Preah Vihear:

"Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (I.C.J. Reports 1961, p. 31.)

The Court further stated in the same case: "... the sole relevant question is whether the language employed in any given declaration does reveal a clear intention ..." (ibid., p. 32).

46. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

* * *

47. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of Australia has made known to the Court at the oral proceedings its own interpretation of the first such statement (paragraph 27 above). As to subsequent statements, reference may be made to what was said in the Australian Senate by the Attorney-General on 26 September 1974 (paragraph 28 above). In reply to a question concerning reports that France had announced that it had finished atmospheric nuclear testing, he said that the statement of the French Foreign Minister on 25 September (paragraph 39 above) "falls far short of an undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre" and that France was "still reserving to itself the right to carry out atmospheric nuclear tests" so that "In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests".

48. It will be observed that Australia has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France, and its conclusion that in fact no "commitment" or "firm, explicit and binding undertaking" had been given is based on the view that the assurance is not absolute in its terms,

that there is a "distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place", that "the possibility of further atmospheric testing taking place after the commencement of underground tests cannot be excluded" and that thus "the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests". The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.

49. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

50. The unilateral statements of the French authorities were made outside the Court, publicly and erga omnes, even though the first of them was communicated to the Government of Australia. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made in vacuo, but in relation to the tests which constitute the very object of the present proceedings, although France has not appeared in the case.

51. In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers
that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign Affairs of Australia, that it "has the conviction that its nuclear experiments have not violated any rule of international law", and nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.

52. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, unimpaired as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

53. The Court finds that no question of damages arises in the present case, since no such claim has been raised by the Applicant either prior to or during the proceedings, and the original and ultimate objective of the Applicant has been to seek protection against any further atmospheric test (see paragraph 28 above).

54. It would be open to Australia, if it had considered that the case had in effect been concluded, to discontinue the proceedings in accordance with the Rules of Court. If it has not done so, this does not prevent the Court from mixing its own independent finding on the subject. It is true that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement" (Factories at Chorzów (Merits), P.C.I.J., Series A, No. 17, p. 51). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

55. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

56. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric nuclear tests in the South Pacific Ocean, a judgment of the Court on this subject might still be of value because, if the judgment upheld the Applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having found that the Respondent has assumed an obligation to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no raison d'être.

57. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.

58. The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have ... arisen render any adjudication devoid of purpose" (Northern Cameroons, Judgment, I.C.J. Reports 1963, p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

59. Thus the Court finds that no further pronouncement is required
in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues in abstracto, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

* * *

60. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court’s function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.

* * *

61. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated “pending its final decision in the proceedings instituted on 9 May 1973 by Australia against France”. It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time.

* * *

62. For these reasons,

THE COURT,

by nine votes to six,

finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia and the Government of the French Republic, respectively.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

President LACHS makes the following declaration:

Good administration of justice and respect for the Court require that the outcome of its deliberations be kept in strict secrecy and nothing of its decision be published until it is officially rendered. It was therefore regrettable that in the present case, prior to the public reading of the Court’s Order of 22 June 1973, a statement was made and press reports appeared which exceeded what is legally admissible in relation to a case sub judice.

The Court was seriously concerned with the matter and an enquiry was ordered in the course of which all possible avenues accessible to the Court were explored.

The Court concluded, by a resolution of 21 March 1974, that its investigations had not enabled it to identify any specific source of the statements and reports published.

I remain satisfied that the Court had done everything possible in this respect and that it dealt with the matter with all the seriousness for which it called.

Judges BENGZON, ONYEAMA, DILLARD, JIMÉNEZ DE ÁRÉCHAGA and Sir Humphrey WALDOCK make the following joint declaration:

Certain criticisms have been made of the Court’s handling of the matter to which the President alludes in the preceding declaration. We wish by our declaration to make it clear that we do not consider those criticisms to be in any way justified.

The Court undertook a lengthy examination of the matter by the several means at its disposal: through its services, by convoking the Agent for Australia and having him questioned, and by its own investigations and enquiries. Any suggestion that the Court failed to treat the matter with all the seriousness and care which it required is, in our opinion, without foundation. The seriousness with which the Court regarded the matter is indeed reflected and emphasized in the communiqués which it issued, first on 8 August 1973 and subsequently on 26 March 1974.

The examination of the matter carried out by the Court did not enable it to identify any specific source of the information on which were based the statements and press reports to which the President has referred. When the Court, by eleven votes to three, decided to conclude its examination it did so for the solid reason that to pursue its investigations and inquiries would in its view, be very unlikely to produce further useful information.
Judges Forster, Gros, Petrén and Ignacio-Pinto append separate opinions to the Judgment of the Court.

Judges Onyema, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock append a joint dissenting opinion, and Judge de Castro and Judge ad hoc Sir Garfield Barwick append dissenting opinions to the Judgment of the Court.

(Initialled) M.L.
(Initialled) S.A.
International Court of Justice

Nuclear Tests
(New Zealand v. France)
Judgment

I.C.J. Reports 1974
NUCLEAR TESTS CASE
(NEW ZEALAND v. FRANCE)

JUDGMENT OF 20 DECEMBER 1974

1974

AFFAIRE DES ESSAIS NUCLÉAIRES
(NOUVELLE-ZÉLANDE c. FRANCE)

ARRÊT DU 20 DÉCEMBRE 1974

Official citation:

Mode officiel de citation:
20 DECEMBER 1974
JUDGMENT

INTERNATIONAL COURT OF JUSTICE
YEAR 1974
20 December 1974

NUCLEAR TESTS CASE
(NEW ZEALAND v. FRANCE)

Questions of jurisdiction and admissibility—Prior examination required of question of existence of dispute as essentially preliminary matter—Exercise of inherent jurisdiction of the Court.
Analysis of claim on the basis of the Application and determination of object of claim—Significance of submissions and of statements of the Applicant for definition of the claim—Power of Court to interpret submissions—Public statements made on behalf of Respondent before and after oral proceedings—Unilateral acts creative of legal obligations—Principle of good faith.
Resolution of dispute by unilateral declaration giving rise to legal obligation—Applicant's non-exercise of right of discontinuance of proceedings no bar to independent finding by Court—Disappearance of dispute resulting in claim no longer having any object—Jurisdiction only to be exercised when dispute genuinely exists between the Parties.

JUDGMENT

Present: President Lachs; Judges Forster, Gros, Bengzon, Petrén, Onyema, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Sir Humphrey Waldock, Nagendra Singh, Ruda; Judge ad hoc Sir Garfield Barwick; Registrar Aquarone.

In the Nuclear Tests case,

between

New Zealand,

represented by

Professor R. Q. Quentin-Baxter, of the New Zealand Bar, Professor of International Law, Victoria University of Wellington, as Agent and Counsel,
assisted by
H.E. Mr. H. V. Roberts, Ambassador of New Zealand,
as Co-Agent,
and by
Hon. Dr. A. M. Finlay, Q.C., Attorney-General of New Zealand,
Mr. R. C. Savage, Q.C., Solicitor-General of New Zealand,
Professor K. J. Keith, of the New Zealand Bar, Professor of International
Law, Victoria University of Wellington,
Mr. C. D. Beethy, of the New Zealand Bar, Legal Adviser, New Zealand
Ministry of Foreign Affairs,
Mrs. A. B. Quentin-Baxter, of the New Zealand Bar,
as Counsel,
and
the French Republic,
The Court,
composed as above,
delivers the following judgment:

1. By a letter of 9 May 1973, received in the Registry of the Court the same
day, the Ambassador of New Zealand to the Netherlands transmitted to the
Registrar an Application instituting proceedings against France, in respect of
a dispute concerning the legality of atmospheric nuclear tests conducted by
the French Government in the South Pacific region. In order to found the
jurisdiction of the Court, the Application relied on Article 36, paragraph 1,
and Article 37 of the Statute of the Court and Article 17 of the General Act
for the Pacific Settlement of International Disputes done at Geneva on
26 September 1928, and, in the alternative, on Article 36, paragraphs 2 and 5,
of the Statute of the Court.
2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was
at once communicated to the French Government. In accordance with para-
graph 3 of that Article, all other States entitled to appear before the Court
were notified of the Application.
3. Pursuant to Article 31, paragraph 2, of the Statute of the Court, the
Government of New Zealand chose the Right Honourable Sir Garfield
Barwick, Chief Justice of Australia, to sit as judge ad hoc in the case.
4. By a letter dated 16 May 1973 from the Ambassador of France to the
Netherlands, handed by him to the Registrar the same day, the French
Government stated that, for reasons set out in the letter and an Annex thereto,
the Court was manifestly not competent in the case; that it
could not accept the Court’s jurisdiction; and that accordingly the French
Government did not intend to appoint an agent, and requested the Court to
remove the case from its list. Nor has an agent been appointed by the French
Government.
5. On 14 May 1973, the Agent of New Zealand filed in the Registry of the
Court a request for the indication of interim measures of protection under

Article 33 of the 1928 General Act for the Pacific Settlement of International
Disputes and Articles 41 and 48 of the Statute and Article 66 of the Rules of
Court. By an Order dated 22 June 1973 the Court indicated, on the basis of
Article 41 of the Statute, certain interim measures of protection in the case.
6. By the same Order of 22 June 1973, the Court, considering that it was
necessary to resolve as soon as possible the questions of the Court’s jurisdic-
tion and of the admissibility of the Application, decided that the written
proceedings should first be addressed to the questions of the jurisdiction of the
Court to entertain the dispute and of the admissibility of the Application and
fixed 21 July 1973 as the time-limit for the filing of a Memorial by the
Government of New Zealand and 21 December 1973 as the time-limit for a
Counter-Memorial by the French Government. The Co-Agent of New
Zealand having requested an extension to 2 November 1973 of the time-limit
fixed for the filing of the Memorial, the time-limits fixed by the Order of 22
June 1973 were extended, by an Order dated 6 September 1973, to 2 November
1973 for the Memorial and 22 March 1974 for the Counter-Memorial. The
Memorial of the Government of New Zealand was filed within the extended
time-limit fixed therefor, and was communicated to the French Government.
No Counter-Memorial was filed by the French Government and, the written
proceedings being thus closed, the case was ready for hearing on 23 March
1974, the day following the expiration of the time-limit fixed for the Counter-
Memorial of the French Government.
7. On 18 May 1973 the Government of Fiji filed in the Registry of the
Court a request under Article 62 of the Statute to be permitted to intervene
in these proceedings. By an Order of 12 July 1973 the Court, having regard
to its Order of 22 June 1973 by which the written proceedings were first to be
addressed to the questions of the jurisdiction of the Court and of the ad-
missibility of the Application, decided to defer its consideration of the
application of the Government of Fiji for permission to intervene until the Court
should have pronounced upon these questions.
8. On 24 July 1973, the Registrar addressed the notification provided for
in Article 63 of the Statute to the States, other than the Parties to the case,
which were still in existence and were listed in the relevant documents of the
League of Nations as parties to the General Act for the Pacific Settlement of
International Disputes, done at Geneva on 26 September 1928, which was
invoked in the Application as a basis of jurisdiction.
9. The Governments of Argentina, Australia, Fiji and Peru requested that
the pleadings and annexed documents should be made available to them in
accordance with Article 48, paragraph 2, of the Rules of Court. The Parties
were consulted on each occasion, and the French Government having

made the position stated in the letter of 16 May 1973, and thus declined
to express an opinion, the Court or the President decided to accede to these
requests.
10. On 10 and 11 July 1974, after due notice to the Parties, public hearings
were held, in the course of which the Court heard the oral argument, on the
questions of the Court’s jurisdiction and of the admissibility of the Application,
advanced by Professor R. Q. Quentin-Baxter, Agent of New Zealand,
and Dr. A. M. Finlay and Mr. R. C. Savage, counsel, on behalf of the
Government of New Zealand. The French Government was not represented
at the hearings.
11. In the course of the written proceedings, the following submissions
were presented on behalf of the Government of New Zealand:
in the Application:

"New Zealand asks the Court to adjudge and declare:
That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests."

in the Memorial:

"... the Government of New Zealand submits to the Court that it is entitled to a declaration and judgment that—

(a) the Court has jurisdiction to entertain the Application filed by New Zealand and to deal with the merits of the dispute; and

(b) the Application is admissible".

12. At the close of the oral proceedings, the following written submissions were filed in the Registry of the Court on behalf of the Government of New Zealand:

"The Government of New Zealand is entitled to a declaration and judgment that:

(a) the Court has jurisdiction to entertain the Application filed by New Zealand and to deal with the merits of the dispute; and

(b) the Application is admissible."

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefore made by that Government. The attitude of the French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the Netherlands and the document annexed thereto. The said letter stated in particular that:

"... the Government of the [French] Republic, as it has notified the Government of New Zealand, considers that the Court is manifestly not competent in this case and that it cannot accept its jurisdiction".

* * *

14. As indicated above (paragraph 4), the letter from the French Ambassador of 16 May 1973 also stated that the French Government "respectfully requests the Court to be so good as to order that the case be removed from the list". At the opening of the public hearing concerning the request for interim measures of protection, held on 24 May 1973, the President announced that "this request ... has been duly noted, and the Court will deal with it in due course, in application of Article 36, paragraph 6, of the Statute of the Court". In its Order of 22 June 1973, the Court stated that the considerations therein set out did not "permit the Court to accede at the present stage of the proceedings" to that request. Having now had the opportunity of examining the request in the light of the subsequent proceedings, the Court finds that the present case is not one in which the procedure of summary removal from the list would be appropriate.

* * *

15. It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

* * *

16. The present case relates to a dispute between the Government of New Zealand and the French Government concerning the legality of atmospheric nuclear tests conducted by the latter Government in the South Pacific region. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the Fisheries Jurisdiction cases, as follows:

"The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits." (I.C.J. Reports 1973, pp. 7 and 54.)

It will however be necessary to give a summary of the principal facts underlying the case.

17. Prior to the filing of the Application instituting proceedings in this case, the French Government had carried out atmospheric tests of nuclear devices at its Centre d'expérimentations du Pacifique in the territory of French Polynesia, in the years 1966, 1967, 1968, 1970, 1971 and 1972. The main firing site used has been Mururua atoll, some 2,500 nautical miles from the nearest point of the North Island of New Zealand and approximately 1,050 nautical miles from the nearest point of the
Cook Islands, a self-governing State linked in free association with New Zealand. The French Government: has created "Prohibited Zones" for aircraft and "Dangerous Zones" for aircraft and shipping, in order to exclude aircraft and shipping from the area of the tests centre; these "zones" have been put into effect during the period of testing in each year in which tests have been carried out.

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere and the consequent dissipation, in varying degrees throughout the world, of measurable quantities of radio-active matter. It is asserted by New Zealand that the French atmospheric tests have caused some fall-out of this kind to be deposited, inter alia, on New Zealand territory; France has maintained, in particular, that the radio-active matter produced by its tests has been so infinitesimal that it may be regarded as negligible and that any fall-out on New Zealand territory has never involved any danger to the health of the population of New Zealand. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them.

* * *

19. By letters of 21 September 1973 and 1 November 1974, the Government of New Zealand informed the Court that subsequent to the Court's Order of 22 June 1973 indicating, as interim measures under Article 41 of the Statute, (inter alia) that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on New Zealand territory, two further series of atmospheric tests, in the months of July and August 1973 and June to September 1974, had been carried out at the Centre d'expérimentations du Pacifique. The letters also stated that fall-out had been recorded on New Zealand territory, analysis of samples of which, according to the New Zealand Government, established conclusively the presence of fall-out from these tests, and that it was "the view of the New Zealand Government that there has been a clear breach by the French Government of the Court's Order of 22 June 1973".

20. Recently a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific region. The significance of these statements, and their effect for the purposes of the present proceedings, will be examined in detail later in the present Judgment.

* * *

21. The Application founds the jurisdiction of the Court on the following basis:

"(a) Articles 36 (1) and 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928; and, in the alternative,

(b) Article 36 (2) and (5) of the Statute of the Court."

22. The scope of the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (Northern Cameroons, Judgment, I.C.J. Reports 1963, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

24. With these considerations in mind, the Court has therefore first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of New Zealand. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However, the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute", must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it.

25. The Court would recall that the submission made in the Application (paragraph 11 above) is that the Court should adjudge and declare
“that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand’s rights under international law”—the alleged rights so violated being enumerated in the Application—and “that these rights will be violated by any further such tests”.

26. The diplomatic correspondence between New Zealand and France over the past ten years reveals New Zealand’s preoccupation with French nuclear tests in the atmosphere in the South Pacific region, and indicates that its objective was to bring about their termination. Thus in a letter from the Prime Minister of New Zealand to the French Ambassador in Wellington dated 19 December 1972, the Prime Minister said:

“My Government is committed to working through all possible means to bring the tests to an end, and we shall not hesitate to use the channels available to us in concert as appropriate with like-minded countries. It is my hope, however, Mr. Ambassador, that you will convey to your Government while in Paris my earnest desire to see this one element of serious contention removed from what is in other respects an excellent relationship between our countries. For my part, I see no other way than a halt to further testing.”

Furthermore in the Application of New Zealand, it is stated, in connection with discussions held in April 1973 between the two Governments that:

“Unfortunately, however, they [the discussions] did not lead to agreement. In particular, the French Government did not feel able to give the Deputy Prime Minister of New Zealand the assurance which he sought, namely that the French programme of atmospheric nuclear testing in the South Pacific had come to an end.”

And in a letter to the President of the French Republic by the Prime Minister of New Zealand dated 4 May 1973, following those discussions, the Prime Minister said:

“Since France has not agreed to our request that nuclear weapons testing in the atmosphere of the South Pacific be brought to an end, and since the French Government does not accept New Zealand’s view that these tests are unlawful, the New Zealand Government sees no alternative to its proceeding with the submission of its dispute with France to the International Court of Justice.

I stress again that we see this as the one question at issue between us, and that our efforts are solely directed at removing it from contention.”

27. Further light is thrown on the nature of the New Zealand claim by the reaction of New Zealand, both through its successive Prime Ministers and through its representatives before the Court, to the statement, referred to in paragraph 20 above, made on behalf of France and relating to nuclear tests in the South Pacific region. In the course of the oral proceedings, the Attorney-General of New Zealand outlined the history of the dispute, and included in this review mention of diplomatic correspondence exchanged between 10 June and 1 July 1974 by France and New Zealand, which was communicated to the Court on 3 July by the Applicant, and of a communiqué issued by the Office of the President of the French Republic on 8 June 1974. The Attorney-General’s comments on these documents, which are thus part of the record in the case, indicated that they merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government’s view, of such a nature as to resolve the dispute to its satisfaction. More particularly, when referring to a Note of 10 June 1974 from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs (quoted in paragraph 36 below) he stated: “New Zealand has not been given anything in the nature of an unqualified assurance that 1974 will see the end of atmospheric nuclear testing in the South Pacific”. The Attorney-General continued:

“On 11 June the Prime Minister of New Zealand, Mr. Kirk, asked the French Ambassador in Wellington to convey a letter to the President of France. Copies of that letter have been filed with the Registry. It urged among other things that the President should, even at that time, weigh the implications of any further atmospheric testing in the Pacific and resolve to put an end to such activity which has been the source of grave anxiety to the people of the Pacific region for more than a decade.” (Hearing of 10 July 1974.)

It is clear from these statements, read in the light of the diplomatic correspondence referred to above, that if the Note of 10 June 1974 could have been construed by New Zealand as conveying “an unqualified assurance that 1974 [would] see the end of atmospheric nuclear testing” by France “in the South Pacific”, or if the President of the Republic, following the letter of 11 June 1974, did “resolve to put an end to [that] activity”, the applicant Government would have regarded its objective as having been achieved.

28. Subsequently, on 1 November 1974, the Prime Minister of New Zealand, Mr. W. E. Rowling, commented in a public statement on the indications given by France of its intention to put an end to atmospheric tests in the Pacific, and said:

“It should... be clearly understood that nothing said by the French Government, whether to New Zealand or to the international community at large, has amounted to an assurance that there will
be no further atmospheric nuclear tests in the South Pacific. The option of further atmospheric tests has been left open. Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists..." (Emphasis added.)

Without commenting for the moment on the Prime Minister's interpretation of the French statements, the Court would observe that the passage italicized above clearly implies that an assurance that atmospheric testing is "finished for good" would, in the view of New Zealand, bring the dispute to an end.

29. The type of tests to which the proceedings relate is described in the Application as "nuclear tests in the South Pacific region that gave rise to radio-active fall-out", the type of testing contemplated not being specified. However, New Zealand's case has been argued mainly in relation to atmospheric tests; and the statements quoted in paragraphs 26, 27 and 28 above, particularly those of successive Prime Ministers of New Zealand, of 11 June and 1 November 1974, show that an assurance "that nuclear testing of this kind", that is to say, testing in the atmosphere, "is finished for good" would meet the object of the New Zealand claim. The Court therefore considers that, for purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radio-active fall-out on New Zealand territory.

30. In the light of the above statements, it is essential to consider whether the Government of New Zealand requests a judgment by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to "substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced" (P.C.I.J., Series A, No. 7, p. 35), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party. Thus in the Fisheries case, the Court said of nine of the thirteen points in the Applicant's submissions: "These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision" (I.C.J. Reports 1951, p. 126). Similarly in the Minquiers and Ecrehos case, the Court observed that:

"The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government." (I.C.J. Reports 1953, p. 52; see also Notebohm, Second Phase, Judgment, I.C.J. Reports 1955, p. 16.)

31. In the circumstances of the present case, as already mentioned, the Court must ascertain the true subject of the dispute, the object and purpose of the claim (cf. Interhandel, Judgment, I.C.J. Reports 1959, p. 19; Right of Passage over Indian Territory, Meriis, Judgment, I.C.J. Reports 1960, pp. 33-34). In doing so it must take into account not only the submission, but the Application as a whole, the arguments of the Applicant before the Court, and other documents referred to above. If these clearly define the object of the claim, the interpretation of the submission must necessarily be affected. The Court is asked to adjudge and declare that French atmospheric nuclear tests are illegal, but at the same time it is requested to adjudge and declare that the rights of New Zealand "will be violated by any further such tests". The Application thus contains a submission requesting a definition of the rights and obligations of the Parties. However, it is clear that the fons et origo of the dispute was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests. This is indeed confirmed by the various statements made by the New Zealand Government, and in particular by the statement made before the Court in the oral proceedings, on 10 July 1974, when, after referring to New Zealand's submission, the Attorney-General stated that "My Government seeks a halt to a hazardous and unlawful activity". Thus the dispute brought before the Court cannot be separated from the situation in which it has arisen, and from further developments which may have affected it.

32. As already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court's attention to the communiqué of 8 June 1974 and subsequent
diplomatic correspondence, and making observations thereon. In these circumstances, the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.

33. At the hearing of 10 July 1974 the Court was counsel for New Zealand with an interpretation of certain expressions of intention communicated to the New Zealand Government by the French Government and the French President. In particular he referred to a communiqué of 8 June 1974 (paragraph 35 below) and a diplomatic Note of 10 June 1974 (paragraph 36 below), and after quoting from that Note, he said:

"I emphasize two points: first, the most France is offering is that in her own time she will cease to disregard an existing Order of the Court; and second, even that offer is qualified by the phrase 'in the normal course of events'. New Zealand has not been given anything in the nature of an unqualified assurance that 1974 will see the end of atmospheric nuclear testing in the South Pacific."

Since that time, certain French authorities have made a number of consistent public statements concerning future tests which provide material facilitating the Court's task of assessing the Applicant's interpretation of the earlier documents, and which indeed require to be examined in order to discern whether they embody any modification of intention as to France's future conduct. It is true that these statements have not been made before the Court, but they are in the public domain, are known to the New Zealand Government, and were commented on by its Prime Minister in his statement of 1 November 1974. It will clearly be necessary to consider all these statements, both those drawn to the Court's attention in July 1974 and those subsequently made.

34. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to statements by the French authorities made prior to that date, submitted the documents containing them and presented an interpretation of their character, touching particularly upon the question whether they contained a firm assurance. Thus both the statements and the New Zealand interpretation of them are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim audi alteram partem, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision, finds that the reopening of the oral proceedings would serve no useful purpose.

35. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 6 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

"The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974.

The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."

36. The second is contained in a Note of 10 June 1974 from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs:

"It should... be pointed out that the decision taken by the Office of the President of the French Republic to have the opening of the nuclear test series preceded by a press communiqué represents a departure from the practice of previous years. This procedure has been chosen in view of the fact that a new element has intervened in the development of the programme for perfecting the French deterrent force. This new element is as follows: France, at the point which has been reached in the execution of its programme of defence
by nuclear means, will be in a position to move to the stage of underground firings as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which will be carried out shortly will, in the normal course of events, be the last of this type.

The French authorities express the hope that the New Zealand Government will find this information of some interest and will wish to take it into consideration.”

37. As indicated by counsel for the Applicant at the hearing of 10 July 1974, the reaction of the New Zealand Prime Minister to this second statement was expressed in a letter to the President of the French Republic dated 11 June 1974, from which the following are two extracts:

“...I have noted that the terms of the announcement do not represent an unqualified renunciation of atmospheric testing for the future.”

“I would hope that even at this stage you would be prepared to weigh the implications of any further atmospheric testing in the Pacific and resolve to put an end to this activity which has been the source of grave anxiety to the people in the Pacific region for more than a decade.”

Thus the phrase “in the normal course of events” was regarded by New Zealand as qualifying the statement made, so that it did not meet the expectations of the Applicant, which evidently regarded those words as a form of escape clause. This is clear from the observations of counsel for New Zealand at the hearing of 10 July 1974. In a Note of 17 June 1974, the New Zealand Embassy in Paris stated that it had good reason to believe that France had carried out an atmospheric nuclear test on 16 June and made this further comment:

“The announcement that France will proceed to underground tests in 1975, while presenting a new development, does not affect New Zealand’s fundamental opposition to all nuclear testing, nor does it in any way reduce New Zealand’s opposition to the atmospheric tests set down for this year: the more so since the French Government is unable to give firm assurances that no atmospheric testing will be undertaken after 1974.”

38. The third French statement is contained in a reply made on 1 July 1974 by the President of the Republic to the New Zealand Prime Minister’s letter of 11 June:

“In present circumstances, it is at least gratifying for me to note the positive reaction in your letter to the announcement in the communiqué of 8 June 1974 that we are going over to underground tests. There is in this a new element whose importance will not, I trust, escape the New Zealand Government.”

39. These three statements were all drawn to the notice of the Court by the Applicant at the time of the oral proceedings. As already indicated, the Court will also have to consider the relevant statements subsequently made by the French authorities: on 25 July 1974 by the President of the Republic; on 16 August 1974 by the Minister of Defence; on 25 September 1974 by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October 1974 by the Minister of Defence.

40. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic, when he said:

“... on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government’s programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect...”

41. On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

42. On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

“We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year.”

43. On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added “in the normal course of events”, he agreed that he had not. This latter point is relevant in view of the Note of 10 June 1974 from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand (paragraph 36 above), to the effect that the atmospheric tests contemplated “will, in the normal course of events, be the last of this type”. The Minister also mentioned that, whether or not other governments had been officially advised of the decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.
44. In view of the foregoing, the Court finds that the communiqué issued on 8 June 1974 (paragraph 35 above), the French Embassy’s Note of 10 June 1974 (paragraph 36 above) and the President’s letter of 1 July 1974 (paragraph 38) conveyed to New Zealand the announcement that France, following the conclusion of the 1974 series of tests, would cease the conduct of atmospheric nuclear tests. Special attention is drawn to the hope expressed in the Note of 10 June 1974 “that the New Zealand Government will find this information of some interest and will wish to take it into consideration”, and the reference in that Note and in the letter of 1 July 1974 to “a new element” whose importance is urged upon the New Zealand Government. The Court must consider in particular the President’s statement of 25 July 1974 (paragraph 40 above) followed by the Defence Minister’s statement of 11 October 1974 (paragraph 43). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression “in the normal course of events”.

45. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric nuclear tests should be carried out in the South Pacific, it is first necessary to determine the status and scope of the international plane of these declarations.

46. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become binding according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being henceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

47. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

48. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the Temple of Preah Vihear:

“Where . . . as is generally the case in international law, which places the principal emphasis on the intention of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.” (I.C.J. Reports 1961, p. 31.)

The Court further stated in the same case: “. . . the sole relevant question is whether the language employed in any given declaration does reveal a clear intention . . .” (ibid., p. 32).

49. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

50. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of New Zealand has made known to the Court its own interpretation of some of these statements at the oral proceedings (paragraph 27 above). As to subsequent statements, reference may be made to what was said by the Prime Minister of New Zealand on 1 November 1974 (paragraph 28 above). It will be observed that New Zealand has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France. In the public statement of 1 November 1974, it is stated that “Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists”. This is based on the view
that "the option of further atmospheric tests has been left open". The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the test.

51. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

52. The unilateral statements of the French authorities were made outside the Court, publicly and erga omnes, even if some of them were communicated to the Government of New Zealand. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made in vacuo, but in relation to the tests which constitute the very object of the present proceedings, although France has not appeared in the case.

53. In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained that its nuclear experi-

ments do not contravene any subsisting provision of international law, nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.

54. The Court will now confront the commitment entered into by France with the claim advanced by the Applicant. Though the latter has formally requested from the Court a finding on the rights and obligations of the Parties, it has throughout the dispute maintained as its final objective the termination of the tests. It has sought from France an assurance that the French programme of atmospheric nuclear testing would come to an end. While expressing its opposition to the 1974 tests, the Government of New Zealand made specific reference to an assurance that "1974 will see the end of atmospheric nuclear testing in the South Pacific" (paragraph 33 above). On more than one occasion it has indicated that it would be ready to accept such an assurance. Since the Court now finds that a commitment in this respect has been entered into by France, there is no occasion for a pronouncement in respect of rights and obligations of the Parties concerning the past—which in other circumstances the Court would be entitled and even obliged to make—whatever the date by reference to which such pronouncement might be made.

55. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

56. This conclusion is not affected by a reference made by the New Zealand Government, in successive diplomatic Notes to the French Government from 1966 to 1974, to a formal reservation of "the right to hold the French Government responsible for any damage or losses received by New Zealand . . . as a result of any nuclear weapons tests conducted by France"; for no mention of any request for damages is made in the Application, and at the public hearing of 10 July 1974 the Attorney-General of New Zealand specifically stated: "My Government seeks a halt to a hazardous and unlawful activity, and not compensation for its continuance." The Court therefore finds that no question of damages in respect of tests already conducted arises in the present case.

57. It must be assumed that had New Zealand received an assurance, on one of the occasions when this was requested, which, in its interpretation, would have been satisfactory, it would have considered the dispute as concluded and would have discontinued the proceedings in
accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject. It is true that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement" (Factory at Chorzów (Meritis), P.C.I.J., Series A, No. 17, p. 51). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

58. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the final objective which the Applicant has maintained throughout has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

59. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric nuclear tests in the South Pacific region, a judgment of the Court on this subject might still be of value because, if the Judgment upheld the Applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having found that the Respondent has assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by New Zealand no longer has any object. It follows that any further finding would have no raison d'être.

60. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.

61. The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose" (Northern Cameroons, Judgment, I.C.J. Reports 1963, p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

62. Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues in abstracto, once it has reached the conclusion that the merits of the case no longer fail to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

* * *

63. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request.

* * *

64. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 9 May 1973 by New
Zealand against France”. It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time.

* * *

65. For these reasons,

THE COURT,

by nine votes to six,

finds that the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of New Zealand and the Government of the French Republic, respectively.

(Signed) Manfred LACHS,
   President.

(Signed) S. AQUARONE,
   Registrar.

Judges FORSTER, GROS, PETRÉN and IGNACIO-PINTO append separate opinions to the Judgment of the Court.

Judges ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA and Sir Humphrey WALDOCK append a joint dissenting opinion, and Judge DE CASTRO and Judge ad hoc Sir Garfield BARWICK append dissenting opinions to the Judgment of the Court.

(Initialled) M.L.
(Initialled) S.A.
International Court of Justice

Gabčíkovo-Nagymaros Project
(Hungary/Slovakia)
Judgment

I.C.J. Reports 1997
INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE GABČÍKOVO-NAGYMAROS PROJECT
(HUNGARY/SLOVAKIA)

JUDGMENT OF 25 SEPTEMBER 1997

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PROJET
GABČÍKOVO-NAGYMAROS
(HONGRIE/SLOVAQUIE)

ARRÊT DU 25 SEPTEMBRE 1997

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Year 1997

25 September 1997

Case Concerning
The Gabčíkovo-Nagymaros Project
(Hungary/Slovakia)

Treaty of 16 September 1977 concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks - "Related Instruments". Suspension and abandonment by Hungary, in 1989, of works on the Project - Applicability of the Vienna Convention of 1969 on the Law of Treaties - Law of treaties and law of State responsibility - State of necessity as a ground for precluding the wrongfulness of an act - "Essential interest" of the State committing the act - Environment - "Grave and imminent peril" - Act having to constitute the "only means" of safeguarding the interest threatened - State having "contributed to the occurrence of the state of necessity". Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant - Arguments drawn from a proposed principle of approximate application - Respect for the limits of the Treaty - Right to an equitable and reasonable share of the resources of an international watercourse - Commission of a wrongful act and prior conduct of a preparatory character - Obligation to mitigate damages - Principle concerning only the calculation of damages - Countermeasures - Response to an internationally wrongful act - Proportionality - Assumption of unilateral control of a shared resource.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments - Legal effects - Matter falling within the law of treaties - Articles 60 to 62 of the Vienna Convention on the Law of Treaties - Customary law - Impossibility of performance - Permanent disappearance or destruction of an "object" indispensable for execution - Impossibility of performance resulting from the breach, by the party invoking it, of an obligation under the Treaty - Fundamental change of circumstances - Essential basis of the consent of the parties - Extent of obligations still to be performed - Stability of treaty relations - Material breach of the Treaty - Date on which the breach occurred and date of notification of termination - Victim of a breach having itself committed a prior breach of the Treaty - Emergence of new norms of environmental law - Sustainable development - Treaty provisions permit-

JUDGMENT

Present: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchent, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski; Registrar Valencia-Ospina.

In the case concerning the Gabčíkovo-Nagymaros Project, represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs, as Agent and Counsel;

H.E. Mr. Dénes Tomaj, Ambassador of the Republic of Hungary to the Netherlands, as Co-Agent;

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Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,

Mr. Alexandre Kiss, Director of Research, Centre national de la recherche scientifique (red.),

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,
Ms Katherine Gorove, consulting Attorney,
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Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,
Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest,
Member of the Hungarian Academy of Sciences,
Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,
Dr. Klaus Kern, consulting Engineer, Karlsruhe,
as Advocates;
Mr. Edward Helgeson,
Mr. Stuart Oldham,
Mr. Péter Molnár,
as Advisers;
Dr. György Kovács,
Mr. Timothy Walsh,
Mr. Zoltán Kovács,
as Technical Advisers;
Dr. Attila Nyikos,
as Assistant;
Mr. Axel Gossesies, LL.M.,
as Translator;
Ms Éva Kocsis,
Ms Katinka Tompa,
as Secretaries,
and
the Slovak Republic,
represented by
H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,
as Agent;
Dr. Václav Mikuška, Member of the International Law Commission,
as Co-Agent, Counsel and Advocate;
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Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former Member of the International Law Commission,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the
Institute of Political Studies, Paris, Member of the International Law Commission,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,
Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,
Mr. Samuel S. Wordsworth, avocat à la cour d’appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,
as Counsel and Advocates;
Mr. Igor Mucha, Professor of Hydrogeology and former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,
Mr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,
as Counsel and Experts;
Dr. Cecilia Kandráčová, Director of Department, Ministry of Foreign Affairs,
Mr. Luděk Krajhanzl, Attorney at Law, Vyrobal Krajhanzl Skácel and Partners, Prague,
Mr. Miroslav Liška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,
Dr. Peter Vršanský, Minister-Counsellor, Chargé d’affaires a.i., of the Embassy of the Slovak Republic, The Hague,
as Counsellors;
Miss Anouche Beaudouin, allocataire de recherche at the University of Paris X-Nanterre,
Ms Cheryl Dunn, Frere Cholmeley, Paris,
Ms Nikoleta Glindová, attaché, Ministry of Foreign Affairs,
Mr. Drahoslav Šťánek, attaché, Ministry of Foreign Affairs,
as Legal Assistants,
The Court,
composed as above,
after deliberation,
delivers the following Judgment:
1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called “Hungary”) to the Netherlands and the Chargé d’affaires ad interim of the Slovak Republic (hereinafter called “Slovakia”) to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.
2. The text of the Special Agreement reads as follows:
"The Republic of Hungary and the Slovak Republic,

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';

Bearing in mind that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project;

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice;

Recalling their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

Desiring further to define the issues to be submitted to the International Court of Justice.

Have agreed as follows:

Article 1

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable.

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.
(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals.

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge ad hoc to sit in the case: it chose Mr. Krzysztof Jan Skubiński.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 (a) and (b), of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 (c), of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit in situ; and, by a letter dated 3 February 1997, they jointly notified to the Court the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit in situ referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

For Hungary: H.E. Mr. Szénási, Professor Valki, Professor Kiss, Professor Vida, Professor Carbiener, Professor Crawford, Professor Nagy, Dr. Kern, Professor Wheeler, Ms Gorove, Professor Dupuy, Professor Sands.

For Slovakia: H.E. Dr. Tomka, Dr. Mikulka, Mr. Wordsworth, Professor McCaffrey, Professor Mucha, Professor Pellet, Mr. Refsgaard, Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.
13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Hungary,
in the Memorial, the Counter-Memorial and the Reply (mutatis mutandis identical texts):

“On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary

Requests the Court to adjudge and declare
First, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

Second, that the Czech and Slovak Federal Republic was not entitled to proceed to the ‘provisional solution’ (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);


Requests the Court to adjudge and declare further
that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

1. that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;

2. that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the ‘provisional solution’ referred to above;

3. that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the ‘provisional solution’;

4. that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;

5. that the Slovak Republic is under the following obligations:

(a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;

(b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and

(c) to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals.”

14. In the oral proceedings, the following submissions were presented by the Parties

On behalf of Hungary,
at the hearing of 11 April 1997:

The submissions read at the hearing were mutatis mutandis identical to those presented by Hungary during the written proceedings.

On behalf of Slovakia,
at the hearing of 15 April 1997:

“On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic

Requests the Court to adjudge and declare
1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromis between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks and related instruments, concluded between Hungary and
Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;

3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith with all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;

5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;

6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;

7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.”

* * *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People’s Republic and the Czechoslovak People’s Republic, of a treaty “concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks” (hereinafter called the “1977 Treaty”). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a “joint investment”. According to its Preamble, the barrage system was designed to attain

“the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties”.

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Zitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Čunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory. Čunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.
Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute “a single and indivisible operational system of works” (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, inter alia, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the “Joint Contractual Plan” which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that “the joint investment [would] be carried out in conformity with the joint contractual plan”.

According to Article 3, paragraph 1:

“Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . (. . . ‘government delegates’).”

Those delegates had, inter alia, “to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule”. When the works were brought into operation, they were moreover “To establish the operating
and operational procedures of the System of Locks and ensure compliance therewith.”

Article 4, paragraph 4, stipulated that:

“Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990.”

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčikovo and Nagymaros would be “jointly owned” by the contracting parties “in equal measure”. Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, “in accordance with the jointly-agreed operating and operational procedures”, while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

“The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge.”

Paragraph 3 of that Article was worded as follows:

“In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced.”

Article 15 specified that the contracting parties

“shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks”.

22 GABČIKOVO-NAGYMAROS PROJECT (JUDGMENT)
Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

“The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks.”

It was stipulated in Article 19 that:

“The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.”

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

“(d) In the Dunakiliti-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. 1.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States.”

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected “by the Contracting Parties on the basis of a separate treaty”. No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

“1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.

2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision.”

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second (m³/s). The power plant would include “Eight . . . turbines with 9.20 m diameter running wheels” and would “mainly operate in peak-load time and continuously during high water”. This type of operation would give an energy production of 2,650 gigawatt-hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

“The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 m³/s additional water is provided for the old bed [of the Danube] besides the water supply of the branch system.”

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 m³/s, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

“The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m³/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed.”

The Joint Contractual Plan also contained “Preliminary Operating and Maintenance Rules”, Article 23 of which specified that “The final operating rules [should] be approved within a year of the setting into operation of the system.” (Joint Contractual Plan, Summary Documentation, Vol. O-1-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a “hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m³/s” per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at
the same time as the Treaty itself. The Agreement moreover made some
adjustments to the allocation of the works between the parties as laid
down by the Treaty.

Work on the Project started in 1978. On Hungary’s initiative, the two
parties first agreed, by two Protocols signed on 10 October 1983 (one
amending Article 4, paragraph 4, of the 1977 Treaty and the other the
Agreement on mutual assistance), to slow the work down and to post-
pone putting into operation the power plants, and then, by a Protocol
signed on 6 February 1989 (which amended the Agreement on mutual
assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in
Hungary, the Hungarian Government decided on 13 May 1989 to sus-
pend the works at Nagymaros pending the completion of various studies
which the competent authorities were to finish before 31 July 1989. On
21 July 1989, the Hungarian Government extended the suspension of the
works at Nagymaros until 31 October 1989, and, in addition, suspended
the works at Dunakiléti until the same date. Lastly, on 27 October 1989,
Hungary decided to abandon the works at Nagymaros and to maintain
the status quo at Dunakiléti.

23. During this period, negotiations were being held between the
parties. Czechoslovakia also started investigating alternative solutions.
One of them, subsequently known as “Variant C”, entailed a unilateral
diversion of the Danube by Czechoslovakia on its territory some 10 kilo-
metres upstream of Dunakiléti (see sketch-map No. 3, p. 26 below). In its
final stage, Variant C included the construction at Čunovo of an overflow
dam and a levee linking that dam to the south bank of the bypass canal.
The corresponding reservoir was to have a smaller surface area and pro-
vide approximately 30 per cent less storage than the reservoir initially
contemplated. Provision was made for ancillary works, namely: an intake
structure to supply the Mosoni Danube; a weir to enable, inter alia,
floodwater to be directed along the old bed of the Danube; an auxiliary
shiplock; and two hydroelectric power plants (one capable of an annual
production of 4 GWh on the Mosoni Danube, and the other with a pro-
duction of 174 GWh on the old bed of the Danube). The supply of water
to the side-arms of the Danube on the Czechoslovak bank was to be
secured by means of two intake structures in the bypass canal at
Dobrohošt’ and Gabčíkovo. A solution was to be found for the Hungar-
ian bank. Moreover, the question of the deepening of the bed of the Dan-
ube at the confluence of the bypass canal and the old bed of the river
remained outstanding.

On 23 July 1991, the Slovak Government decided “to begin, in Sep-
ember 1991, construction to put the Gabčíkovo Project into operation
by the provisional solution”. That decision was endorsed by the Federal
Czechoslovak Government on 25 July. Work on Variant C began
in November 1991. Discussions continued between the two parties but
to no avail, and, on 19 May 1992, the Hungarian Government transmitted
to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an “Application of the Republic of Hungary v. The Czech and Slovak Federal Republic on the Diversion of the Danube River”; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the “Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project” was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its “initial Application [to be] now without object, and... lapsed”.

According to Article 4 of the Special Agreement, “The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management regime for the Danube.” However, this regime could not easily be settled. The filling of the Cunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities).

“In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures.”

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement “concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube”,

on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 m³/s. It provided for an annual average of 400 m³/s in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

* * *

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of “related instruments”; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as “the Treaty”. “The Treaty” is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs (a) and (c), of the Special Agreement.

The Special Agreement however does not define the concept of “related instruments”, nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabčíkovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as “an agreement at the same level as the other... related Treaties and inter-State agreements”.

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to “related instruments” in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

* * *
27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 (a), of the Special Agreement, the Court is requested to decide first

“whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary”.

28. The Court would recall that the Gabčíkovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a “single and indivisible operational system of works.”

The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčíkovo, paragraph 2 lists the following works:

“(a) the Dunakiliti-Hrušov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

(b) the Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

(c) the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

(d) series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto;

(e) improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

(f) deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section.”

For Nagymaros, paragraph 3 specifies the following works:

“(a) head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

(b) series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

(c) deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section.”

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

“(5) The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

(a) The Czechoslovak Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the left bank, in Czechoslovak territory;

(2) the head-water canal of the by-pass canal, in Czechoslovak territory;

(3) the Gabčíkovo series of locks, in Czechoslovak territory;

(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;

(b) the restoration of vegetation in Czechoslovak territory;

(b) The Hungarian Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;

(2) the Dunakiliti-Hrušov head-water installations on the right bank, in Hungarian territory;

(3) the Dunakiliti dam, in Hungarian territory;

(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;

(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;

(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;

(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;

(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;

(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;

(10) the Nagymaros series of locks, in Hungarian territory;

(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;

(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;

(13) restoration of vegetation in Hungarian territory.”
30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the “technical specifications” concerning the System of Locks would be included in the “joint contractual plan”. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčíkovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo) and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčíkovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered

"the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimising claims for compensation.”

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčíkovo sector, and the signed Protocol which records that meeting contains the following passage:

"The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčíkovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding.”

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

"The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System (GNBS).

Having studied the expected impacts of the construction in accordance with the original plan, the Committee [ad hoc] of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks.

In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will
ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary.”

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the “Preparatory works on the closure of the riverbed at . . . Dunakiliit”; the purpose of this measure was to invite “international scientific institutions [and] foreign scientific institutes and experts” to cooperate with “the Hungarian and Czechoslovak institutes and experts” with a view to an assessment of the ecological impact of the Project and the “development of a technical and operational water quality guarantee system and . . . its implementation”.

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecologica risks associated with the Gabčíkovo sector of the Project. He proposed that an agreement should be concluded before 30 July 1990.

The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbales dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabčíkovo-Nagymaros Project, “on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube’s bed in the region of Dunakiliit”. It added that the technical principles of the agreement could be initialed within two weeks and that the agreement itself ought to be signed before the end of March 1990. After the principles had been initialled, Hungary “[was to] start the actual closure of the Danube bed”. Czechoslovakia further stated its willingness to “ conclude[ ] . . . a separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the . . . System”. It also proposed “to return to deadlines indicated in the Protocol of October 1983”, the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliit. Then, by Notes Verbales dated 3 and 30 November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabčíkovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabčíkovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seising an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabčíkovo dam, as well as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately “with the preparatory operations for the Dunakiliit bed-decanting”, but specified that the river would not be dammed at Dunakiliit until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.

In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabčíkovo-Nagymaros Project was a “mistake” and that it would initiate negotiations as soon as possible with the Czechoslovak Government “on remedying and sharing the damages”. On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, the Hungarian Plenipotentiary transmitted a draft agreement along those lines to his Czechoslovak counterpart.

On the same day, the Czechoslovak President declared that the Gabčíkovo-Nagymaros Project constituted a “totalitarian, gigomaniac monument which is against nature”, while emphasizing that “the problem [was] that [the Gabčíkovo power plant] [had] already been built”. For his part, the Czechoslovak Minister of the Environment stated, in a speech given to Hungarian parliamentary committees on 11 September 1991, that “the G/N Project [was] an old, obsolete one”, but that, if there were many reasons to change, modify the treaty . . . it [was] not acceptable to cancel the treaty . . . and negotiate later on”.

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliit. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the tailrace canal of the bypass canal assigned to it under Article 5, paragraph 5 (b), of the 1977 Treaty.

* * *
39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a “state of ecological necessity”.

Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km²) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/ Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m³/s, in addition to the water provided to the system of sidearms. That volume could be increased to 200 m³/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built, the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this two-fold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a “state of ecological necessity” did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project’s impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while
suggested that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna Convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to validity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work; and this led it to conclude that the Vienna Convention was applicable to the “contractual legal régime” constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether “ecological necessity” or “ecological risk” could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of “ecological state of necessity” in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčíkovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, inter alia, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in violation of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

* * *

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971, p. 47, and Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 18; see also Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 95-96).

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčíkovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended: while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 228; and see Article 17 of the Draft Articles on State Responsi-
48. The Court cannot accept Hungary’s argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its willingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary’s conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as “single and indivisible”.

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

“Article 33. State of Necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity.” (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the “state of necessity” as being

“the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State” (ibid., para. 1).

It concluded that “the notion of state of necessity is . . . deeply rooted in general legal thinking” (ibid., p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

“in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . .” (ibid., p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a “grave and imminent peril”; the act being challenged must
have been the “only means” of safeguarding that interest; that act must not have “seriously impaire[d]” an essential interest” of the State towards which the obligation existed; and the State which is the author of that act must not have “contributed to the occurrence of the state of necessity”. Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an “essential interest” of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an “essential interest” to a matter only of the “existence” of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, “a grave danger to . . . the ecological preservation of all or some of [the] territory of a State” (ibid., p. 35, para. 3); and specified, with reference to State practice, that “It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an ‘essential interest’ of all States.” (Ibid., p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

“the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the “peril” invoked by Hungary, of its “grave and imminent” nature, as well as of the absence of any “means” to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 et seq.), Hungary on several occasions expressed, in 1989, its “uncertainties” as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a “peril” in the sense of a component element of a state of necessity. The word “peril” certainly evokes the idea of “risk”; that is precisely what distinguishes “peril” from material damage. But a state of necessity could not exist without a “peril” duly established at the relevant point in time; the mere apprehension of a possible “peril” could not suffice in that respect. It could moreover hardly be otherwise, when the “peril” constituting the state of necessity has at the same time to be “grave” and “imminent”. “Imminence” is synonymous with “immediacy” or “proximity” and goes far beyond the concept of “possibility”. As the International Law Commission emphasized in its commentary, the “extremely grave and imminent” peril must “have been a threat to the interest at the actual time” (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a “peril” appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, “grave” and “imminent” “peril” existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-
čikovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any danger associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court’s appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčikovo sector. It will recall that Hungary’s concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the ad hoc Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

"The measuring results of an at least five-year monitoring period following the completion of the Gabčikovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

"It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.

The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context
also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim summum jus summa injuria" (Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudice the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* * *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1(a), of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1(b), of the Special Agreement, the Court is asked in the second place to decide whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'
and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (daming of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)."

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunaihlti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was inter alia expressed as follows in Czechoslovakia’s Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

“Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčikovo dam as agreed in the Joint Construction Plan.”

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of these solutions implied an agreement between the parties, with the exception of one variant, subsequently known as “Variant C”, which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the Gabčikovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčikovo sector. Hungary, for its part, took the view that:

“In the case of a total lack of understanding the so-called C variation or ‘theoretical opportunity’ suggested by the Czech-Slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years”;

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

“Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.

The preparatory works for diverting the water of the Danube near the Dunaihlti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations.”

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

“the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčikovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic”.

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against “any unilateral step that would be in contradiction with the interests of our [two] nations and international law” and indicated that they considered it “very important [to] receive information as early as possible on the
details of the provisional solution”. For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

“Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčíkovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution.”

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Čunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabčíkovo-Nagymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness “to stop work on the provisional solution and continue the construction upon mutual agreement” if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabčíkovo part, were to “confirm that negative ecological effects exceed its benefits”. However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention


... the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention”;

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-
of independent experts, and it should be emphasized that, according to the Special Agreement, “Variant C” must be taken to include the consequences “on water and navigation course” of the dam closing off the bed of the Danube.

In the section headed “Variant C Structures and Status of Ongoing Work”, one finds, in the report of the Working Group, the following passage:

“In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the

(1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.

Variant C consists of a complex of structures, located in Czechoslovakia . . . The construction of these are planned for two phases. The structures include . . . :

(2) By-pass weir controlling the flow into the river Danube.
(3) Dam closing the Danubian river bed.
(4) Floodplain weir (weir in the inundation).
(5) Intake structure for the Mosoni Danube.
(6) Intake structure in the power canal.
(7) Earth barrages/dykes connecting structures.
(8) Ship lock for smaller ships (15 m x 80 m).
(9) Spillway weir.
(10) Hydropower station.

The construction of the structures 1-7 are included in Phase 1, with remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* * *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary’s decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a “principle of approximate application” to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it “of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith”.

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary’s unlawful actions. It claimed that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that “Mitigation of damages is also an aspect of the performance of obligations in good faith.” For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčíkovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia’s conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia’s obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia’s arguments rested on an erroneous presentation of the facts and the law. Hungary denied, inter alia, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that “no such rule” of “approximate application” of a treaty exists in international law: as to the argument derived from “mitigation of damage[s]”, it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* * *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary’s decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have
led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia “was entitled to proceed, in November 1991” to Variant C, and “to put [it] into operation from October 1992”.

75. With a view to justifying those actions, Slovakia invoked what it described as “the principle of approximate application”, expressed by Judge Sir Hersch Lauterpacht in the following terms:

“It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it.” (Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of “approximate application” because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation: that but cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally damned, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which “does not qualify as a wrongful act” (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, “Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996”, Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), p. 141, and Yearbook of the International Law Commission, 1993, Vol. II, Part 2, p. 57, para. 14).

*
80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that “It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained.”

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

*  

82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that “Variant C could be presented as a justified countermeasure to Hungary’s illegal acts”.

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary’s prior failure to comply with its obligations under international law.


In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary’s suspension and abandon-
tions under international law, and that the measure must therefore be reversible.

* * *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (b), of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* * *

89. By the terms of Article 2, paragraph 1 (c), of the Special Agreement, the Court is asked, thirdly, to determine “what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary”.

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to its Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as “a serious breach of international law” and stated that, unless work was suspended while further enquiries took place, “the Hungarian Government would have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty”. In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations “on every level”, it could not agree “to stop all work on the provisional solution”.

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-

ally acceptable solution. Commission involvement would depend on each Government not taking “any steps . . . which would prejudice possible actions to be undertaken on the basis of the report’s findings”. The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee “without any preliminary conditions”; criticizing Hungary’s approach, he refused to suspend work on the provisional solution, but added, “in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States”.

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions “inappropriate”.

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia’s refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* * *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impos-

sibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had “remained inflexible” and continued with its implementation of Variant C, “a temporary state of necessity eventually became permanent, justify-

ing termination of the 1977 Treaty”.

Slovakia, for its part, denied that a state of necessity existed on the
basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary’s second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

“Article 61

1. Supervening Impossibility of Performance
2. Impossibility of performance may not be invoked by a party as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Hungary declared that it could not be “obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage”. It concluded that

“By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform.”

In Hungary’s view, the “object indispensable for the execution of the treaty”, whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, “a legal situation which was the raison d’etre of the rights and obligations”.

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical “disappearance or destruction” of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility “if the impossibility is the result of a breach by that party . . . of an obligation under the treaty”.

95. As to “fundamental change of circumstances”, Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

“Article 62

Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.”

Hungary identified a number of “substantive elements” present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of “socialist integration”, for which the Treaty had originally been a “vehicle”, but which subsequently disappeared; the “single and indivisible operational system”, which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the “framework treaty” into an “immutable norm”; and, finally, the transformation of a treaty consistent with environmental protection into “a prescription for environmental disaster”.

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia’s material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:


Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as “the best possible approximate application” of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an erga omnes obligation of prevention of damage pursuant to the “precautionary principle”. On this basis, Hungary argued, its termination was “forced by the other party’s refusal to suspend work on Variant C”.

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of jus cogens that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather “to the language of self-help or reprisals”.

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98. The question, as formulated in Article 2, paragraph 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary’s notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty’s conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment.
and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

* *

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty: the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

* *

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

* *

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the Fisheries Jurisdiction case, it stated that

"Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (I.C.J. Reports 1973, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of
environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (in which case the Vienna Convention did not apply):

"Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is 'or the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (I.C.J. Reports 1980, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days
after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary’s termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary’s own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

“It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.” (Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

111. Finally, the Court will address Hungary’s claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn” (I.C.J. Reports 1996, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty’s conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule pacta sunt servanda if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.
115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 (c), of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

* * *

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the “disappearance of one of the parties”. On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, “There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party” and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

“the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project”,

Hungary sought to distinguish between, on the one hand, rights and obligations such as “continuing property rights” under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized “as the successor to the Government of the CSFR” with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.

Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which “a rule of automatic succession to all treaties is provided for”, based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the “concept of automatic succession” contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create “obligations and rights . . . relating to the régime of a boundary” within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a “localized” treaty, or that it created rights “considered as attaching to [the] territory” within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary’s conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary’s notification in May 1992, remains in force between itself, as successor State, and Hungary.

Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the “general rule of continuity which applies in the case of dissolution”; it argued, secondly, that the Treaty is one “attaching to [the] territory” within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia’s second argument rests on “the principle of ipso jure continuity of treaties of a territorial or localized character”. This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:
2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory."

According to Slovakia, “[t]his article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law”. The 1977 Treaty is said to fall within its scope because of its “specific characteristics . . . which place it in the category of treaties of a localized or territorial character”. Slovakia also described the Treaty as one “which contains boundary provisions and lays down a specific territorial régime” which operates in the interest of all Danube riparian States, and as “a dispositive treaty, creating rights in rem, independently of the legal personality of its original signatories”. Here, Slovakia relied on the recognition by the International Law Commission of the existence of a “special rule” whereby treaties “intended to establish an objective régime” must be considered as binding on a successor State (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, doc. A/CONF.80/16/Add.2, p. 34). Thus, in Slovakia’s view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified “treaties of a territorial character” as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (Official Records of the United Nations Conference on the Succession of States in respect of Treaties, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law, it notes that neither of the Parties disputed this. Moreover, the Commission indicated that “treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties” (ibid., p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However, the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (ibid., pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations “attaching to” the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hun-
and that: “The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement.”

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of restitutio in integrum, and called for the re-establishment of “joint control by the two States over the installations maintained as they are now”, and the “re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river”. It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer; the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future (pretium doloris), and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the “cessation of the continuous unlawful acts” and a “guarantee that the same actions will not be repeated”, and asked the Court to order “the permanent suspension of the operation of Variant C”.

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its “flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations”. It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

“whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.”

Provided the bypass canal and the Gabčíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunajská and Čunovo, bearing Nagymaros in mind.”

It indicated that the Gabčíkovo power plant would not operate in peak mode “if the evidence of environmental damage [was] clear and accepted by both Parties”. Slovakia noted that the Parties appeared to agree that an accounting should be undertaken “so that, guided by the Court’s findings on responsibility, the Parties can try to reach a global settlement”. It
added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, "whether they relate to its unlawful suspensions and abandonments of works or to its formal repudiation of the Treaty as from May 1992", and that compensation should take the form of a restitutio in integrum. It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, restitutio in integrum ought to take the form of a return by Hungary, at a future time, to its obligations under the Treaty" and that "For compensation to be 'full'... to 'wipe out all the consequences of the illegal act'... a payment of compensation must... be added to the restitutio..." Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

1. Losses caused to Slovakia in the Gabčíkovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

2. Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

3. Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Cúnovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

*  *

130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the past conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to determine what the future conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

*  *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a lex specialis.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle ex injuria jus non oritur is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Cúnovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of
energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been taken over by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects of the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the North Sea Continental Shelf cases:

"[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (I.C.J. Reports 1969, p. 47, para. 85).

142. What is required in the present case by the rule pacta sunt servanda, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and
must be performed by them in good faith.” This latter element, in the Court’s view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its liturgical application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agency of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Duníkúlitt, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a de facto status into a treaty-based régime.

It appears from various parts of the record that, given the current state of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the System of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

“Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.”

(General Assembly doc. A/51/869 of 11 April 1997.)

* * *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

“reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (P.C.I.J., Series A, No. 17, p. 47).

150. Reparation must, “as far as possible”, wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out “as far as possible” if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.
151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary’s decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

* * *

155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,

Finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjajoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

AGAINST: Judge Herczegh;

B. By nine votes to six,

Finds that Czechoslovakia was entitled to proceed, in November 1991, to the “provisional solution” as described in the terms of the Special Agreement;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Bedjajoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,

Finds that Czechoslovakia was not entitled to put into operation, from October 1992, this “provisional solution”;

IN FAVOUR: President Schwebel; Vice-President Weeramantry; Judges Bedjajoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: Judges Oda, Koroma, Vereshchetin, Parra-Aranguren; Judge ad hoc Skubiszewski;

D. By eleven votes to four,

Finds that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: Vice-President Weeramantry; Judges Oda, Bedjajoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

AGAINST: President Schwebel; Judges Herczegh, Fleischhauer, Rezek;
(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

Finds that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

Favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaune, Ranjeva, Shi, Koroma, Vereshchetic, Parra-Aranguren, Kooijmans; Judge ad hoc Skubiszewski;

Against: Judges Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

Finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

Favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaune, Ranjeva, Shi, Koroma, Vereshchetic, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

Against: Judges Herczegh, Fleischhauer;

C. By thirteen votes to two,

Finds that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

Favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaune, Ranjeva, Shi, Koroma, Vereshchetic, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

Against: Judges Herczegh, Fleischhauer;

D. By twelve votes to three,

Finds that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

Favour: President Schwebel; Vice-President Weeramantry; Judges Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

Against: Judges Oda, Koroma, Vereshchetic;

E. By thirteen votes to two,

Finds that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

Favour: President Schwebel; Vice-President Weeramantry; Judges Oda, Bedjaoui, Guillaune, Ranjeva, Shi, Koroma, Vereshchetic, Parra-Aranguren, Kooijmans, Rezek; Judge ad hoc Skubiszewski;

Against: Judges Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTY and Judges BEDJAOU and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESCHETIN and PARRA-ARANGUREN and Judge ad hoc SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.
(Initialled) E.V.O.
Inter-American Court of Human Rights

Mayagna (Sumo) Was Tigni Community v. Nicaragua
Judgment of 31 August 2001
Inter-American Court of Human Rights

Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua

Judgment of August 31, 2001
(Merits, Reparations and Costs)

In the Mayagna (Sumo) Awas Tingni Community case (hereinafter “the Community”, “the Mayagna Community”, “the Awas Tingni Community”, or “Awas Tingni”), the Inter-American Court of Human Rights (hereinafter “the Court”, “the Inter-American Court” or “the Tribunal”), composed of the following judges:

Antônio A. Cançado Trindade, President;
Máximo Pacheco-Gómez, Vice President;
Hernán Salgado-Pesantes, Judge;
Oliver Jackman, Judge;
Alirio Abreu-Burelli, Judge;
Sergio García-Ramírez, Judge;
Carlos Vicente de Roux -Rengifo, Judge, and
Alejandro Montiel Argüello, ad hoc Judge;

also present, Manuel E. Ventura-Robles, Secretary, and
Pablo Saavedra-Alessandri, Deputy Secretary,

pursuant to articles 29 and 55 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers the following Judgment on the instant case:

I
INTRODUCTION OF THE CASE

1. On June 4, 1998, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Court a lawsuit against the State of Nicaragua (hereinafter “the State” or “Nicaragua”). The case in question had originated in petition No. 11,577, received at the Commission’s Secretariat on October 2, 1995.

2. In its lawsuit, the Commission cited articles 50 and 51 of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and article 32 and subsequent articles of the Rules of Procedure. The Commission presented this case for the Court to decide whether the State violated articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention, in view of the fact that Nicaragua has not demarcated the communal lands of the Awas Tingni Community, nor has the State adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources, and also because it granted a concession on community lands without the assent of the Community, and the State did not ensure an effective remedy in response to the Community’s protests regarding its property rights.

3. Likewise, the Commission requested that the Court declare that the State must establish a legal procedure to allow rapid demarcation and official recognition of the property rights of the Mayagna Community, as well as that it must abstain from granting or considering the granting of any concessions to exploit natural resources on the lands used and occupied by Awas Tingni until the issue of land tenure affecting the community has been resolved.

4. Finally, the Commission requested that the Court sentence the State to payment of equitable compensation for material and moral damages suffered by the Community, and to payment of costs and expenses incurred in prosecuting the case under domestic jurisdiction and before the inter-American System.

II
JURISDICTION

5. Nicaragua has been a State Party to the American Convention since September 25, 1979, and recognized the contentious jurisdiction of the Court on February 12, 1991. Therefore, under article 62(3) of the Convention, the Court has jurisdiction to consider the merits of the instant case.

III
PROCEEDING BEFORE THE COMMISSION

6. On October 2, 1995, the Inter-American Commission received in its Secretariat a petition lodged by Jaime Castillo Felipe, Syndic of the Community, in his own name and on behalf of the Community. Precautionary measures were also requested in that petition, since the State allegedly was about to grant Sol del Caribe, S.A. (SOLCARSA) (hereinafter “SOLCARSA”) a concession to commence logging on communal lands. On the 6th of that same month and year, the Commission acknowledged receipt of said brief.

7. On December 3, 1995, and January 4, 1996, the Commission received briefs reiterating the request for the precautionary measures mentioned in the previous paragraph.

8. On January 19, 1996, the petitioners requested a hearing before the Commission, but the Commission answered that it would not be possible to grant that request.

* Pursuant to the March 13, 2001 Order of the Court on Transitory Provisions pertaining to the Rules of Procedure of the Court, this Judgment on the merits of the case is rendered under the terms of the Rules of Procedure approved by the September 16, 1996 Order of the Court.
9. On February 5, 1996, the Commission began processing the case and sent the
relevant parts of the petition to the State, requesting that it provide the
required information within 90 days.
10. On March 13, 1996, James Araya, as legal representative of the Community,
submitted two newspaper articles to SOLCARSA, referring a letter sent by the Ministry of the
Environment and Natural Resources (hereafter "Marena") to SOLCARSA, as required by article 8(1) of the
Nicaraguan Constitution. They also reported that the State had not suspended the concession.
11. In a March 28, 1996, brief, the petitioners sent a draft memorandum of understanding to the
Commission, for a friendly settlement of the case, and included a copy of a concession contract (draft
being processed at the Ministry of the Environment and Natural Resources).
12. On April 17, 1996, as legal representative of the Community, James Araya
submitted a document in which the Indigenous communities of the North Atlantic
Coastal Autonomous Region (hereafter the "RAAN") and the Indigenous Movement of the
South Atlantic Coastal Autonomous Region (hereafter the "RASCA") expressed their support for the
petition. The State and the Commission accepted this proposal.
13. On May 3, 1996, there was an informal meeting among the petitioners, the
State, and the Commission. At that meeting, Nicaragua rejected the draft
memorandum of understanding, submitted by the claimants (supra, para. 11).
14. On June 20, 1996, there was a second meeting between the petitioners, the
State, and the Commission. At that meeting, Nicaragua rejected the draft
memorandum of understanding submitted by the claimants (supra, para. 11). In turn,
the petitioners suggested that a delegation of the Commission visit Nicaragua for a
third meeting.
15. A third meeting took place on October 3, 1996, among the petitioners, the
State and the Commission. At that meeting, Nicaragua requested the Commission to
submit its report within 30 days and to stop any further concessions in the area.
16. On December 4, 1996, the petitioners submitted the draft
memorandum of understanding to the Commission. The Commission granted the State
a 30-day extension to respond to the petition.
17. On this occasion, Nicaragua rejected the Commission's decision not to grant
any further concessions in the area and that it begin the process of removing
the concession.
18. On December 4, 1996, the petitioners submitted the draft
memorandum of understanding to the Commission. The Commission granted the State
a 30-day extension to respond to the petition.
19. On October 31, 1996, the petitioners submitted the draft
memorandum of understanding to the Commission. The Commission granted the State
a 30-day extension to respond to the petition.
20. On November 5, 1997, the State requested that the Commission close the
petition. The Commission granted the State's request on that basis.
21. On November 5, 1997, the State requested that the Commission close the
petition. The Commission granted the State's request on that basis.
25. On March 3, 1998, the Inter-American Commission approved Report No. 27/98, forwarded to the State on the 6th of that same month and year, and granted Nicaragua 2 months to report on measures it had taken to comply with the recommendations. In that Report, the Commission concluded:

141. Based on the acts and omissions examined, [...] that the State of Nicaragua has not complied with its obligations under the American Convention on Human Rights. The State of Nicaragua has not demarcated the communal lands of the Awas Tingni Community or other indigenous communities, nor has it taken effective measures to ensure the property rights of the Community on its lands. This omission by the State constitutes a violation of Articles 1, 2 and 21 of the Convention, which together establish the right to the said effective measures. Articles 1 and 2 oblige States to take the necessary measures to give effect to the rights contained in the Convention.

142. The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.

143. [...] that the State of Nicaragua did not guarantee an effective remedy to respond to the claims of the Awas Tingni Community regarding their rights to lands and natural resources, pursuant to Article 25 of the Convention.

The Commission also recommended that Nicaragua:

a. Establish a procedure in its legal system, acceptable to the indigenous communities involved, that [would] result in the rapid official recognition and demarcation of the Awas Tingni territory and the territories of other communities of the Atlantic coast;

b. Suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous communities, [is] resolved, or a specific agreement reached between the state and the Awas Tingni Community;

c. Initiate discussions with the Awas Tingni Community within one month in order to determine the circumstances under which an agreement [could] be reached between the State and the Awas Tingni Community.

26. On May 7, 1998, the Inter-American Commission received the State’s reply. The Commission stated that, even though said reply was presented extemporaneously, it would analyze its content in order to add it to the case record. As regards the recommendations of the Inter-American Commission, Nicaragua stated that:

a) In order to comply with the recommendations of the Commission with regard to establishing a legal procedure acceptable to the indigenous communities involved, which [would] result in the demarcation and official recognition of the lands of the Awas Tingni and other communities of the Atlantic coast, the Government of Nicaragua has a National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast. To the same end, a draft Law on Indigenous Communal Property [has been] prepared, with three elements:
   1. To make the necessary provisions for accrediting the indigenous communities and their authorities.
   2. To proceed to demarcate the properties and provide title documents.
   3. Settlement of the dispute.
   This bill endeavors to find a legal solution to the property of indigenous people or ethnic minorities. The project will be consulted with civil society and, once there is a consensus, it will be submitted to the National Assembly for discussion and subsequent approval. The estimated time for the whole procedure is about three months from today’s date.

b) Regarding the recommendation to suspend all activity relating to the logging concession granted to SOLCARSA and to comply with the judgment of the Supreme Court of Justice, the Government of Nicaragua cancelled this concession on February 16, 1998. On that day, it notified Michael Kang, General Manager of SOLCARSA[,] that, as of that date, the concession was null and void. He was also advised that he should order the suspension of all activities and warned that, to the contrary, he would be violating Article 167 of the Constitution and be liable to having either a criminal or civil suit brought against him.

c) Regarding the recommendation to initiate discussions with the Awas Tingni Community, the Government of Nicaragua is firmly committed to finding a global solution for all the indigenous communities of the [Atlantic] Coast, within the framework of the [Communal] Property Draft Bill, and to this end, there will be extensive consultations with these communities.

27. As regards the conclusions of Report No. 27/98, the Nicaraguan State expressed its acknowledgment of the rights of the indigenous communities, enshrined in its Constitution and other legislative norms. It further stated that it has faithfully complied with the previous legal provisions and, consequently, it has acted in accordance with the national legal system and the provisions of the rules and procedures of the [American] Convention [on] Human Rights. Likewise, the Community of Awas Tingni exercised their rights as set forth in the law and had access to the legal remedies that the law provides.

Finally, Nicaragua requested that the Inter-American Commission close the instant case.

28. On May 28, 1998, the Commission decided to bring the case before the Court.

IV PROCEEDING BEFORE THE COURT

29. The Commission filed the application before the Court on June 4, 1998.

30. The Commission appointed Claudio Grossman and Hélio Bicudo as its delegates, David Padilla, Hernando Valencia and Bertha Santosoy, as its legal advisors, and James Anaya, Todd Crider, and María Luisa Acosta Castellón as the assistants.

31. On June 19, 1998, after a preliminary examination of the application by the President of the Court (hereinafter "the President"), the Secretariat of the Court (hereinafter "the Secretariat") notified the State of the application, as well as of the periods within which it should respond to it, raise preliminary objections, and appoint its representatives. Furthermore, it invited the State to appoint an ad hoc Judge. That same day, the Secretariat requested the Commission to send some pages of the petition annexes which were illegible.

32. On July 2, 1998, Nicaragua appointed Alejandro Montiel Argüello as ad hoc Judge, and Edmundo Castillo Salazar as its agent.

33. That same day, the Commission submitted to the Court copies of the application annex pages requested by the Secretariat (supra para. 31), as well as the
On August 18, 1998, the State attested the appointment of Rosenaldo J. Castro S. and Bertha Marino Argüello as its legal advisors.

On August 19, 1998, Nicaragua filed the preliminary objection stating that domestic remedies had not been exhausted, pursuant to articles 46 and 47 of the Convention, and requested that the Court declare the application inadmissible.

On September 25, 1998, the Commission submitted its observations to the preliminary objection raised by the State.

On October 19, 1998, the State submitted its reply to the application.

On January 27, 1999, the Organization of Indigenous Syndics of the Nicaraguan Caribbean (OSICAN) submitted a brief as amicus curiae. On February 4, 1999, the Secretariat received a note from Eduardo Conrado Poveda, in which he acceded to the abovementioned amicus curiae brief.

On March 15, 1999, the Secretariat requested that the State send various documents offered as annexes in the briefs of reply to the application and on preliminary objections, which had not been submitted at that time. Documents requested from the reply to the application were: pages 129 and 130 of annex 10; maps and physical descriptions offered in annex 15, and documents pertaining to titling of neighboring communities to Awas Tingni, offered in that same annex. The following documents were requested for annex 10 of the brief on preliminary objections: estimated projections of the geographical location of the area claimed by the Awas Tingni Community, claims by other communities, “overlap” of claims, ejido lands, national lands, and other illustrations relevant to the case; a certification by the Instituto Nicaragüense de Reforma Agraria (hereinafter “INRA”) in connection with the request for titling by the Awas Tingni Community; the Nicaraguan Constitution; certification of articles of the Nicaraguan Legal Codes, relevant Laws and Decrees, and certification of the actions taken by Central Government institutions, decentralized bodies or autonomous entities, and other institutions of the National Assembly and the Supreme Court of Justice of Nicaragua.

On May 26, 1999, the State submitted a brief to which it attached the following documents: the Nicaraguan Constitution, with its amendments, the Amparo Law, Law No. 290 and pages 8984 to 8989 of the Official Newspaper La Gaceta No. 205, of October 30, 1998. In that same brief, Nicaragua stated that it would not submit the maps and physical descriptions offered as annex 15 in its brief replying to the application, because “the maps submitted with the brief on preliminary objections show the geographical location of the area claimed by the Community, claims by other communities, physical descriptions, and so forth”. The State also expressed that it would not submit the INRA certification regarding titling of the Awas Tingni Community, offered as annex 10 of the brief on preliminary objections, “because that same brief [...] included a certification issued by that institution on this same affair, on August 5, 1998”. Regarding pages 129 and 130 of annex 10 of the brief replying to the application, the State indicated that said annex actually ended on page 128. As regards the documents pertaining to titling of other indigenous communities, the State pointed out that, if it deemed this appropriate, it would submit them later on during the proceedings.

On May 28, 1999, the Canadian organization Assembly of First Nations (AFN) submitted a brief in English, acting as amicus curiae. The Spanish version of that document was presented in February, 2000.

On May 31, 1999, the organization International Human Rights Law Group submitted a brief in English, acting as amicus curiae.

A public hearing was held on preliminary objections, at the seat of the Court, on May 31, 1999.

On February 1, 2000, the Court rendered its Judgment on preliminary objections, in which it dismissed the preliminary objection raised by Nicaragua.

On February 2, 2000, the Secretariat requested that the Commission send the definitive list of witnesses and expert witnesses offered by the Commission to render their testimony at the public hearing on the merits of the case. The Commission submitted said information on the 18th of that same month and year.

On March 20, 2000, the President issued an Order convening the Inter-American Commission and the State to a public hearing on the merits, to be held at the seat of the Court on June 13, 2000. That public hearing did not take place due to budgetary cutbacks which made the Court postpone its XLVIII Regular Session, at which that hearing was to take place.

On April 7, 2000, the State submitted a brief stating “the names of the persons who w[ould] explain the content and scope of the documentary evidence offered at the appropriate time”, for the following persons to be heard as witnesses and expert witnesses at the public hearing on the merits of the present case: Marco Antonio Centeno Cafferena, Director of the Office of Rural Titling; Uriel Vanegas, Director of the Secretariat of Territorial Demarcation of the Regional Council of the RAAN; Gonzalo Medina, advisor and an expert in Geodesics and Cartography at the Nicaraguan Institute of Territorial Studies, and María Nella Rocha, Special Public Attorney for the Environment at the Office of the Attorney General of the Republic.

The arguments submitted by the State in said brief indicate that testimony of the witnesses and expert witnesses offered would contribute to establishing:

a) damages caused to property rights of indigenous communities that are neighbors of the Mayagna Awas Tingni Community, if title were given to the disproportionate area claimed by that Community

b) damages to land claims of the rest of the indigenous communities of the Atlantic Coast of Nicaragua, if the disproportionate area claimed by the Awas Tingni Indigenous Community were allocated to it;

c) the interest of the State in carrying out an equitable and objective titling process on the lands of the Indigenous Communities, which will safeguard the rights of each one of the Communities; arguments presented in the brief on Preliminary Objections and in the Reply to the Application, and supported by documents submitted by means of the Annexes previously referred to.

On April 13, 2000, the Commission sent a brief in which it requested that the Court order the State to adopt "the necessary measures to ensure that its officials do not act in such a way that they tend to apply pressure on the Community to give up its claim, or that tends to interfere in the relationship between the Community and its attorneys, [, and...] that it cease to attempt to negotiate with members of the
Community without a prior agreement or understanding with the Commission and the Court in that regard”. The Commission attached an April 12, 2000 brief by James Anaya, legal representative of the Community, to Jorge E. Taiana, Executive Secretary of the Commission, which included as an annex the report prepared by María Luisa Acosta Castellón on the meeting between officials of the State and the Awas Tingni Community, held on March 30 and 31, 2000, in the offices of the Nicaraguan Ministry of Foreign Affairs.

49. On April 14, 2000, the Secretariat gave the State 30 days within which to submit its comments to the aforementioned brief. On May 10 of that same year, Nicaragua stated that it had not applied any pressure at all on the Community nor had it interfered in the Community’s relations with its legal representatives. The State also indicated its willingness to seek a friendly settlement through direct and exclusive conversations with the Commission. It submitted an attached document dated February 3, 2000, with the title “record of appointment of the representatives of the inhabitants who constitute the Mayagna ethnic group of the Community of Awas Tingni, Municipality of Wa[es]pam, Rio Coco, RAAN”.

50. On May 10, 2000, the Commission sent a brief in which it stated that Nicaragua, in its reply to the application, had not offered witnesses nor expert witnesses. It also added that the State had not argued that force majeure or other reasons justified admitting evidence not listed in its reply, and for this reason the Commission requested that the Court declare the calling of witnesses and expert witnesses offered by Nicaragua inadmissible (supra para. 47). 51. On June 1, 2000, the Secretariat requested that the State submit, no later than June 15 of that year, the grounds for or comments on its offering of witnesses and expert witnesses, for the President to consider their admissibility. In its August 18, 2000 Order, the Court reiterated its request for the State to submit the grounds for the extemporaneous proposal of witnesses and expert witnesses (supra para. 47); the Court also requested that the State specify which persons were offered as witnesses and which as expert witnesses.

52. On May 31, 2000, the Hutchins, Soroka & Dionne law firm submitted an amicus curiae brief in English, on behalf of the Mohawks Indigenous Community of Akwesasne.

53. On September 5, 2000, the State submitted a brief in which it stated that the persons listed in its April 7, 2000 brief (supra para. 47) had been offered as expert witnesses. The following day the Secretariat, under instructions by the President, asked the Commission to send its observations to that brief, as well as its definitive list of witnesses and expert witnesses by September 12, 2000.

54. On September 12, 2000, the Commission sent a note in which it upheld its request for the appointment of expert witnesses offered by the State to be declared inadmissible, since the State did not give reasons to substantiate the extemporaneous proposal. In that same note, the Commission gave the definitive list of its witnesses and expert witnesses, including as an expert witness Theodore Macdonald Jr., who in the application had been offered as a witness.

55. In his September 14, 2000 Order, the President decided that the offer of evidence made by the State on April 7, 2000 (supra para. 47) was time-barred; however, as evidence to facilitate adjudication of the case, in accordance with article 44(1) of the Rules of Procedure, the President summoned Marco Antonio Centeno Caffarena to come before the Court as witness. The President also rejected the request by the Commission for Theodore Macdonald Jr. to appear as an expert witness, because it was time-barred, and admitted him as a witness, as originally offered. The President also summoned witnesses Jaime Castillo Felipe, Charly Webster McLean Cornelio, Wilfredo McLean Salvador, Brooklyn Rivera Bryan, Humberto Thompson Sang, Guillermo Castellaje and Galo Emildio Enrique Gurdian Gurdian, and expert witnesses Lottie Marie Cunningham de Aguirre, Charles Rice Hale, Roque de Jesús Roldán Ortega and Rodolfo Stavenhagen Gruenbaum, all of them offered by the Commission in its application, to render testimony at the public hearing on the merits of the case, scheduled to be held at the seat of the Court on November 16, 2000.

56. On October 5, 2000, the Commission submitted a brief in which it requested the good offices of the Court for the public hearing on the merits to be held at the seat of the Supreme Court of Justice of Costa Rica, given the large number of people who had shown an interest in attending that hearing.

57. On October 20, 2000, the President issued an Order in which he informed the Commission and the State that the public hearing convened by the September 14, 2000 Order would be held at the seat of the Supreme Electoral Board of Costa Rica, starting at 16:00 hours on November 16, 2000, to hear the testimony and reports, respectively, of the witnesses and expert witnesses previously summoned.

58. On October 26, 2000, the State sent a brief requesting the Court to reject the request by the Commission to hold the public hearing on the merits at the seat of the Supreme Court of Justice of Costa Rica, because the reasons given were “purely speculative” and were not “sufficient juridical reason to justify the transfer of said hearings”.

59. On October 27, 2000, the Commission sent a brief with a list of 19 members of the Awas Tingni Community who would attend the public hearing as observers.

60. On that same day, the President issued an Order in which he decided that, given the request by the State for the public hearing on the merits to be held at the seat of the Court and that the number of members of the Mayagna Community who would attend the hearing, according to the Commission, was much smaller than had originally been envisioned, the reason given for holding the public hearing outside the seat of the Court did not exist, and he therefore decided that the hearing would be held at the seat of the Court, on the same day and at the same time specified in his October 20, 2000 Order (supra para. 57).

61. In November, 2000, Robert A. Williams Jr., on behalf of the organization National Congress of American Indians (NCAI), submitted a brief, in English, acting as amicus curiae.

62. On November 16, 17, and 18, 2000, at the public hearing on the merits of the case, the Court heard the testimony of the witnesses and expert witnesses offered by the Commission and that of the witness summoned by the Court in accordance with article 44(1) of the Rules of Procedure. The Court also heard the final oral pleadings of the parties.

There appeared before the Court:

For the Inter-American Commission on Human Rights:
Hélio Bicudo, delegate;  
Claudio Grossman, delegate;  
Bertha Santoscoy, attorney, and  
James Anaya, assistant.

For the State of Nicaragua:

Edmundo Castillo Salazar, agent;  
Rosenaldo Castro, advisor;  
Betsy Baltodano, advisor, and  
Ligia Margarita Guevara, advisor.

Witnesses offered by the Inter-American Commission on Human Rights:

Jaime Castillo Felipe (Interpreter: Modesto José Frank Wilson);  
Charly Webster Mclean Cornelio;  
Theodore Macdonald Jr.;  
Guillermo Castilleja;  
Gállo Claudio Enrique Gurdían Gurdían;  
Brooklyn Rivera Bryan;  
Humberto Thompson Sang, and  
Wilfredo Mclean Salvador.

Expert witnesses offered by the Inter-American Commission on Human Rights:

Rodolfo Stavenhagen Gruenbaum;  
Charles Rice Hale;  
Roque de Jesús Roldán Ortega, and  
Lottie Marie Cunningham de Aguirre.

Witness summoned by the Inter-American Court of Human Rights (art. 44(1) of the Rules of Procedure):

Marco Antonio Centeno Caffarena.

63. During his appearance at the public hearing on the merits of the case on November 17, 2000, Marco Antonio Centeno Caffarena offered several documents to substantiate his testimony, and on November 21, 2000 he submitted eight documents (infra paras. 79 and 95).

64. On November 24, 2000, the Court, in accordance with article 44 of its Rules of Procedure, decided that it was useful to add to the body of evidence in this case the following documents offered by Marco Antonio Centeno Caffarena: a copy, certified by a notary public, of the February 22, 1983 certification of the entry in the Public Registry of Real Estate of the Department of Zelaya, on February 10, 1917, of estate No. 2111, and the ethnographic expert opinion by Ramiro García Vásquez on the document prepared by Theodore Macdonald, "Awas Tingni an Ethnographic Study of the Community and its Territory" (infra paras. 79 and 95). The Court also asked that the State, no later than December 15, 2000, submit a copy of the complete study, "Diagnostic study of land tenure in the indigenous communities of the Atlantic Coast", prepared by the Central American and Caribbean Research Council.

65. On December 20, 2000 the State complied with the request made by the Court in the Order mentioned in the previous paragraph, by providing a copy of the General framework, Executive summary and Final Report of the document "Diagnostic study of land tenure in the indigenous communities of the Atlantic Coast", prepared by the Central American and Caribbean Research Council (infra paras. 80 and 96).

66. On January 29, 2001, the Commission submitted a note together with three documents: comments by Theodore Macdonald on January 20, 2001, and comments by Charles Rice Hale on January 7, 2001, both in connection with the ethnographic expert opinion by Ramiro García Vásquez on the document prepared by Theodore Macdonald, "Awas Tingni an Ethnographic Study of the Community and its Territory" (infra paras. 81 and 97); and a copy of the document "Awas Tingni an Ethnographic Study of the Community and its Territory. 1999 Report".

67. On June 21, 2001, the Secretariat, following instructions by the President, granted the Commission and the State up to July 23 of that year to submit their final written arguments. On July 3, 2001, the Commission requested an extension until August 10 of that same year to submit its brief. On July 6, 2001, the Secretariat, following instructions by the President, informed the Commission and the State that the extension requested had been granted.

68. In its July 31, 2001 note, the Secretariat, following instructions by the President and pursuant to article 44 of the Rules of Procedure, requested that the Commission submit the documentary evidence and pleadings to substantiate the request for payment of reparations, costs and expenses submitted by the Commission in the point on petitions in its lawsuit (supra para. 4), no later than August 10, 2001.

69. On July 31, 2001 the Secretariat, following instructions by the Court and in accordance with article 44 of the Rules of Procedure, granted Nicaragua up to August 13, 2001 to supply, as evidence to facilitate the adjudication of the case, the following documents: existing title deeds of the Awas Tingni Community (Mayagna Community); of the Ten Communities (Miskita Community); of the Tasba Raya Indigenous Community (also known as the Six Communities), which includes the communities of Miguel Bikan, Wisconsin, Esperanza, Francis Sirpi, Santa Clara and Tasba Park (Miskito Communities) and of the Karain Indigenous Community (Miskito Community). These documents were not submitted to the Court.

70. On August 8, 2001, the State objected to the parties being granted the possibility of submitting final written arguments and requested that, in case the Court decided to proceed with the admission of those pleadings, the State be granted an extension up to September 10, 2001, to submit them. The following day, the Secretariat, under instructions by the President, informed the State that it had been a constant and uniform practice at the Court to grant the parties the opportunity to submit final written arguments, taken to be a summary of the positions stated by the parties at the public hearing on the merits, in the understanding that said briefs were not subject to additional contradictory comments by the parties. In connection with the request for an extension of the period for the State to submit its final pleadings, the Secretariat expressed that, following instructions by the President, given the time allotted to the parties to submit their final written arguments, and so as to avoid impairing the balance which the Court must maintain in protecting human rights, legal certainty and procedural equity, an un postponable period up to August 17, 2001, was granted to both parties.
A) DOCUMENTARY EVIDENCE

75. The Inter-American Commission submitted copies of 58 documents in 50 annexes with its application (super paras. 1 and 29).

1 c.f. annex c.1, sketch of the area where the Awas Tingni Community is located in the RAAN; annex c.2, November 8, 1992 brief by Charles Webster Mclean Cornelio; annex c.3, February, 1996 document "Awas Tingni. An Ethnographic Study of the Community and its Territory", Draft Preliminary Report prepared by the Awas Tingni Territorial Demarcation Project, main researcher: Theodore Macdonald; annex c.4, map "Land tenure of the Mayagna of Awas Tingni in the Area of the Concession to SOLCARSA"; annex c.6, statement by Theodore Macdonald Jr. on January 3, 1996; annex c.7, November, 1997, map, "Map of Subsistence Use and Occupation of the Awas Tingni Indigenous Community"; annex c.8, July 11, 1995 brief by Maria Luisa Acosta Castellón, attorney for the Awas Tingni Community, to Milton Caldera C., Minister of MARENA, attaching: January, 1994 document, "Territorial Rights of the Awas Tingni Indigenous Community" prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community"; annex c.9, October 23, 1995 brief by James Anaya, legal representative of the Mayagna Awas Tingni Community, to Milton Caldera Cardenal, Minister of MARENA; annex c.10, December, 1994 document "Cerro Wakambar Broad-leaved Forest Management Plan (Final Edition)", prepared by Swietenia S. Consultants for KUNYUNG CO. LTD; annex c.11, statement by Charles Webster Mclean Cornelio on December 4, 1995; annex c.12, January 4, 1996 document, "Memorandum in support of supplemental request for provisional measures. In the Case of the Mayagna Indian Community of Awas Tingni and Jaime Castillo Felipe, on his own behalf and on behalf of the Community of Awas Tingni, against Nicaragua" prepared by James Anaya, John S. Allen, Maria Luisa Acosta Castellón, Jeffrey G. Buttwinkel, S. Todd Crider and Steven M. Tulberg; annex c.13, March, 1996 brief requesting "official recognition and demarcation of the ancestral lands" of the Mayagna Awas Tingni Community addressed to the Regional Council of the RAAN, attaching: document "General Census of the Awas Tingni Community" for the year 1994; annex c.14, March 20, 1996 brief by James Anaya, legal representative of the Mayagna Awas Tingni Community, addressed to Ernesto Leal, Minister of Foreign Affairs; annex c.15, March 20, 1996 brief by James Anaya, legal representative of the Mayagna Awas Tingni Community, addressed to Claudio Gutiérrez, Minister of MARENA; annex c.16, document "Draft Memorandum of Understanding"; annex c.17, newspaper article in Diario La Prensa, "Indigenous habitat endangered by logging", published on March 24, 1996; annex c.18, newspaper article in The New York Times, "It's Indians vs. loggers in Nicaragua", published on June 25, 1996; annex c.19, May 17, 1996 brief by James Anaya, legal representative of the Mayagna Awas Tingni Community, addressed to José Ángel Tijerino, Permanent Representative of Nicaragua at the Organization of American States (OAS); annex c.20, May 8, 1996 report by Maria Luisa Acosta Castellón, addressed to James Anaya; annex c.21, testimony of deed number one in protocol number twenty of notary public Oscar Saravia Batodador; official recording the Forest Management Plan for the Awas Tingni Community; annex c.22, March 13, 1996 brief by Claudio Gutiérrez Huete, representative of MARENA, and Hyong Seok Byun, representative of SOLCARSA corporation; annex c.22, administrative provision No. 2.95 of June 28, 1995, of the Board of Directors of the Regional Council of the RAAN; annex c.23, December 8, 1995 brief by Alta Hocker Blandford, President of the Regional Council of the RAAN, and Myrna Taylor, First Secretary of the Board of Directors of the Regional Council of the RAAN, addressed to Roberto Araquistán Cisneros, General Director of Forestry; annex c.24, document "Report on the second meeting of the National Committee for the Demarcation of the Communal Lands of the Atlantic Coast of Nicaragua held on November 14, 1996 in Puerto Cabezas"; annex c.25, November 14, 1996 document "Statement by the indigenous representatives of the National Committee for the Indigenous Communities of the Atlantic Coast of Nicaragua"; annex c.26, November 21, 1996 brief by Ned Archbold and others, of the Organization of Indigenous Syndics of the Nicaraguan Caribbean (OSICAN), addressed to James Anaya; annex c.27, December 16, 1996 brief by Guillermo Chavarría, Coordinator of the Indigenous Movement of the RAAS, addressed to Enrique Brenes, Provisional President of the National Committee for the Demarcation of the Communal Lands of the Atlantic; annex c.28, General Register of the Regional Council of the RAAN, "Cerro Wakambar Broad-leaved Forest Management Plan (Final Draft)"; annex c.29, letter of September 1, 1997 by the National Council of the RAAN, "Illegal concession continues deforestation in the Northern Atlantic", published on May 29, 1997; annex c.30, newspaper article from Diario La Tribuna, "The trees fall far away and nobody hear them", published on May 29, 1997; newspaper article "Ancestral rights?"; annex c.33, newspaper article in Diario La Tribuna, "Deforestation in no-man’s land", published on June 12, 1997; annex c.34, statement by Mario Guevara Somoza on October 3, 1997, annex c.35, official letter MN-RES-0377.97 of May 29, 1997; annex c.36, August 5, 1997 memorandum of the Evaluating Committee for the "SOLCARSA" case, addressed to Roberto Stadthagen Vogel, Minister of MARENA, sending him the Evaluation Report on the SOLCARSA Firm; annex c.37, statement by Guillermo Espinosa Duarte, Deputy Mayor, , then Acting Mayor of Bilwi, Puerto Cabezas, RAAN, on October 1, 1997; annex c.38, communiqué by the Authorities of Betania, signed by Guillermo Lagra, Reinhard Dariwali, William Fidencio and Guillermo Silvano and annex c.39, document "SOLCARSA does not comply with Ministerial Resolution either", prepared by Magda Lanuza; annex c.40, article "Privatizing the rain forest: a new era of concessions", published in July, 1997, in Reports CERAD, November 9, 1997, of the Regional Council of the RAAN; annex c.44, protest letter of November 2, 1997, by OSICAN, addressed to the Inter-American Commission; annex c.45, amparo remedy filed on September 11, 1995 before the Appellate Court of the Supreme Court of Justice in Masaya, filed by the Mayagna of Awas Tingni Community against Milton Caldera C., Minister of MARENA, Roberto Araquistán, Director of MARENA’s National Forestry Service, and Alejandro Lázaro, Director of MARENA’s National Forestry Administration; annex c.44, September 19, 1995 decision by the Appellate Court of the Sixth Region, Civil Court, Matagalpa, regarding the amparo remedy filed by Maria Luisa Acosta Castellón, as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Síriaco Castillo Fenley, Syndic and Deputy Syndics, respectively, of the Mayagna Awas Tingni Community, against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistán, Director of MARENA’s National Forestry Service, and Alejandro Lázaro, Director of MARENA’s National Forestry Administration; annex c.45, appeal for review of facts as well as law filed on September 21, 1995, before the Supreme Court of Justice of Nicaragua by Maria Luisa Acosta Castellón, legal representative of the Awas Tingni Community; annex c.46, February 28, 1997 official notice to Maria Luisa Acosta Castellón notifying her of the February 27, 1997 judgment No. 11 by the Supreme Court of Justice of Nicaragua; annex c.47, September 21, 1997 judgment by the Appellate Court of the Sixth Region, Constitutional Court, Matagalpa, in connection with the amparo remedy filed by Maria Luisa Acosta Castellón, as legal representative of Benévitio Salomón, Síriaco Castillo Fenley, Orlando Salomón Felipe, and Jotam López Espinoza, on their own behalf and as Syndics, Coordinator, Town Judge and Person in Charge of the Forest, respectively, in the Awas Tingni Community, against Roberto Stadthagen Vogel, Minister of MARENA; Roberto Araquistán, Director General of MARENA’s National Forestry Service; Jotam Lozada, General Director of MARENA’s National Forestry Administration, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN; annex c.48, February 27, 1997 judgment No. 12 by the Constitutional Court of the Supreme Court of Justice of Nicaragua declaring the "Cerro Wakambar" Forest Management Plan of SOLCARSA unconstitutional and amparo remedy filed by Maria Luisa Acosta Castellón, legal representative of the Mayagna Awas Tingni Community, and Humberto Thompson Sang, member of the Regional Council of the RAAN, against Claudio Gutiérrez, Minister of MARENA, and Alejandro Lázaro, Director of MARENA’s National Forestry Administration; annex c.49, February 3, 1998 judgment by the Constitutional Court of the Supreme Court of Justice of Nicaragua declaring the "Cerro Wakambar" Forest Management Plan of SOLCARSA unconstitutional and amparo remedy filed by Maria Luisa Acosta Castellón, legal representative of the Mayagna Awas Tingni Community, against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistán, Director General of MARENA’s National Forestry Service; Jotam Lozada, General Director of MARENA’s National Forestry Administration, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN; annex c.50, November 5, 1997 note by Felipe Rodríguez Chávez, Ambassador, Permanent Representative of Nicaragua to the OAS, addressed to Julio E. Taína, Executive Secretary of the Commission; annex c.51, April 29, 1998, note by Jésus Sabarío A., General Director for International Organizations at the Nicaraguan Ministry of Foreign Affairs,
76. In its reply to the lawsuit (supra. p. 37), the State attached copies of 16 documents contained in 14 annexes.2

77. During the preliminary objections stage, the State submitted copies of 26 documents.3

dressed to Felipe Rodríguez Chávez, Ambassador, Permanent Representative of Nicaragua to the OAS; and resolution No. 17-08-97 of October 9, 1997, by the Regional Council of the RAAN.


3 cfr. official letter MN-RSV-02-0113-98 of February 16, 1998 by Roberto Stadthagen Vogt, Minister of MARENA, addressed to Michael Kang, General Manager of SOLCARS; judgment No. 11 of February 27, 1997 by the Constitutional Court of the Supreme Court of Justice of Nicaragua regarding the amparo remedy filed on September 11, 1995, before the Marena by María Luisa Acosta Castellón as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Síricco Castillo Fenley, Syndic and Deputy Syndics, respectively, of the Mayagna Awá Tinquí Community, against Milton Caldon, Secretary of the Interior; minister of MARENA, Roberto Araquistán, Director of MARENA National Forestry Service, and Alejandro Lainez, Director of MARENA's National Forestry Administration; table "Receipt of amparo Remedies from 1995 to August 15, 1998"; table "Comparative Analysis of amparo Judgments from 1995 to the current minister of 1999"; certificate of August 5, 1998 by Vladimir A. Castillo, minister Director of INRA; copy of the first page of the March, 1996 brief requesting "official recognition and demarcation of the ancestral lands" of the Mayagna Awá Tinquí Community, addressed to the Minister of the Environment on January 2, 1997; document " Ownership of the lands of the Mayagna Awá Tinquí Community in the Land of the Northeast" prepared by John Strasna; certificate issued on August 18, 1998 by Edgar Navas, Advisor and Assistant to the Minister of the Presidency; certificate issued on August 5, 1998 by Virgilio Gurdian Castillo, Minister Director of INRA; August, 1998 projections and maps on the location of indigenous areas, and the territorial definition of the national territory of Nicaragua within the RAAN, prepared by the Office of the Director of Geodesics and Cartography at the Nicaraguan Institute of Territorial Studies (INETER); August, 1998 report "Judicial Framework and Activities Carried Out by the State for Demarcation and Titling of the lands belonging to the Mayagna Awá Tinquí Community in the Land of the Northeast" prepared by the High Directorate of INRA; list of support programs and projects submitted by the Government of Nicaragua to the Advisory Group in Stockholm, Sweden, "in support of the country’s Autonomous Regions and, specifically, the indigenous communities of Nicaragua", private, public, self-produced, and ninety-five to page three hundred and two of the Boletín Judicial of the Supreme Court of Justice of Nicaragua in 1990; a copy, certified by a notary public, of page three hundred and one to page three hundred and nine of the Boletín Judicial of the Supreme Court of Justice of Nicaragua in 1991; a copy, certified by a notary public, of page three hundred and forty-five to page three hundred and fifty-two of the Boletín Judicial of the Supreme Court of Justice of Nicaragua in 1992; a copy, certified by a notary public, of pages three hundred and twenty of the Boletín Judicial of the Supreme Court of Justice of Nicaragua in 1993; a copy, certified by a notary public, of page two hundred and seventy-eight to page two hundred and eighty-five of the Boletín Judicial of the Supreme Court of Justice of Nicaragua, published in the official newspaper La Gaceta, No. 28, on January 19, 1994; a copy, certified by a notary public, of the four pages of the Boletín Judicial of the Supreme Court of Justice of Nicaragua with Judgment No. 19, of March 7, 1994, of the Supreme Court of Justice of Nicaragua, published in the official newspaper La Gaceta, No. 28, on January 19, 1994; a copy, certified by a notary public, of page two hundred and seventy-one to page two hundred and seventy-two of the Boletín Judicial of the Supreme Court of Justice of Nicaragua in 1995; a copy, certified by a notary public, of page six hundred and six to page six hundred and sixteen of the Boletín Judicial of the Supreme Court of Justice of Nicaragua in 1996; a certificate issued on May 19, 1998 by the director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration of
79. On November 21, 2000, Marco Antonio Centeno Caffarena, General Director of the Office of Rural Titling of Nicaragua, sent copies of 8 documents (supra paras. 63 and 64).  

80. On December 20, 2000, in response to a request by the Court, the State submitted a copy of one document (supra para. 65).  


82. On August 10, 2001, together with the final written pleadings, the Commission submitted one document as an annex to that brief (supra para. 71).  

MARENA, and Efrain Osejo and others, members of the Board of Directors of the Regional Council of the RAAN, are doing the best in their capacity as "rapporteurs" to study the "present situation" and "the incipient land crisis in the south of the State", in pages 80 to 89 and 119 to 128 of the March, 1998 "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast. General framework", prepared by the Central American and Caribbean Research Council.  


8 cfr. judgment No. 163 of October 14, 1998, by the Constitutional Court of the Supreme Court of Justice of Nicaragua regarding the amparo remedy filed by María Luisa Acosta Castellón, as legal representative of Benigno Salomón Mclean, Sireocio Castillo Fenley, Orlando Salomón Felipe and Jotam López Espinoza, on their own behalf and as Syndic, Coordinator, Town Judge and Person Responsible for the Forest, respectively, of the Awas Tingi Community, against Roberto Stadhanen. Vogl, Minister of MARENA, Roberto Aracquistain, General Director of the National Forestry Service of MARENA; Jorge Brooks

B) ORAL AND EXPERT EVIDENCE  

83. At the public hearing held on November 16, 17 and 18, 2000 (supra para.62), the Court heard the testimony of eight witnesses and four expert witnesses offered by the Inter-American Commission, as well as the testimony of one witness summoned by the Tribunal, exercising its authority under article 44(1) of the Rules of Procedure. Said testimonies are summarized below, in the order received:  

a. Testimony of Jaime Castillo Felipe, member of the Awas Tingi Community (Interpreter: Modesto José Frank Wilson)

The witness was born in Awas Tingi on June 15, 1964, and he currently lives in the Awas Tingi Community. He is a member of the Mayagna ethnic group, and his mother tongue is "Sumo Mayagna".

The other members of the Awas Tingi Community are also Sumo. It is true that there are persons in the Community who are not of the Mayagna ethnic group, but they are few, having come to live there or having members of the Community as spouses. They have been in Awas Tingi for over fifty years, and before they lived in Tuburú. He does not know exactly in what year the hamlet of Awas Tingi was established. They are the owners of the land which they inhabit because they have lived in the territory for over 300 years, and this can be proven because they have historical places and because their work takes place in that territory. There were members of the Tilba-Lupia Community who lived in Awas Tingi. He could indicate the persons who constitute the Community.

He was Syndic of the Awas Tingi Community from 1991 to 1996. The Syndic is the person in charge of resolving conflicts which might arise within the community, as well as of taking steps, in coordination with the communal authorities, before State entities.

During the time he was Syndic, he dealt with INRA to attain titling or demarcation of lands in favor of the Community, but those steps were unsuccessful, since there has been no response to date. On March 12, 1996, he addressed the Regional Council of the RAAN. The authorities' response was that they were going to study his request but he has not received any reply in that regard. At that time he submitted maps of the Community, the census of the population of Awas Tingi, and a document on the territory of the Community, prepared by Dr. Theodore Macdonald, of Harvard University.

He and the members of the Community make their living from agriculture, hunting, and fishing, among other activities. To hunt they make a 15-day trip. The Community selects what is to be consumed, so as not to destroy the natural resources.

The lands are occupied and utilized by the entire Community. Nobody owns the land individually; the land's resources are collective. If a person does not belong to the Community, that person cannot utilize the land. There is no right to expel anyone from the Community. To deny the use of the land to any member of the Community,
the matter has to be discussed and decided by the Community Council. When a person dies, his or her next of kin become the owners of those things that the deceased person owned. But since lands are collective property of the community, there is no way that one member can freely transmit to another his or her rights in connection with the use of the land.

He is not aware of whether his ancestors obtained any title deed. When an agreement was reached between the logging firm Maderas y Derivados de Nicaragua S.A., (MADENSA) (hereinafter "MADENSA") and the Community, in 1992, the latter stated that it had a property right recognized by the Central Government and by the National Government, because the witness and the other members of the Community feel that they are the true owners of those lands, since they have lived on them for over 500 years.

The Community filed the application before the Inter-American Commission because it required the title deed which it had requested several times and the State had never replied. They hope to obtain a reply based on justice and the rights of indigenous communities. At first they intended to settle the land claim in a friendly manner, but now, having exhausted all means and having reached the level of the Inter-American Court, they await its decision to put an end to this conflict.

b. Testimony of Charly Webster Mclean Cornelio, Secretary of the Awas Tingni Territorial Committee

The witness was born in Awas Tingni, Nicaragua, and he is a member of the Mayagna Community, which in the Mayagna language means “child of the Sun”. He held the position of Person Responsible for the Forest within the Community, and therefore he protected the forest from harm and cared for the animals. He is currently the Secretary of the Awas Tingni Territorial Committee, and in 1991 he participated, together with the other leaders of the Community, in the making of the map which identifies the territorial limits of the Mayagna Community.

The Community he belongs to has 1,016 inhabitants, and is formed by 208 families; only four families are formed by marriages of Miskito men and Mayagna women. The number of inhabitants was determined through a census taken recently by the leaders of the Community. Figures presented by the State, according to a census taken years ago, place the number of members of the Community between 300 and 400, but that is not the current number.

The struggle of the Mayagna to attain recognition by the State of their historical right to their lands goes back a long time. Recent efforts to attain respect for their lands include the drafting, without any advisory assistance, of the document "Struggling for Mayagna Sumo", in which they ask the State to recognize their property rights. This document was made known to Alberto Escobar, who was then the INRA delegate. Subsequently they went to Managua for a dialogue with the Minister of INRA, but they did not obtain the title deed to their land.

In 1992 the Community signed a contract with the MADENSA firm, with no advisory assistance. The leaders of the Community stated to the representatives of MADENSA that they had title to those lands in the sense that they had a right to them through historical possession. Then they signed another agreement with MADENSA, with advisory assistance from and participation by MARENA, which committed itself to helping the Community in the demarcation of its territory, but this commitment was not fulfilled.

Afterwards, the State granted a concession to the firm SOLCARSA. Their disagreement with that concession is based on the fact that the State did not previously consult with the Community to determine whether the concession was advantageous, and also because the works by SOLCARSA would be on 62,000 hectares of Awas Tingni territory. Therefore, the Community reacted and a General Assembly was held, at which the decision was reached to draft a letter to denounce the State.

To attain respect for the territory of the Community, its leaders made a map. The Community has 13 kilometers in the mountains, and is located 21 kilometers from Puerto Cabezas, alongside the municipality of Waspáam, and according to the map its borders are within the following boundaries: from Caño Cocolano going by Kisak Laini, by Suku Was, Kalwa, Kitan Mukni, Kuru Was, Kiamak, Caño Turuh Wasni, Caño Rawa Was, Tunjlan Tuna, to Kuah Sahna. This map shows the area they are claiming. The leaders of the Community have referred to its territory, and have not talked about hectares. The witness is not aware that doctors Anaya and Acosta requested a title deed to 16,000 hectares for the Community in 1993. The State, in turn, has argued that the extent of the territory claimed by the Mayagna is excessive, bearing in mind the number of members of the Community determined by the official census, and that the area claimed by this Community is not in proportion to the area it effectively occupies. The Mayagna have had some conflicts with the communities of Francia Sirpi, Santa Clara and Esperanza regarding land claims, which have been settled peacefully. According to the State, part of its territory is claimed by groups in the Eighteen Communities and in the Ten Communities, who have stated that they possessed it before the Mayagna arrived, and that they had allowed them to settle in their territory as a sign of good will. In face of this statement, the witness points out that the territories of these communities are far away from those of Awas Tingni and that, therefore, he does not understand why there is a talk about a conflict over land, when there is no such conflict.

The witness explained that to go from the hamlet of Awas Tingni, where most of the Community is concentrated, to Tuburú, also inhabited by members of the Mayagna Community, they have to travel in "pipantes", a type of canoe driven by oars, and in dry weather this takes a day and a half, and during the rainy season two days and a half.

The territory of the Mayagna is vital for their cultural, religious, and family development, and for their very subsistence, as they carry out hunting activities (they hunt wild boar) and they fish (moving along the Wawa River), and they also cultivate the land. It is a right of all members of the Community to farm the land, hunt, fish, and gather medicinal plants; however, sale and privatization of those resources are forbidden.

The territory is sacred for them, and throughout the territory there are several hills which have a major religious importance, such as Cerro Mono, Cerro Urus Asang, Cerro Kiamak and Cerro Quiritis. There are also sacred places, where the Community has fruit trees such as pejibaye, lemon, and avocado. When the inhabitants of Awas Tingni go through these places, which date 300 centuries, according to what his grandfather said, they do so in silence as a sign of respect for their dead ancestors, and they greet Asangpas Muigeni, the spirit of the mountain, who lives under the hills.

c. Testimony of Theodore Macdonald Jr., anthropologist
As regards current land tenure in the Awash Tigrigni Community, the witnesses believe that first one must talk about history. The Community has identified as a Mayagna Community, but gradually through demographic growth and also with the influx of other communities, an independent community with a common language, called the Tigrigna, emerged. In 1971, a territorial conflict with the people living on the eastern side of the Awash River was resolved. The territory is called Italian. It is situated in the north of the Wawa region. The Italian authorities had accepted the Awash Tigrigni as a community and took shape and strengthened its feeling of community with its own limits. 

There are two other maps, made by a witness. The first of these maps was made in 1992, with the assistance of the Maya and after the study of the territory to which they referred. The second map, drawn in 1999, is almost the same. The main difference is that it is hand-drawn, but both maps were based on the same information. The methodology used to make the map was as follows: first, he began in the Awash Tigrigni Community, with a Geographic Information System (GIS), which provides a view of the territory. Then, he went up the Wawa River, and the sacred place, the hill, is located on the eastern side of the Wawa region. The hill is the place where the community is located, and the mountain, which is the reference point, is the hill. The hill is located near the coastal community of the territory. The main difference is that it is hand-drawn, but both maps were based on the same information. The methodology used to make the map was as follows: first, he began in the Awash Tigrigni Community, with a Geographic Information System (GIS), which provides a view of the territory. Then, he went up the Wawa River, and the sacred place, the hill, is located on the eastern side of the Wawa region. The hill is the place where the community is located, and the mountain, which is the reference point, is the hill. The hill is located near the coastal community of the territory. The main difference is that it is hand-drawn, but both maps were based on the same information. The methodology used to make the map was as follows: first, he began in the Awash Tigrigni Community, with a Geographic Information System (GIS), which provides a view of the territory. Then, he went up the Wawa River, and the sacred place, the hill, is located on the eastern side of the Wawa region. The hill is the place where the community is located, and the mountain, which is the reference point, is the hill. The hill is located near the coastal community of the territory. The main difference is that it is hand-drawn, but both maps were based on the same information.
A fundamental theme in the definition of indigenous peoples is how they relate to the land. All anthropological, ethnographic, and historical studies agree that the relationship between indigenous peoples and the land on which they live provides and maintains the cultural identity of those peoples. One must understand that the land is not only instrumental and religious, with the history and current dynamics of these people are linked.

The indigenous peoples of the Atlantic Coasts of North, Central, and South America have traditionally practiced shifting subsistence agriculture. They often combine this with other activities, such as fishing and hunting, and have developed complex social, economic, and political systems. Their relationship to the land, whether as farmers, hunters, or gatherers, is central to their identity. The territory is essential for indigenous communities and a link to their cultural and ancestral roots.

In lowlands, indigenous peoples have traditionally lived in small communities, often dispersed along the riverbanks. They are closely connected to the land, with their livelihoods dependent on it. The land is not only a source of food but also a spiritual and cultural center. The indigenous peoples of the Atlantic Coasts have a deep understanding of the land's cycles and are intimately tied to the natural environment. This connection is reflected in their traditional knowledge and practices, which are passed down through generations.

He knows about the situation of the indigenous peoples of the Atlantic Coasts of North, Central, and South America. His knowledge comes from the ethnographic and anthropological literature of Nicaragua and from reports by social workers, anthropologists, and indigenous leaders. He has been involved in projects that aim to promote the rights of indigenous peoples and to improve their living conditions. He has worked with various organizations, including human rights groups and government agencies, to advocate for the rights of indigenous peoples.

The indigenous peoples of the Atlantic Coasts of North, Central, and South America have a rich cultural heritage and a unique way of life. They are known for their traditional knowledge, their spiritual practices, and their unique artistic expressions. The indigenous peoples of the Atlantic Coasts have a strong sense of community and are known for their strong social and political organizations.

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In 1993, as Forestry Policy Officer of the World Wildlife Fund (WWF) for Latin America, he began a project in connection with the Awas Tingni Community in Nicaragua. The project was an advisory role in Forestry Policy, specifically with regard to the sustainable use of natural resources in the Atlantic Coast. The immediate background of the Awas Tingni project was a concession of roughly one million hectares of the Atlantic Coast, which was ultimately resolved through the assistance of the World Wildlife Fund.

In the case of the Awas Tingni Community, it had initiated a contractual agreement with a company called MADENSA, Maderas y Derivados de Nicaragua, of Dominican capital, which established the basis for what might be a form of logging whichinvolved participation by inhabitants of that region.

Basing what is not used, what is not owned for the operation to be economically viable, there must be the necessary elements for the operation of the forests of Latin America where there are many rural population groups surviving around them, it is...
necessary for it to be socially viable, there must be the social support and legal framework required to ensure that these operations, even if they are technically successful and economically viable, do not harm the rights that the communities inhabiting those forests may have.

For all these reasons, the World Wildlife Fund found that the case of this contractual relationship between Awas Tingni and MADENSA was a very interesting possibility to show that this type of forest management can be done. The fact that MADENSA had from the start accepted the presence of the community was significant progress as compared to the case of a concession previously granted to a Taiwanese company, in which the fact that there were indigenous communities in the area was simply not recognized.

Before beginning the project, the following government officials were contacted: Dr. Jaime Incer, then the Minister of MARENA; Roberto Araquistain, the Director of the National Forests Service; Eng. Brady Watson, in charge of the Administration of Forests on Public Lands (ADFOREST), and James Gordon, the Delegate of IRENA, now MARENA, in Puerto Cabezas. In the framework of discussions with other officials, the starting point was that while the Community did not have formal title to the land, implicit ownership was recognized due to occupation of those lands, which would eventually have to be formalized. In other words, it was known that at least a part, if not all the area covered by the management plan of MADENSA, was communal land of the Awas Tingni Community. There was also the recognition that as a result of this process, demarcation of that communal land would take place, because a clear legal framework is one of the fundamental conditions for sustainable management.

The first contact the witness had with the Community was in early 1993. They were accompanied by representatives of IRENA and of the National Forestry Service. They held meetings with some of the leaders with some of the leaders of the Awas Tingni Community. Afterwards they traveled to Awas Tingni to get to know the rest of the Community and the conditions under which they lived, as well as to hear people’s opinions directly. By talking with the leaders of the Community at Puerto Cabezas and with members of the Community, they became aware of two main concerns. One was the contract which the Community had signed with MADENSA, a 25 year contract, which made them feel trapped, and the second concern, the main one for them, was the uncertainty they felt with regard to land tenure. The Community was not so much interested in exploitation proper of the forest or in the resources it could provide, but rather in obtaining funding for the necessary studies to finally be able to carry out the demarcation of their lands. These were their main concerns.

It was agreed with MADENSA and with IRENA that the 25 year contract that Awas Tingni had signed with the former would be renegotiated. For this, technical and legal advisory services would be required, because they had been requested by the Community, so as to negotiate better conditions.

The role of the World Wildlife Fund was to ensure that such support be provided to the Community. The WWF helped set up a technical legal team, which began with participation by James Anaya, from the University of Iowa, and Hans Ackerson, a forestry expert who had provided advisory services to Nicaragua in the area of forestry.

An important obstacle in the negotiation of this process was the lack of legal precedent to serve as a reference point for this type of arrangements. Another obstacle throughout the negotiation was the issue of land tenure, since to have a management plan there had to be a well-defined area.

Another task undertaken by the World Wildlife Fund was to ensure that there be a process to which the various parties would adhere. In addition, once the negotiations had begun, the WWF contributed to hiring a facilitator to help “unblock” the negotiation. The result of these negotiations was an agreement among the three parties, with participation by the Awas Tingni Community, the State through MARENA, and the MADENSA corporation. It was a five-year, renewable agreement, setting the terms for the sale of timber by the Community and bought by the corporation; the terms under which MARENA recognizes land tenure, ownership of the land; the terms of activities for yearly extraction, and the monitoring system which this operation would require.

Several parts of the agreement refer to land tenure. One of them considers the Community as if it were "the owner of these lands". Furthermore, Nicaragua undertook the commitment to facilitate the titling process and to not undermine the Community’s aspirations as regards their territorial claims. While the contract stated that the State would facilitate the process of land titling, the witness does not recall having heard how this would be done. He recalls a discussion on this matter, because the process of land titling which was known up to then was that carried out by INRA, the Nicaraguan Agrarian Reform Institute, which at that time distributed 50 manos of land to families. The National Forestry Service was very emphatic that such a process was inadequate in this case, arguing that what they wanted to promote as land use was forestry, while the INRA process promoted agricultural land use. They feared that the model of agricultural land distribution would unleash a wave of deforestation. He does not recall MARENA establishing a path for the Community to request land titling, since they were also confused as to what the process should be.

As of 1994, he had less contact with the project and no direct knowledge of what was happening. He heard of State plans to grant a concession to the SOLCARSA corporation through a letter sent by the Community, through its representatives, to Minister Milton Caldera. He held a conversation with Minister Caldera at the time in connection with the concession to SOLCARSA. That official knew that the land claimed by the community included most of the area included in the concession, and that the Community objected to it. The Minister’s reaction was to inform him that MARENA had signed with the Community and with MADENSA was an agreement which he did not agree with, and regarding the Community’s claims, he said “they are too many”.

The State has had two policies in granting the concession to MADENSA, first, and subsequently to SOLCARSA. One was a recognition of the acquired rights of the communities, and that they should be taken into account in those forest management contracts; the other was that as long as there is no title deed, there is no basis for thinking that the communities have acquired rights and, therefore, concessions on public lands can be granted to third parties.

f. Testimony of Galio Claudio Enrique Gurdían Gurdían, holder of a licentiate degree in philosophy, a specialist in social anthropology and development studies, especially relations between States and indigenous peoples
The former INRA, currently the Ministry of Agriculture and Forestry, has no authority for the indigenous community's customary lands. There has been no titling of indigenous communities since 1990, the formal power of land demarcation and titling has not been exercised.


He was one of the three main researchers who was designated as the consultant coordinator of the General Diagnostic Study on land tenure among the indigenous communities of Nicaragua.

The concept that inspired the initiative was to bring to the people a map of the territory and here reside. The project had two main objectives: to study the living conditions of the population and to map the territory for the future demarcation of the community's lands.

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According to oral history, the Awas Tingni Community migrated. The settlement pattern of the communities is a pattern of territorial migration. One of the grounds of the State for denying possession rights to the territory has been to argue that these communities are nomadic. The Awas Tingni Community migrated from the traditional settlement of the Mayagna communities and also of the Miskito communities, seeking better conditions for their subsistence.

Since 1990 the State, through its corresponding agencies, has not given any title deeds to the communities.

g. **Testimony of Brooklyn Rivera Bryan, an indigenous leader**

He is a member of one of the Miskito communities, Lidaucra Sandy Bay, and he lives in the city of Bilwi, in the Northern Atlantic Autonomous Region in Nicaragua. When he held the position of Minister-Director of the Nicaraguan Institute for the Development of the Autonomous Regions (INDIRA), he coordinated development and social action plans of the State, at an institutional level, in the autonomous region where most of the indigenous communities of Nicaragua are located. At that time, he was aware of the policies and practices of other State institutions regarding the indigenous communities, specifically those of MARENA and the Nicaraguan Institute of Agrarian Reform (INRA).

In connection with the situation of indigenous peoples and the titling of their lands, he points out that when he was Minister-Director of INDIRA he took steps to oppose the granting of concessions. He first addressed MARENA, in charge of deciding on such concessions. Since he did not obtain an appropriate response, he sent a communiqué to all the other Ministers, who at that time showed no interest. The situation was not dealt with.

INRA limited its work to addressing land claims by the cooperatives and landless peasants, granting them a plot of land, 50 manzanas per family, accompanied by technical assistance. INRA did not undertake any responsibility toward the indigenous communities, arguing that the law did not empower them to deal with their claims, and there was no other specific agency to deal with them. INRA transferred the claims of the indigenous communities to INDIRA, but the law did not give it the authority to deal with those specific claims, nor did it do so with MARENA, so the State lacked a legal instrument to address those claims.

When there were claims by the indigenous communities, he addressed the authorities at INRA to see how they could be dealt with, and he discussed the matter with high officials in the Cabinet. Even though INRA claimed that it had no authority, it issued certificates of land granted to former military, army and police entities, and the Nicaraguan resistance, lands which were within the territories of most indigenous communities.

Subsequently, INDIRA sought other mechanisms, based on the activities of the communities themselves, for which purpose it cooperated in the establishment of the Organization of Indigenous Syndics, who are the legal administrators of the lands of the communities. The Organization of Syndics of the Atlantic Coast of Nicaragua (OSICAN) was born. This organization prepared a bill through extensive consultation with the indigenous communities, and it was submitted to the National Assembly in 1996. As a result of that initiative, it was decided that the National Committee for Demarcation of Lands of the Indigenous Communities should be set up, and this was done in 1996, but it was not able to attain progress in the tasks entrusted to it.

Establishment of the National Demarcation Committee remained as a legacy to the Government which took office in 1997. During that Government there were some meetings between representatives of the States and indigenous peoples, who requested that indigenous representation be broadened; that request led to a bill which was submitted to the National Assembly on October 13, 1998.

When the State granted the concession to the SOLCARSAs corporation, the witness held the position of Minister, for which reason he knows that, while MARENA was considering that concession, some representatives of the indigenous communities of Awas Tingni, Kakamuklaya, and others came to their offices to object, arguing that their territorial rights were being violated, since the area of the proposed concession coincided with their ancestral territories.

Together with representatives of the communities, he contacted the higher authorities at MARENA to state their concerns and demands. However, the position adopted by that Institution, as by the Government, was that empty areas or wastelands belonged to the State, that the indigenous communities had no title to the land, and that the concession would bring benefits because it would generate employment and income. These concerns were raised directly with the Minister of MARENA, first Milton Caldera, then his successor Claudio Gutiérrez, and then Roberto Araquistán y Láinez, who were directly in charge of policies pertaining to concessions.

To grant a concession to a firm, first the criteria and policies for the country’s forest development had to be established; however, that had not yet been done, so concessions were granted without well adjusted criteria to ensure indigenous property rights and protection of the environment. MARENA only required the firm to submit a forest management plan. The witness noted that some of MARENA’s officials participated in the consultancy groups that prepared the management plans, so there was a conflict of interest.

The indigenous communities of the region were never consulted on whether the concession to SOLCARSAS was convenient, nor was any inspection carried out in the area. Neither was there a concrete commitment to investigate and appropriately address their complaints.

Under Law No. 14, 28 indigenous communities that benefited from the agrarian reform were given titles. The witness knows that a draft Indigenous Communal Property Law was submitted to the National Assembly, and there were consultations to analyze that bill.

The Awas Tingni Community, which was the one directly affected by the concession, has possession which goes back to the time before the creation of the Nicaraguan State, and like most indigenous communities it has a historical right to the lands it occupies and its resources. The concession to SOLCARSAs damages them, as the logging would take place in their territory, which the community have traditionally occupied to live on and to carry out cultural, economic, and social activities. Maps and studies effectively support the right they have, as communities, to those areas and to their ancient places.

h. **Testimony of Humberto Thompson Sang, a member of the Lanlaya indigenous community**
The witness was born in the Awas Tingni Community. He holds the position of Person Responsible for the School Center at Awas Tingni.

He has no knowledge of the Management Plan, which is a prior requirement to begin logging being approved by the State for SOLCARSA. He knows that MARENA, in its role as Ministry, ordered the concession to be suspended shortly after being notified by the Supreme Court of Justice that the concession was unconstitutional.

The witness knows of an unconstitutionality remedy filed against the concession to SOLCARSA, in which the Awas Tingni Community was a party to the suit, and as a result of which the concession was declared unconstitutional.

The Awas Tingni Community occupies ancestral lands, is an indigenous community, and is represented by the witness.

As regards the request for land titling made to the Executive, the answer they received was that they would not study it until they had visited the site.

The Awas Tingni Community has been struggling for a long time, requesting that their lands be declared state land.

The Awas Tingni Community has been recognized as a community since 1979, as a result of the declaration of the Central American Indigenous and Ethnic Group, which is a prior requirement to begin logging being approved by the State for SOLCARSA.

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The witness is aware of the territorial claim by the Awá-Tingi Community. His sources of knowledge on Awá-Tingi include the ethnographic study carried out by the Central American and Caribbean Research Institute. As regards cartography, the work by the Central American and Caribbean Research Institute is similar, in terms of its rigor and content, to the study of 122 communities included in the aforementioned diagnostic study.

The ancestors of the current inhabitants of Awá-Tingi always used and possessed this territory. In prior times they were a population that lived in different places. With the arrival of the Moravian Missionaries at the turn of the 19th and 20th centuries, the population increased due to factors such as hunting and fishing, and the area, which until then was considered spiritual or cultural value, became a defining area within the territory claimed. There are key sites that are spiritual and are located within the area claimed.

The indigenous communities closest to the Awá-Tingi Community are not of the same Mayagna ethnic group, as are the communities of Tazala, La Raia, and the Ten villages in the area of Awá-Tingi. The Ten villages are relatively isolated, but they are quite distant from each other.

It is very common for there to be overlaps in all the areas included in the diagnostic study and for there to be overlaps in the indigenous communities that claim the areas of the communities of Tazala, La Raia, and the Ten villages. There are no titles of deeds granted over the area claimed by the Awá-Tingi Percentage. There are no overlaps with the Ten villages, but there are overlaps with what these communities already have. Reference is made for a subsequent process which has not yet taken place.

The data for the Awá-Tingi Community have been analyzed in connection with their land claim and it has been found that the extent of the claim by Awá-Tingi is precisely identified in terms of the diagnostic study. Each communal block in turn has some overlapping areas which would be the basis for a subsequent process that has not yet taken place.

What has been found to function as a righting mechanism for the management of the land without denying use by other communities, is the legal recognition that some of the area claimed by the Awá-Tingi Community is not currently in use by other communities, which has been recognized by agreements, in the perception of the indigenous communities, by the representatives of the government, and by the communities themselves.

The negotiation process for territory expansion has been ongoing since 1989. The indigenous groups of the area have been organizing themselves to articulate their interests and demands, and many of them have been involved in the process. The indigenous groups have been involved in the process of negotiating the extension of their territories, and have been working towards the establishment of new territories, without compromising their cultural identity and traditions.

The indigenous communities have been organizing themselves to articulate their interests and demands, and many of them have been involved in the process of negotiating the extension of their territories, and have been working towards the establishment of new territories, without compromising their cultural identity and traditions.
The indigenous property, which belongs collectively to an indigenous people, community, or group, and is not subject to alienation, is recognized and protected. The right to collective lands is a fundamental right for indigenous peoples, and the UN Declaration on the Rights of Indigenous Peoples places a high value on the recognition and protection of indigenous peoples' rights to their lands, territories, and resources. The right to collective lands is not only a fundamental human right but also a key element in the survival and well-being of indigenous peoples. The recognition and protection of collective lands are essential for the survival and well-being of indigenous peoples, and they are critical for the realization of other rights, such as the right to self-determination, culture, and education. The recognition and protection of collective lands are also important for promoting a more just and equitable society, as they recognize the contribution of indigenous peoples to the world's diversity and cultural heritage. In conclusion, the recognition and protection of collective lands are essential for the survival and well-being of indigenous peoples, and they are critical for the realization of other rights, such as the right to self-determination, culture, and education. The recognition and protection of collective lands are also important for promoting a more just and equitable society, as they recognize the contribution of indigenous peoples to the world's diversity and cultural heritage.
The ongoing process of consultation on the draft bill for titling of indigenous communal property in Nicaragua is a significant step toward the indigenous peoples.

Indigenous peoples live off the land; in other words, the possibility of maintaining their culture and avoiding physical displacement depends on their relationship with the land. As has been acknowledged, the indigenous peoples, who have been displaced for a long time, have a direct access to the land, which they have traditionally occupied.

The countries that carried out constitutional reforms have effectively contributed to providing greater stability for indigenous peoples, as well as substanially improving their relations with the state and the rest of the country’s population. The Constitution of Nicaragua protects property rights for indigenous communities.

Regarding domestic remedies under Nicaraguan legislation, the only existing one is the amparo remedy. According to Law No. 49, the amparo remedy is to be filed before the Appellate Court, which hears the first instance. In the event of the amparo remedy up to the Supreme Court of Justice.

Indigenous peoples have reported cases involving the violation of their rights to the amparo remedy, which includes the Appellate Court and the Supreme Court of Justice. In the case of the Awas Tingni Community, the Supreme Court of Justice was the first body to decide on the matter, and it ultimately delivered a decision in the case.

The Awas Tingni Community filed an amparo remedy on September 12, 1995, and the amparo remedy was eventually filed by the Supreme Court of Justice. The application was decided by the Supreme Court of Justice, which declared that the Awas Tingni Community had the right to file the amparo remedy.

A second amparo remedy was subsequently filed because the first one was not accepted. The second amparo remedy was filed on February 27, 1997, without responding to the original claim.

The experience in Latin America regarding the issue of communal property provides clear evidence. All the processes that have been carried out in the last 20 years have been geared toward the elimination of forms of collective property and autonomous communities. Many of the indigenous people have managed to attain collective property, which has contributed to the elimination of many of the indigenous people's physical and cultural disappearances. The experience of the Awas Tingni Community is an example of how indigenous peoples can effectively contribute to the elimination of forms of collective property and autonomous communities, as well as to the promotion of indigenous peoples' rights. The experience of the Awas Tingni Community shows that indigenous peoples can effectively contribute to the elimination of forms of collective property and autonomous communities, as well as to the promotion of indigenous peoples' rights.
According to the law in Nicaragua, compliance with the decisions of the Supreme Court of Nicaragua in the case of amparo remedies must be within 24 hours. However, compliance with the decision of the Supreme Court on the aforementioned remedy did not occur within that period, but rather in approximately one year.

While compliance with the order of the Supreme Court of Nicaragua was still pending, the witness heard that the company was fined for felling precious wood trees, among other things. It was a 1,000,000 cordoba fine. She also knows that the General Comptroller’s Office approved that fine and that the Comptroller’s Office punished the official authority in charge once again. The Comptroller’s Office determined that the sanction should be at least twice the amount of that fine, and requested that the Minister responsible pay it individually for not having enforced the law, but the Minister never made the payment; furthermore, this Minister has recently had problems with the Comptroller’s Office again in connection with the felling of precious wood trees in Nicaragua.

In her opinion, there is no other judicial procedure which has proven to be effective in Nicaragua for enforcement of Constitutional norms in connection with indigenous peoples. To improve the functioning of the judicial system as regards the indigenous communities, it would be necessary to modify Law No. 49 on the amparo remedy, which indicates the procedures for filing this remedy, a procedure which must be established in such a way that it is simple, agile, and effective, for indigenous communities to have access to justice; the Organic Law of the Judiciary must also be modified for it to be in accordance with the Constitutional framework and to establish that judicial authorities can act ex officio in petitions filed by indigenous communities regarding their territorial right; and the Law on Demarcation and Titling of Traditional Lands of the Waspam Indigenous Communities and Waspam must be enforced, be published and be effective, for those communities to have access to a procedure to resolve their claims on territorial rights. The bill was supported by the two Regional Autonomous Councils and officially submitted to the National Assembly.

Article 18 of the Statute on Autonomy of the Autonomous Regions is especially interesting, as it establishes that the administration of justice must be subject to special regulations, taking into account the cultural specificities of the indigenous communities and ethnic communities.

On the other hand, the witness attests to the ancestral nature of possession by Awas Tingni since this is an indigenous community with its own language, its own culture, and historically established possession in its territory. She is aware that the Awas Tingni Community requested titling of its land through administrative procedures, that they exhausted all such procedures, and nevertheless the Community has received no response from the administrative authorities.

As an attorney she is familiar with the concept of administrative procrastination. It is constituted in accordance with the will of the authorities. Once it has occurred, and when the administrative path has been exhausted, the communities have no other option than to resort to the judiciary, in other words, the only procedure is the amparo remedy in light of omission by the authorities. The period to file an amparo remedy is 30 days after notification of the act or omission by the authorities. Through an amparo remedy, the Awas Tingni Community requested titling of its ancestral lands via the judiciary. The witness knows of actions carried out by Awas Tingni before the Courts to promote its rights.

Regarding the request that the logging concession be suspended, the amparo remedy filed by the Awas Tingni Community was rejected due to the State's constant disrespect for recognition of indigenous rights of the communities. From a procedural standpoint, the courts did not discuss the reason why the remedy was rejected.

For the indigenous communities, there is no other procedure through which they can assert their ancestral rights, which are recognized in the Constitution.

Article 18 of the Autonomy Statute of the Autonomous Regions states that the administration of justice must be subject to special regulations, but it is a general law for which regulations have not been developed. There is no procedure that allows the judicial authorities to take into account the specificities they should consider.

m. Testimony of Marco Antonio Centeno Caffarena, Director of the Office of Rural Titling in Nicaragua

The witness lives in Managua, Nicaragua. He has been a Government official since 1991, having held high-level positions as an advisor and on issues pertaining to property. He is currently the General Director of the Office of Rural Titling.

To explain the history of land titling in Nicaragua, one must differentiate three periods or stages in the course of the 20th century.

The first moment was that of implementation of the Treaty between the United Kingdom and the Republic of Nicaragua, the Harrison-Altmirano treaty, as it was called. Article three of this treaty ordered that title deeds to a specific area be granted to the existing indigenous communities of the Nicaraguan Miskití. Each four-member household unit was to be granted title deed to eight manzanas of land. If the household had more than that number of members, they should receive title deed to an additional two manzanas per person.

The objective of the treaty was to grant title deeds to all the ethnic groups or indigenous communities inhabiting the Atlantic Coast of Nicaragua at that time. Between 1915 and 1920, more than 80,000 hectares were titled, and 60 title deeds were issued which are duly registered in the Public Real-Estate Record Office at Bluefields, which is the only one on the Atlantic Coast. In addition, two titles were granted to the Tilba-Lupia community, the registration numbers for which are 2111 and 2112. At that time, the Mayagna or Sumo ethnic groups were granted title to a considerable amount of land, roughly 3,690 hectares, taking into account the results of the 1950 population census, which estimated that population at roughly 407 individuals in the Atlantic Coast region of Nicaragua.

The procedure followed during implementation of the Harrison-Altmirano Treaty was an elementary one. The Titling Committee for the Mosquitia was set up, and it visited the places where title deeds were to be granted or where there were communities, and the communities stated their demands. These demands "were published, so that if any one felt that there was an infringement, they could object". If there were no objections, the land was measured and title deed subsequently granted, but if someone objected, a friendly settlement was sought by providing compensation for the areas where others were affected by the titling.

Subsequently, during the sixties and seventies, there was a second moment during which the Nicaraguan Agrarian Institute (IAN) granted title deeds following an agrarian criterion; for this reason, the comprehensive approach to titling gave way to
A period in which title deeds to additional lands were granted under the 1963 Agrarian Law. At that time, the indigenous communities received title deeds to 65,000 hectares. The Mayagna or Sumo ethnic groups received title deeds to 4,000 hectares. As a consequence of the 1963 Agrarian Reform Law, the indigenous groups were granted and they received title deeds.

The period of the Revolution, during the 1970s and 1980s, is another moment. Under a new agrarian reform law, based on the criteria of the Real Estate Title Office, the indigenous groups were granted and they received title deeds.

No formal request for land titling by the Awajin Community has been found in the archives of the institution of the Ministry of Rural Titling (MINADRA). However, at some point during the case proceedings, the Inter-American Human Rights Commission supplied the documentation of the case file. The Commission’s findings were presented to the Mayagna Community, which has not been decided by the Office of Rural Titling of the Ministry of Agriculture.

Furthermore, the witness could not specify the year in which that claim took place.

The institutional criterion of the Office of Rural Titling of the Ministry of Agriculture does not have ancestral occupation of the lands to which it is requesting title deeds. In fact, the Awajin Community has conflicts of interest regarding land titling with communities which already duly received title deeds from the Office of Rural Titling of the Ministry of Agriculture. The Awajin Community, however, does not have ancestral occupation of lands to which it is requesting title deeds.
combined with elements of historical demography, nor were linguistic studies conducted to corroborate that this is a compact community belonging to a clearly defined ethnic group. Furthermore, this study was inconclusive regarding the ancestral nature of occupation of the area claimed.

There are Constitutional norms pertaining to land titling and recognition of the rights of the indigenous communities, but the Office of Rural Titling is not the agency which should recognize them, as its role is merely to make them operative. As a titling institution, it has delegations in areas where there is indigenous presence, which are there precisely to detect and receive titling requests; but according to the Statute on Autonomy of the Atlantic Coast, the local authorities have the responsibility of providing assistance to the population groups and contributing to appropriate processing of their claims.

VI
EVALUATION OF THE EVIDENCE

84. Article 43 of the Rules of Procedure indicates the appropriate procedural moment to submit items of evidence and their admissibility, as follows:

Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto and, when appropriate, in the document setting out the preliminary objections and in the answer thereto. Should any of the parties allege force majeure, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing parties are guaranteed the right of defense.

85. Article 44 of the Rules of Procedure empowers the Court to:

1. Obtain, on its own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant.
2. Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful.
3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorization of the Court.

86. It is important to point out that the principle of presence of both parties to an action rules matters pertaining to evidence. This principle is one of the foundations for article 43 of the Rules of Procedure, as regards the time at which evidence must be submitted for there to be equality among the parties.

87. Given that the purpose of evidence is to demonstrate the veracity of the facts alleged, it is extremely important to establish the criteria applied by an international human rights court in evaluating items of evidence.

88. The Court has discretionary authority to evaluate testimony or statements made, both in writing and by other means. For this, it can adequately evaluate evidence following the rule of “competent analysis”, which allows the judges to arrive at a conclusion on the veracity of the facts alleged, taking into account the object and purpose of the American Convention.⁹

89. So as to obtain the greatest possible number of items of evidence, this Court has been very flexible in admitting and evaluating them, following the rules of logic and based on experience. A criterion which has already been mentioned and applied previously by the Court is non-formalism in evaluation of evidence. The procedure established for contentious cases before the Inter-American Court has its own characteristics that differentiate it from that which is applicable in domestic legal processes, as the former is not subject to the formalities of the latter.

90. For this reason, “competent analysis” and the non-requirement of formalities in admission and evaluation of evidence are fundamental criteria for its evaluation, as evidence is assessed rationally and as a whole.

91. The Court will now assess the value of the items of evidence tendered by the parties in the instant case.

* *

92. Regarding the documentary evidence tendered by the Commission and by the State, which was neither disputed nor challenged, nor were questions raised on its authenticity, this Court attaches legal value to that evidence and admits it into evidence in the instant case.

93. The documents “Awas Tingni. An Ethnographic Study of the Community and its Territory”, prepared by Theodore Macdonald in February, 1996; “Ethnographic expert opinion on the document prepared by Dr. Theodore Macdonald”, written by Ramiro García Vásquez, and several maps of the territory occupied by the Awas Tingni Community, were challenged as regards their content. The Court takes into account the various positions of the parties regarding said documents; nevertheless, the Court believes it useful to admit them into evidence in the present case.

94. Regarding the newspaper clippings tendered by the Commission, the Court believes that even though they are not properly documentary evidence, they can be appraised insofar as they reflect publicly or well-known facts, statements by high-level State agents, or corroborate what is established in other documents or testimony received during the proceedings.¹⁰

95. The documents tendered by Marco Antonio Centeno Caffarena on November 21, 2000, at the public hearing, were assessed by the Court, and in its Order of November 24, 2000, this Court admitted into evidence, pursuant to article 44 of its Rules of Procedure, two of the eight documents he submitted (supra paras. 63, 64 and 79).

96. The document “General diagnostic study of land tenure in the indigenous communities of the Atlantic Coast”, prepared by the Central American and Caribbean

¹⁰ cfr. Ivcher Bronstein case, supra note 9, para. 70; Baena Ricardo et al. case, supra note 9, para. 78; and Constitutional Court case, Decision of January 31, 2001. C Series No. 71, para. 53.
Research Council, was tendered by the State on December 20, 2000, as requested by the November 24, 2000 Court Order (supra paras. 64, 65 and 80). Since that document was requested by the Court, based on article 44 of its Rules of Procedure, it is admitted into evidence in the instant case pursuant to the provision in subparagraph one of that same norm.

97. The Court finds the three documents tendered by the Commission on January 29, 2001 (supra paras. 66 and 81) to be useful, especially since they were not disputed nor challenged, nor were their authenticity or veracity questioned. Therefore, they are admitted into evidence in the instant case.

98. The body of evidence of a case is indivisible and is formed by the evidence tendered throughout all stages of the proceedings. For this reason, the documentary evidence tendered by the State and by the Commission during the preliminary objections stage is admitted into evidence in the present case.

99. The State did not submit the documents requested by the Court on July 31, 2001, as evidence to facilitate adjudication of the case (supra para. 69). In this regard, the Court makes the observation that the parties must submit to the Court the evidence requested by the Court, whether documents, testimony, expert opinions, or other types of evidence. The Commission and the State must supply all required inventory items - ex officio, as evidence to facilitate adjudication of the case, or upon a request by a party - for the Court to have as many elements of judgment as possible to determine the facts and as a basis for its decisions. In this regard, it must be taken into account that in proceedings on violations of human rights it may be the case that the applicant does not have the possibility of tendering evidence which can only be obtained with the cooperation of the State.

100. Regarding the expert opinions and testimonial evidence heard, which was neither challenged nor disputed, the Court admits it into evidence only insofar as it is in accordance with the object of the respective examination.

101. In the brief submitting its final arguments, the State expressed that:

Almost all the expert witnesses presented by [the] Commission recognized that they had no direct knowledge of the claim to ancestral lands made by the Awas Tingni Indigenous Community; in other words, they recognized that their professional opinions were based on studies carried out by other persons. As those studies are not conclusive, they should not be admitted as scientific evidence to substantiate an accusation of non-titling of ancestral lands.

102. Regarding the above, the Court has discretionary authority to evaluate statements and pronouncements submitted to the Court. For this purpose, the Court will conduct an appropriate appraisal of the evidence, following the rules of "competent analysis". PROVEN FACTS

103. After examining the documents, testimony, expert opinions, and the statements by the State and by the Commission, in the course of the instant proceedings, this Court finds that the following facts have been established:

a. the Awas Tingni Community is an indigenous community of the Mayagna or Sumo ethnic group, located in the Northern Atlantic Autonomous Region (RAAN) of the Atlantic Coast of Nicaragua;

b. the administrative organization of the RAAN is formed by a Regional Council, a Regional Coordinator, municipal and communal authorities, and other bodies corresponding to the administrative subdivision of the municipalities;

c. the organization of the Awas Tingni Community includes a Board of Directors whose members are the Town Judge, the Syndic, the Deputy Syndic, and the Person Responsible for the Forest. These members are elected in an assembly of all adult members of the Community, and they answer directly to that assembly.


14 cfr. official letter DSDG-RMS-02-Crono-015-00-08, of October 8, 1998 by Rosario Meza Soto, Deputy General Director of the National Institute of Statistics and the Census (INEC), to Fernando Robledo Lang, Secretary of the Presidency; document "Annex A Research Universe"; testimony of Charity Webster Mclean Cornello before the Inter-American Court on November 16, 2000; "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast. General framework", prepared by the Central American and Caribbean Research Council; amparo remedy filed on September 11, 1995, before the Appellate Court of Matagalpa by Maria Luisa Acosta Castellon, as special agent for Jaime Castillo Felipe, Marcial Salomén Sebastan and Siraico Castillo Fenley, Syndic and Deputy Syndic, respectively, of the Mayagna Awas Tingni Community, against Milton Caldera Cardenal, Minister of MARENA; Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Lázaro, Director of the National Forestry Administration of MARENA, and the January, 1994 document "Territorial Rights of the Awas Tingni Indigenous Community", prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community".


16 cfr. January, 1994 document "Territorial Rights of the Awas Tingni Indigenous Community" prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community"; amparo remedy filed on December 11, 1995, before the Appellate Court of Matagalpa by Maria Luisa Acosta Castellon, as special agent for Jaime Castillo Felipe, Marcial Salomén Sebastan and Siraico Castillo Fenley, Syndic and Deputy Syndics, respectively, of the Awas Tingni Mayagna Community, against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Lázaro, Director of the National Forestry Administration of MARENA; February 27, 1997 Judgment No. 11 of the Constitutional Council of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on September 11, 1995 before the Appellate Court of Matagalpa by Maria Luisa Acosta Castellon, as special agent for Jaime Castillo Felipe, Marcial Salomén Sebastan and Siraico Castillo Fenley, Syndic and Deputy Syndics, respectively, of the Awas Tingni Mayagna Community, against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistain, Director of the National Forestry Service of
d. the Mayagna (Sumo) Awas Tingni Community is formed by more than six hundred persons; 17

e. the members of the Community subsist on the basis of family farming and communal agriculture, fruit gathering and medicinal plants, hunting and fishing. These activities, as well as the use and enjoyment of the land they inhabit, are carried out within a territorial space in accordance with a traditional collective form of organization; 16

f. there are "overlaps" or superpositions of communal lands claimed by the indigenous communities of the Atlantic Coast. Some communities alleghe rights over the same lands claimed by the Awas Tingni Community; 19 furthermore, the State

MAREA, and Alejandro Láñe, Director of the National Forestry Administration of MAREA; and decision No. 163 of October 14, 1998 by the Constitutional Court of the Supreme Court of Justice on the amparo remedy filed by María Luisa Acosta Castellón, as legal representative of Benedicto Salomón Mclean, Sílaco Castillo Flenery, Orlando Salomón Felipe and Jotam López Espinoza, an on their behalf and as Syndic, Coordinator, Town Judge and Person Responsible for the Forest, respectively, on the Awas Tingni Community, against Roberto Stahdagen Vogt, Minister of MAREA, Roberto Araquistán, General Director of the National Forestry Service of MAREA, Jorge Brooks Saldaña, Director of the State Forestry Administration of MAREA, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN.

17 cfr. March, 1996 brief requesting "official recognition and demarcation of ancestral lands" of the Mayagna Awas Tingni Community, addressed to the Regional Council of the RAAN, judgment No. 163 of October 14, 1998 by the Constitutional Court of the Supreme Court of Justice of Nicaragua, on the amparo remedy filed by María Luisa Acosta Castellón, representing Benedicto Salomón Mclean, Sílaco Castillo Flenery and Jotam Jotam López Espinoza, an on their behalf and as Syndic, Coordinator, Town Judge and Person Responsible for the Forest, respectively, on the Awas Tingni Community, against Roberto Stahdagen Vogt, Minister of MAREA, Roberto Araquistán, General Director of the National Forestry Service of MAREA, Jorge Brooks Saldaña, Director of the State Forestry Administration of MAREA, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN.

18 cfr. testimony of Charly Webster Mclean Cornelio before the Inter-American Court on November 16, 2000; testimony of Jaime Castillo Felipe before the Inter-American Court on November 16, 2000; testimony of Theodore MacDonald Jr. before the Inter-American Court on November 16, 2000; January, 1994 document "Territorial Rights of the Awas Tingni Indigenous Community" prepared by the University of Iowa as part of its "Project in Support of the Awas Tingni Community"; and "General Census of the Awas Tingni Community" for the year 1994.


20 cfr. "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", Final Report and General Framework, March 1998, prepared by the Central American and Caribbean Research Council; testimony of Guillermo Castilleja before the Inter-American Court on November 17, 2000; July 11, 1995 brief by María Luisa Acosta Castellón, attorney for the Awas Tingni Community, to Milton Caldera C., Minister of MAREA, amparo remedy filed on September 11, 1995 before the Appellate Court of Matagalpa by María Luisa Acosta Castellón, as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Sílaco Castillo Flenery, Syndic and Deputy Syndic, respectively, of the Awas Tingni Mayagna Community, against Milton Caldera Cardenal, Minister of MAREA, Roberto Araquistán, Director of the National Forestry Service of MAREA, and Alejandro Láñe, Director of the National Forestry Administration of MAREA; March, 1996 brief requesting "official recognition and demarcation of the ancestral lands" of the Mayagna Awas Tingni Community, addressed to the Regional Council of the RAAN; "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast, General framework", March 1998, prepared by the Central American and Caribbean Research Council; testimony of Jaime Castillo Felipe before the Inter-American Court on November 16, 2000; testimony of Charly Webster Mclean Cornelio before the Inter-American Court on November 16, 2000; statement by Sydney Antonio P. on August 30, 1998; and statement by Ramón Rayo Méndez on August 29, 1998; sworn statement by Miguel Taylor Ortiz on August 30, 1998; sworn statement by Ramón Rayo Méndez on August 30, 1998.

21 cfr. comprehensive forest management contract signed on March 26, 1992 by Jaime Castillo Felipe, Marcial Salomón Sebastián, Sílaco Castillo Flenery, and Genaro Mendez and Amondo Clarence Demetrio, representing the Awas Tingni Community, and Francisco Lemus Lanuza, representing MADERA y Derivados de Nicaragua, S.A.; and "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast. General framework", March, 1998, prepared by the Central American and Caribbean Research Council.

22 cfr. "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", Final Report and General Framework, March 1998, prepared by the Central American and Caribbean Research Council; testimony of Guillermo Castilleja before the Inter-American Court on November 17, 2000; July 11, 1995 brief by María Luisa Acosta Castellón, attorney for the Awas Tingni Community, to Milton Caldera C., Minister of MAREA.

Concession to the SOLCARS corporation for the utilization of timber

Watson and Emilio Hammer Francis, President and Secretary, respectively, of The Ten Indigenous Communities, to Virgilio Gurdian, Director of the Nicaraguan Agrarian Reform Institute (INRA); September 11, 1998 certification by Otto Borst Conrado, legal representative of the Taoba Raya Indigenous Community; March, 1996 brief requesting "official recognition and demarcation of the ancestral lands" of the Mayagna Awas Tingni Community, to the Regional Council of the RAAN; and September 11, 1998 brief by Rodolfo Spear Smith, General Coordinator of the Indigenous Community of Karátá, addressed to Virgilio Gurdian, Minister of INRA.

on January 5, 1995, the National Forestry Service of MARENA approved the forest management plan submitted by SOLCARSA to utilize timber "in the area of the Wawa River and Cerro Wakambay". In March, 1995, that plan was submitted to the Regional Council of the RAAN. On April 28, 1995, the Regional Coordinator of the RAAN and the SOLCARSA corporation signed an agreement, and on June 28 of that year the Board of Directors of the Regional Council of the RAAN, in resolution No. 2-95, recognized that agreement and authorized the beginning of logging operations in the area of Wakambay, as set forth in the forest management plan;24

k. on March 13, 1996 the State, through MARENA, granted a 30 year concession to the SOLCARSA corporation to manage and utilize the forest in an area of roughly 62,000 hectares located in the RAAN, between the municipalities of Puerto Cabezas and Waspam;25

l. SOLCARSA was sanctioned by Ministerial Order No. 02-97, adopted by MARENA on May 16, 1997, for having illegally felled trees "on the site of the Kukulaya community" and for having carried out works without the environmental permit;26

m. on February 27, 1997 the Constitutional Panel of the Supreme Court of Justice declared the concession granted to SOLCARSA to be unconstitutional because it had not been approved by the plenary of the Regional Council of the RAAN (infra para. 103(a)(iii)). Subsequently, the Minister of MARENA requested that the Regional Council of the RAAN approve this concession.27

24 cfr. June 28, 1995 administrative provision No. 2-95 of the Board of Directors of the Regional Council of the RAAN; testimony in public instrument number one of protocol number twenty of notary public Oscar Saravia Baltodano which includes the "Forest Management and Use Contract" signed on March 13, 1996 by Claudio Gutiérrez Huete, representing MARENA, and Hyoung Seock Byun, representing the SOLCARSA corporation; resolution No. 17-08-10-97 of the Regional Council of the RAAN on October 29, 1997 document "Broad-leaved Forest Management Plan (Final Edition)" prepared by Switewin S.A. Consultores for KUMKYUNG CO., LTD.

25 cfr. testimony of public instrument number one of protocol number twenty of notary public Oscar Saravia Baltodano which includes the "Forest Management and Use Contract" signed on March 13, 1996 by Claudio Gutiérrez Huete, representing MARENA, and Hyoung Seock Byun, representing the SOLCARSA corporation; official letter MN-RSV-02-011.98 on February 16, 1997, by Roberto Stadaghan Vogl, Minister of MARENA, to Michael Kang, General Manager of SOLCARSA; Judgment No. 12 of February 27, 1997, by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on March 29, 1997 before the Appellate Court of Matagalpa by Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, and Claudio Gutiérrez, Minister of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA; and Ministerial order No. 02-97 of May 16, 1997, by the Minister of MARENA.

26 cfr. Ministerial order No. 02-97 of May 16, 1997, by the Minister of MARENA.

27 cfr. Decision No. 12 of February 27, 1997 by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on March 29, 1997 before the Appellate Court of Matagalpa by Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, against Claudio Gutiérrez, Minister of MARENA, and Alejandro Láinez, Director of the National Forestry Administration of MARENA; official letter MN-RSV-02-011.98 on February 16, 1997, by Roberto Stadaghan Vogl, Minister of MARENA, to Efrain Osejo Morales, President of the Regional Council of the RAAN; resolution No. 17-08-10-97 of October 9, 1997 by the Regional Council of the RAAN; request for execution of Judgment No. 12 of February 27, 1997, by the Constitutional Court of the Supreme Court of Justice of Nicaragua, filed on January 22, 1998 at the Secretariat of the Constitutional Court of the Supreme Court of Justice of Nicaragua by Humberto Thompson Sang, member of the Regional Council of the RAAN; February 3, 1998 order by the Constitutional Court of the Supreme Court of Justice of Nicaragua by Humberto Thompson Sang, member of the Regional Council of the RAAN; May 29, 1997 by Roberto Stadaghan Vogl, Minister of MARENA, to Efrain Osejo Morales, President of the Regional Council of the RAAN; statement by Mario Guevara Somarriba on October 3, 1997, and statement by Guillermo Ernesto Espinoza Duarte, Vice-mayor, at that time Acing Mayor of Bilwi, Puerto Cabezas, RAAN, on October 1, 1997.

n. on October 9, 1997, the Regional Council of the RAAN decided to: a) "ratify Administrative Provision No. 2-95 of June 28, 1995, signed by the Board of Directors of the Autonomous Regional Council and the Regional Coordinator of the [RAAN], which approved the logging concession in favor of the SOLCARSA corporation; b) "suspend the existing Agreement between the Regional Government and [SOLCARSA], signed on April 28, 1995", and c) "ratify [...] the Contract for Management and Use of the Forest, signed by the Minister of MARENA and [...] SOLCARSA on March 13, 1996." 28

Administrative efforts made by the Awas Tingni Community

ñ. on July 11, 1995 María Luisa Acosta Castellón, representing the Community, submitted a letter to the Minister of MARENA, with a request that no further steps be taken to grant the concession to the SOLCARSA corporation without an agreement with the Community. The letter also stated that MARENA had the duty to "facilitate the definition of the communal lands and [...] to avoid damaging [...] the territorial claims of the Community", since it was thus stipulated in the agreement signed by the Community, MADENSA, and MARENA in May, 1994 (supra para. 103 (i)). 29

o. In March, 1996 the Community submitted a brief to the Regional Council of the RAAN, in which it requested "that the Regional Council initiate a study process leading the territorial demarcation by the Awas Tingni Community and other interested communities, "so as to ensure their property rights on their ancestral communal lands", and to "prevent the granting of concessions for exploitation of natural resources within the area under discussion without prior consent by the Community". For this, they proposed the following: a) an evaluation of the ethnographic study submitted by the Community and, if necessary, a supplementary study; b) a process of negotiation between the Awas Tingni Community and other communities regarding the borders of their communal lands; c) identification of State lands in the area; and d) "delimitation of the communal lands of Awas Tingni". The Community stated that the request was submitted "due to lack of administrative remedies available within the Nicaraguan legal system through which indigenous communities can ensure property rights to their communal lands". 30

Legal steps and actions

p. First amparo remedy filed by the Awas Tingni Community and its leaders.

p.i) on September 11, 1995 María Luisa Acosta Castellón, acting as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Síriaco Castillo Fenley, representatives of the Community, filed an amparo remedy before the Appellate Court of Matagalpa against Milton Caldera Cardenal, Minister of MARENA, Roberto Araquistain, Director of the National Forestry Service of MARENA, and Alejandro Láinez, Director of the National Forestry

28 cfr. resolution No. 17-08-10-97 of October 9, 1997 by the Regional Council of the RAAN.

29 cfr. July 11, 1995 brief by María Luisa Acosta Castellón, attorney for the Awas Tingni Community, addressed to Milton Caldera C., Minister of MARENA.

30 cfr. March, 1996 brief requesting "official recognition and demarcation of the ancestral lands" of the Mayagna Awas Tingni Community, addressed to the Regional Council of the RAAN.
Administration of MARENA. In that application they requested that: a) the abovementioned officials be ordered to abstain from granting the concession to SOLCARS; that the agents of SOLCARS be ordered to leave the communal lands of Awas Tingni, where they had been carrying out works directed toward initiating the lumber operation and that they begin a process of dialogue and negotiation with the Community, in case the SOLCARS corporation continued to have an interest in utilizing timber on Community lands; b) any other remedies be adopted that the Supreme Court of Justice deemed just; and c) an order be issued to suspend the process of granting the concession requested by MARENA by SOLCARS. Furthermore, when they referred to the Constitutional provisions breached, the applicants stated that the disputed actions and omissions "were violations of articles 5, 46, 89 and 180 of the Nicaraguan Constitution, which together ensure the property and use rights of the indigenous communities to their communal lands" and that, even though "[t]he Community lacks a real title to the lands... the rights in its communal lands have solid foundations in a traditional land tenure system linked to communitarian organization and cultural practices", 31

p.ii) on September 19, 1995 the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa declared the amparo application inadmissible as "unfounded", arguing that the Community had tacitly consented to the granting of the concession, according to the Amparo Law, because the applicants had "in the thirty days since they became aware of the infringement of their rights" elapse, before submitting that application. That Court considered that the applicants were aware of the actions by MARENA since before July 11, 1995, the date at which they addressed a letter to the Minister of MARENA (supra para. 103 (f)); 32

p.iii) on September 21, 1995, María Luisa Acosta Castellón, acting as special agent for Jaime Castillo Felipe, Marcial Salomón Sebastián and Sírico Castillo Fenley, representatives of the Mayagna (Sumo) Awas Tingni Community, filed an amparo application before the Supreme Court of Justice appealing for review of facts as well as law, in which they stated that the Community and its members had not consented to the process of granting the concession, that the remedy "[was] filed against actions which [were] being committed currently, as the Community and its members [became] aware of new violations on a daily basis", and that therefore the thirty days to file the amparo remedy "could [...] begin to be counted as of the last violation which the members of the Community [were] aware of"; 33

p.iv) on February 27, 1997 the Constitutional Panel of the Supreme Court of Justice dismissed the amparo application appealing for review of facts as well as law, based on the same reasons argued by the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa (supra para. 103. p(i)); 34

q. Amparo remedy filed by members of the Regional Council of the RAAN:

q.i) on March 29, 1996, Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, filed an amparo remedy before the Appellate Court of Matagalpa, against Claudio Gutiérrez, Minister of MARENA, and Alejandro Lainéz, Director of the National Forestry Administration of MARENA, for having "signed and authorized" the logging concession to SOLCARS, without it having been discussed and evaluated by the plenary of the Regional Council of the RAAN, thus breaching article 181 of the Constitution of Nicaragua. In that remedy, they requested the implementation of the concession be suspended, and that the concession be annulled; 35

q.ii) on April 9, 1996, the Civil Panel of the Appellate Court of Matagalpa admitted the amparo remedy filed, ordered that the Attorney General of the Republic be informed, warned the officials against whom the remedy had been filed that they should submit reports on their actions to the Supreme Court of Justice, and summoned the parties to appear before the latter Court to file their reports on the acts, decisions and omissions they considered had nullified the amparo remedy (supra para. 103. (f)).
"to exercise their rights." Finally, it denied the request to suspend the disputed act; 36

q.iii) in judgment No. 12 of February 27, 1997 the Constitutional Panel of the Supreme Court of Justice granted the amparo application and ruled that the concession was unconstitutional as it "was not approved by the Regional Council [of the RAAN], but rather by its Board of Directors, and by the Regional Coordinator of the [RAAN]", thus breaching article 181 of the Constitution of Nicaragua; 37

q.iv) on January 22, 1998, Humberto Thompson Sang, a member of the Regional Council of the RAAN, submitted a brief to the Constitutional Court of the Supreme Court of Justice, in which he requested execution of judgment No. 12 issued on February 27, 1997; 38

q.v) on February 3, 1998, the Constitutional Panel of the Supreme Court of Justice issued an order to inform the President of the Republic that the Minister of MARENA had not complied with Judgment No. 12 of February 27, 1997, for the President to order that the Minister duly comply with that judgment, and the Court also ordered that the National Assembly be informed of this; 39

q.vi) in an official letter of February 16, 1998, the Minister of MARENA informed the General Manager of SOLCARSA that he should order "the suspension of all actions" pertaining to the logging concession contract, since that contract had become "devoid of any effect or value," in accordance with judgment No. 12 of February 27, 1997 by the Supreme Court of Justice; 40

r. Second amparo remedy filed by members of the Awas Tingni Community:

r.i) on November 7, 1997, María Luisa Acosta Castellón, representing Benevicto Salomón Mclean, Siracito Castillo Fenley, Orlando Salomón Felipe and Justam López Espinoa, who appeared on their own behalf and as representatives of the Mayagna (Sumo) Awas Tingni Community, filed an amparo remedy before the Civil Court of the Appellate Court of the Sixth Region of Matagalpa, against Roberto Stadthagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration (ADFOREST) of MARENA, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN during the periods from 1994 to 1996 and 1996 to 1998. In that remedy they requested that: a) the concession to SOLCARSA be declared null, because it was granted and ratified setting aside the Constitutional rights and guarantees of the Awas Tingni Community; b) an order be issued for the Board of Directors of the Regional Council of the RAAN to process the request submitted in March, 1996 to "further a process to obtain recognition and official [c]ertification of the property rights of the Community to its ancestral lands;" c) an order be issued for the officials of MARENA to refrain from furthering a concession to utilize [n]atural [r]esources in the area of the concession to SOLCARSA, until land tenure in that area has been defined or an agreement has been reached with Awas Tingni and any other Community which has a justified claim to communal lands within that area", and d) the disputed act be suspended.41

r.ii) on November 12, 1997, the Civil Panel of the Appellate Court of the Sixth Region of Matagalpa admitted the amparo application; it denied the request of the applicants that the act be suspended because "apparently the act ha[d] been carried out;" it ordered that the decision be made known to the Attorney General of the Republic, and that the officials against whom the application had been filed should be notified for them to report to the Supreme Court of Justice on their actions, and it summoned the parties to appear before that Court "to exercise their rights." 42

r.iii) on October 14, 1998, the Constitutional Panel of the Supreme Court of Justice declared "the amparo remedy application to be inadmissible because it

36 cfr. Judgment No. 12, of February 27, 1997, by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on March 29, 1997, before the Appellate Court of Matagalpa by Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, against Claudio Gutierrez, Minister of MARENA, and Alejandro Lainez, Director of the National Forestry Administration of MARENA.
37 cfr. judgment No. 12, of February 27, 1997, by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on March 29, 1997, before the Appellate Court of Matagalpa by Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, against Claudio Gutierrez, Minister of MARENA, and Alejandro Lainez, Director of the National Forestry Administration of MARENA.
38 cfr. request for execution of judgment No. 12, of February 27, 1997 by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the amparo remedy filed on March 29, 1997, before the Appellate Court of Matagalpa by Alfonso Smith Warman and Humberto Thompson Sang, members of the Regional Council of the RAAN, against Claudio Gutierrez, Minister of MARENA, and Alejandro Lainez, Director of the National Forestry Administration of MARENA.
39 cfr. February 3, 1998 judgment by the Constitutional Court of the Supreme Court of Justice of Nicaragua on the request for execution of judgment filed by Humberto Thompson Sang, member of the Regional Council of the RAAN.
40 cfr. official letter MNS-02-0113.98 of February 16, 1998, by Roberto Stadthagen Vogl, Minister of MARENA, to Michael Kang, General Manager of SOLCARSA.
41 cfr. November 12, 1997 decision by the Appellate Court of the Sixth Region, Civil Court, Matagalpa, on the amparo remedy filed by Maria Luisa Acosta Castellon, as legal representative of Benevicto Salomón Mclean, Siracito Castillo Fenley, Orlando Salomón Felipe and Justam López Espinoa, on their own behalf and as Syndic, Coordinator, Town Judge, and Person Responsible for the Forest, respectively, of the Awas Tingni Community, against Roberto Stadthagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration of MARENA, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN; and judgment No. 163 of October 14, 1998, by the Constitutional Court of the Supreme Court of Justice of Nicaragua, on the amparo remedy filed by Maria Luisa Acosta Castellon, as legal representative of Benevicto Salomón Mclean, Siracito Castillo Fenley, Orlando Salomón Felipe and Justam López Espinoa, on their own behalf and as Syndic, Coordinator, Town Judge, and Person Responsible for the Forest, respectively, of the Awas Tingni Community, against Roberto Stadthagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration of MARENA, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN.
42 cfr. November 12, 1997 decision by the Appellate Court of the Sixth Region, Civil Court, Matagalpa, on the amparo remedy filed by Maria Luisa Acosta Castellon, as legal representative of Benevicto Salomón Mclean, Siracito Castillo Fenley, Orlando Salomón Felipe and Justam López Espinoa, on their own behalf and as Syndic, Coordinator, Town Judge, and Person Responsible for the Forest, respectively, of the Awas Tingni Community, against Roberto Stadthagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldaña, Director of the State Forestry Administration of MARENA, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN.
is time-barred”, arguing that the applicants allowed the thirty days to elapse after they became aware of the act, without submitting the remedy. That Court concluded, in this regard, that the concession was signed on March 13, 1996, and that the applicants were aware of the concession shortly after it was signed;\(^{43}\)

s. indigenous communities in Nicaragua have received no title deeds to land since 1990;\(^ {44}\)

t. on October 13, 1998, the President of Nicaragua submitted to the National Assembly the draft bill “Organic Law Regulating the Communal Property System of the Indigenous Communities of the Atlantic Coast and BOSAWAS”, which sought to “implement the provisions of [a]rticles 5, 89, 107, and 180 of the Constitution” because such provisions “require the existence of a legal instrument which specifically regulates delimitation and titling of indigenous community lands, to give concrete expression to the principles embodied in them”\(^ {45}\). At the time this Judgment is issued, the aforementioned draft bill has not yet been adopted as law in Nicaragua.

VIII
VIOLATION OF ARTICLE 25
Right to Judicial Protection

Arguments of the Commission

104. Regarding article 25 of the Convention, the Commission alleged that:

a) despite the fact that the institution of amparo has been protected by the Constitution of Nicaragua (articles 45 and 188) and by Nicaraguan legislation (Law No. 49 or Amparo Law), it has been absolutely ineffective to prevent the State from allowing the foreign firm SOLCARSA to destroy and exploit the lands which for years have belonged to the Awas Tingni Community;

b) the applicants resorted to the jurisdictional body established by law to seek legal remedy to protect them from acts which violated their Constitutional rights. The jurisdictional body must give reasons to support its conclusions, and it must decide on the admissibility or inadmissibility of the legal claim which originates the judicial remedy, after a procedure in which evidence is tendered and there is debate on the allegation. The legal remedy was ineffective, since it did not recognize the violation of rights, it did not protect the applicants in the rights affected, nor did it provide adequate reparation. The court avoided a decision on the rights of the applicants and hindered their exercise of the right to legal remedy pursuant to article 25 of the Convention;

c) almost a year after the second amparo remedy had been admitted, the Supreme Court of Justice ruled against that remedy without deciding on the merits, arguing that the applicants only objected to the initial granting of the concession, and that Court reached the conclusion, in this regard, that the remedy was time-barred, when actually the remedy objected to the lack of response to the territorial claim by the Community and the “alleged” ratification of the concession by the Regional Council of the RAAN in 1997;

d) judicial protection pertains to the obligation of the States parties to ensure that the competent authorities comply with judicial decisions, pursuant to article 25(2)(c) of the Convention. However, in the only case included in the facts in this proceeding, in which there was a ruling on the amparo remedy, the State ignored the judicial decision issued in favor of the indigenous communities, thus breaching the abovementioned article of the Convention. Furthermore, the decision of the Supreme Court of Justice was based on omission of the procedural requirement set forth in article 181 of the Constitution, and it did not protect property rights regarding the area under that concession;

e) the Nicaraguan authorities should have complied with the February 27, 1997 judgment in a timely manner and, therefore, they should have urgently and rapidly suspended any act which had been declared to be unconstitutional, so as to avoid that SOLCARSA cause irreparable damage in the lands of the Awas Tingni Community. However, they did not proceed in this manner. For two years, the Community suffered the continuation of a logging concession which negatively affected their traditional land tenure and their natural resources;

f) the Commission was informed on May 6, 1998 of the suspension of the concession granted to SOLCARSA, a year and a half after the Supreme Court of Justice had ordered that suspension and after the Commission adopted the Report pursuant to article 50 of the Convention;

g) The response of Nicaragua to the Report by the Commission constitutes an acceptance of international responsibility, insofar as it recognizes its obligation, when it points out that it is in the process of complying with the recommendations made in that report;

h) Nicaragua does not allow the indigenous groups access to the Judiciary, and therefore it discriminates against them;

i) There is no effective procedure or mechanism in Nicaragua for demarcation and titling of indigenous land, especially that of the Atlantic Coast communities. Lack of an effective mechanism for titling and demarcation of indigenous lands is clearly visible in the case of Awas Tingni. The complexity of the matter is no excuse for the State not to comply, for

\(^{43}\) Cfr. judgment No. 163 of October 14, 1998, by the Constitutional Court of the Supreme Court of Justice of Nicaragua, on the amparo remedy filed by María Luisa Acosta Castellón, as legal representative of Benevento Salomón Mclean, Siracito Castillo Fleney, Orlando Salomón Felipe and Jotam López Espinoza, on their own behalf and as Syndic, Coordinator, Town Judge, and Person Responsible for the Forest, respectively, of the Awas Tingni Community, against Roberto Stadhaagen Vogl, Minister of MARENA, Roberto Araquistain, General Director of the National Forestry Service of MARENA, Jorge Brooks Saldana, Director of the State Forestry Administration of MARENA, and Efrain Osejo et al., members of the Board of Directors of the Regional Council of the RAAN.

\(^{44}\) Cfr. testimony of Marco Antonio Centeno Caffarena before the Inter-American Court on November 17, 2000; testimony of Charles Rice Hale before the Inter-American Court on November 17, 2000; testimony of Galio Claudio Enrique Gurdian Gurdian before the Inter-American Court on November 17, 2000; and “General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast. General framework”, March, 1996, prepared by the Central American and Caribbean Research Council.

\(^{45}\) October 13, 1998 brief by Arnoldo Alemán Layayo, President of the Republic of Nicaragua, to Noel Pereira Majano, Secretary of the National Assembly; October 13, 1998 bill "Organic Law Regulating the Communal Ownership System of the Indigenous Communities of the Atlantic Coast and BOSAWAS", and official letter DSP-E-9200-10-98 of October 13, 1998 by the Secretary of the Presidency of the Republic of Nicaragua to Noel Pereira Majano, Secretary of the National Assembly.
years, with its duty according to the American Convention, nor to consider that the untitled indigenous lands are State lands, nor to grant concessions to foreign firms on those lands. Even after the State undertook the commitment, in its "1986 Constitution", to guarantee communal property of the indigenous communities, a long period has gone by without this being actually carried out in connection with Awas Tingni and many other indigenous communities;

j) the representatives of Awas Tingni have taken several steps in connection with titling of their lands, addressing the State authorities which have had any relevant competence, including INRA, the institution which was indicated by Nicaragua as the authority which had the power to grant title deed to the indigenous communal lands. On the other hand, according to the tripartite contract signed by the Community, MARENA and MADENSA, MARENA undertook a commitment to provisionally recognize property rights of the Community over the forestry management area and to facilitate a titling process in favor of the Community. However, MARENA did not fulfill this commitment. Furthermore, in March, 1996 the Community submitted a titling request to the Regional Council of the RAAN, but never received a reply, and instead the following year the Council authorized the concession to the SOLCARSA corporation without having consulted with the Community. Finally, the Community met with the President of Nicaragua in February, 1997, to object to the concession and request his aid for those same goals; however, that meeting did not generate any concrete act for the benefit of the Community.

k) in promoting the concession to SOLCARSA, the State did not take into account the Community and its traditional land tenure; Nicaragua considered the area of the concession to be State lands;

l) the Community has no formal title nor any other instrument recognizing its right to the land where they live and where their cultural and subsistence activities take place, even though it has been requesting it from the State for years. Since 1987, Nicaragua has granted no title deeds at all to indigenous communities. The situation of the Community has continued despite efforts made since 1991 to attain demarcation and titling of their traditional land. The State has been negligent and arbitrary in the face of the titling requests by the Community;

m) the principle of estoppel does not allow the State to argue that the Community has no legitimate claim based on traditional or historic land tenure, since that allegation is contrary to positions maintained by the State before the Commission and before the Community on several occasions;

n) for indigenous peoples, access to a simple, rapid, and effective legal remedy is especially important in connection with the enjoyment of their human rights, given the conditions of vulnerability under which they normally find themselves for historical reasons and due to their current social circumstances. In this case, article 25 of the Convention was breached in three ways: unjustified delay in court proceedings; rejection of the remedies filed by the Community, and non-enforcement of the judgment that declared the concession to be unconstitutional; and

f) the granting of the concession to SOLCARSA and omission by the State in not adopting measures to ensure the rights of the Awas Tingni Community to its land and natural resources, according to their traditional patterns of use and occupation, were breaches of articles 1 and 2 of the Convention.

Arguments of the State

105. Regarding article 25 of the Convention, the State, in turn, alleged that:

a) it cannot be established that there has been legislative procrastination in Nicaraguan law that has hindered claiming a right recognized by the Constitution. There is a legal framework to carry out the process of land titling for indigenous communities in the country, through the Nicaraguan Agrarian Reform Institute (INRA), which was ignored by the Community. This juridical framework was established by Law No. 14, "Amendment to the Agrarian Reform Law", on January 11, 1986. The State has granted title deeds to 28 indigenous communities under this law. There is no request for title deed submitted by the community in the files of INRA;

b) there has been no denial of recognition of a right in connection with which there have simply been no requests made to the national authorities. The Awas Tingni Indigenous Community never filed a formal request for land titling before the courts. The Supreme Court of Justice cannot be blamed for not having provided a legal remedy which was never requested. The claims of the Community were all related to their objection to the logging concession granted to SOLCARSA;

c) the Community submitted an ambiguous and obscure request to the Regional Council of the RAAN for it to help fill a normative gap which allegedly existed in this matter. With that, the Community sought to disregard the indigenous land titling procedures, in addition to creating confusion or conflict of jurisdictions between the authorities of the Central Government and of the Regional Governments in the Atlantic Coast;

d) on November 7, 1997 the Community filed an amparo remedy before the Supreme Court of Justice arguing the responsibility of the State for administrative procrastination caused by lack of a decision by the Regional Council of the RAAN, diverting attention from the fundamental issue, arguing that the Community had not submitted any request for titling of its alleged ancestral lands before the competent authorities, which is equivalent to lack of procedural claim;

e) the Community has disregarded domestic procedures under Nicaraguan law, it claims lands which are not ancestral, and through the mechanism of international judicial pressure it seeks to set aside the interests of third parties in the area;

f) the Awas Tingni Community exercised its right to request land titling in a deficient manner, considering that it was doing so when it objected to the logging concession granted on lands that they claim:

1. When the administrative procedure to grant the logging concession had not yet been completed and the authorities of MARENA advised the public on May 17, 18, and 19, 1995 of that circumstance, for third
parties to have the opportunity to object, the Community abstained from raising any objection to that concession, thus turning it into a consensual act.

2. Once the logging concession had been granted to the SOLCARSA corporation, the Community did not resort to the amparo remedy within the term established by law. Through this grave omission, absolutely imputable to the applicant party, they lost the possibility of a judicial review of the administrative decisions pertaining to the concession.

3. In a negligent manner, the Community disputed the judicial decision which denied the amparo remedy mentioned in the previous point, by filing another amparo remedy appealing for review of facts as well as law, in which it did not request suspension of the administrative act which granted the concession. However, the Supreme Court of Justice had to restrict its ruling strictly to the question posed by the applicant (principle of strict right in the review).

4. While the judgment on the remedy appealing for review of facts as well as law was still pending, the Community did not object to the logging concession through a remedy of unconstitutionality, when it had the opportunity to do so. This is another expression of their negligent exercise of their right to petition. The Community had to depend on the action of a third party to obtain what it was incapable of obtaining. The obligation to exhaust all domestic remedies falls exclusively on the applicants, who cannot excuse themselves from their procedural obligation due to remedies filed by third parties;

5. Regarding the request for annulment of the logging concession granted to SOLCARSA, the Nicaraguan judicial system was effective in providing the judicial remedy requested, as that concession was declared null. Those who were not effective were the advisors to the Awas Tingni Community who did not file any remedy of unconstitutionality against that concession, as was done by some members of the Regional Council of the RAAN. Regarding the alleged delay in the enforcement of the judgment that declared the concession to be null, it must be taken into account that the State requested that SOLCARSA suspend the concession shortly after that judgment was issued. Furthermore, the significance of this issue is not clear, as the remedy which led to that judgment was filed by a third party, alleging unconstitutionality of a concession granted in areas which Awas Tingni claims without having demonstrated ancestry nor property rights;

g) the right of Awas Tingni to titling of the non-ancestral lands that it occupies would be subject to a decision by the State, after having consulted with that Community;

h) the Commission has said that Nicaragua uses the excuse that it has not given title deed to the Awas Tingni Community because the territorial claim submitted by the latter is complex. However, there has been no decision on that claim because Awas Tingni has not proven that it has the necessary requirements to substantiate it, specifically that of ancestral occupation of the ancestral lands; and

i) the State has promoted important initiatives in connection with titling of communal lands of the indigenous communities of the Atlantic Coast.

* * *

Considerations of the Court

106. Article 25 of the Convention states that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws [...] or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

(a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;

(b) to develop the possibilities of judicial remedy; and

(c) to ensure that the competent authorities shall enforce such remedies when granted.

107. Article 1(1) of the Convention affirms that

[The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

108. Article 2 of the Convention, in turn, asserts that

[Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

109. The Commission argues, as a key point, lack of recognition of the rights of the Community of Awas Tingni by Nicaragua, and more specifically the ineffectiveness of the procedures set forth in legislation to make those rights of the indigenous communities effective, as well as the lack of demarcation of the lands possessed by that Community. The Commission adds that, despite multiple steps taken by the Community, official recognition of the communal property has not yet been attained, and furthermore it has been prejudiced by a logging concession granted to a company called SOLCARSA on the lands occupied by that community.

110. The State, in turn, argues basically that the Community has disproportionate claims, since its possession is not ancestral, it is requesting title to lands that have been claimed by other indigenous communities of the Atlantic Coast of Nicaragua, and it has never made a formal titling request before the competent authorities.
Nicaragua also maintains that there is a legal framework which regulates the procedure of land titling for indigenous communities under the authority of the Nicaraguan Agrarian Reform Institute (INRA). As regards the logging concession granted to SOLCARSA, the State points out that the Awas Tingni Community suffered no prejudice, as that concession was not executed but rather was declared unconstitutional.

111. The Court has noted that article 25 of the Convention has established, in broad terms,

the obligation of the States to offer, to all persons under their jurisdiction, effective legal remedy against acts that violate their fundamental rights. It also establishes that the right protected therein applies not only to rights included in the Convention, but also to those recognized by the Constitution or the law.46

112. The Court has also reiterated that the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights, “is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention”.47

113. The Court has also pointed out that

the inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it.48

114. This Court has further stated that for the State to comply with the provisions of the aforementioned article, it is not enough for the remedies to exist formally, since they must also be effective.49

115. In the present case, analysis of article 25 of the Convention must be carried out from two perspectives. First, there is the need to analyze whether or not there is a land titling procedure with the characteristics mentioned above, and secondly whether the amparo remedies submitted by members of the Community were decided in accordance with article 25.

a) Existence of a procedure for indigenous land titling and demarcation:

116. Article 5 of the 1995 Constitution of Nicaragua states that:

Freedom, justice, respect for the dignity of the human person, political, social, and ethnic pluralism, recognition of the various forms of property, free international cooperation and respect for free self-determination are principles of the Nicaraguan nation.

[...]

The State recognizes the existence of the indigenous peoples, who have the rights, duties and guarantees set forth in the Constitution, and especially those of maintaining and developing their identity and culture, having their own forms of social organization and managing their local affairs, as well as maintaining communal forms of ownership of their lands, and also the use and enjoyment of those lands, in accordance with the law. An autonomous regime is established in the [...] Constitution for the communities of the Atlantic Coast.

The various forms of property: public, private, associative, cooperative, and communitarian, must be guaranteed and promoted with no discrimination, to produce wealth, and all of them while functioning freely must carry out a social function.

117. Article 89 of the Constitution further states that:

The Communities of the Atlantic Coast are an inseparable part of the Nicaraguan people, and as such they have the same rights and the same obligations.

The Communities of the Atlantic Coast have the right to maintain and develop their cultural identity within national unity; to have their own forms of social organization and to manage their local affairs according to their traditions.

The State recognizes the communal forms of land ownership of the Community of the Atlantic Coast. It also recognizes the use and enjoyment of the waters and forests on their communal lands.

118. Article 180 of said Constitution states that:

The Communities of the Atlantic Coast have the right to live and develop under the forms of social organization which correspond to their historical and cultural traditions.

The State guarantees these communities the enjoyment of their natural resources, the effectiveness of their communal forms of property and free election of their authorities and representatives.

It also guarantees preservation of their cultures and languages, religions and customs.

119. Law No. 28, published on October 30, 1987 in La Gaceta No. 238, Official Gazette of the Republic of Nicaragua, regulated the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua. In this connection, it established that:

Art. 4. The Regions inhabited by the Communities of the Atlantic Coast enjoy, within the unity of the Nicaraguan State, an Autonomous Regime which guarantees effective exercise of their historical and other rights, set forth in the Constitution.

[...]

Art. 9. Rational use of the mining, forestry, fishing, and other natural resources of the Autonomous Regions will recognize the property rights to their communal lands, and must benefit their inhabitants in a just proportion through agreements between the Regional Government and the Central Government.


120. Decree No. 16-96 of August 23, 1996, pertaining to the creation of the National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast, established that "the State recognizes communal forms of property of the lands of the Communities of the Atlantic Coast", and pointed out that "it is necessary to establish an appropriate administrative body to begin the process of demarcation of the traditional lands of the indigenous communities". To this end, the decree entrusts that national commission, among other functions, with that of identifying the lands which the various indigenous communities have traditionally occupied, to conduct a geographical analysis process to determine the communal areas and those belonging to the State, to prepare a demarcation project and to seek funding for this project.

121. Law No. 14, published on January 13, 1986 in La Gaceta No. 8, Official Gazette of the Republic of Nicaragua, called "Amendment to the Agrarian Reform Law", establishes in article 31 that:

The State will provide the necessary lands for the Miskito, Sumo, Rama, and other ethnic communities of the Atlantic of Nicaragua, so as to improve their standard of living and contribute to the social and economic development of the [N]ation.

122. Based on the above, the Court believes that the existence of norms recognizing and protecting indigenous communal property in Nicaragua is evident.

123. Now then, it would seem that the procedure for titling of lands occupied by indigenous groups has not been clearly regulated in Nicaraguan legislation. According to the State, the legal framework to carry out the process of land titling for Indigenous communities in the country is that set forth in Law No. 14, "Amendment to the Agrarian Reform Law", and that process should take place through the Nicaraguan Agrarian Reform Institute (INRA). Law No. 14 establishes the procedures to guarantee property to land for all those who work productively and efficiently, in addition to determining that property may be declared "subject to" agrarian reform if it is abandoned, uncultivated, deficiently farmed, rented out or ceded under any other form, lands which are not directly farmed by their owners but rather by peasants through mederia, sharecropping, colonato, squatting, or other forms of peasant production, and lands which are being farmed by cooperatives or peasants organized under any other form of association. However, this Court considers that Law No. 14 does not establish a specific procedure for demarcation and titling of lands held by indigenous communities, taking into account their specific characteristics.

124. The rest of the body of evidence in the instant case also shows that the State does not have a specific procedure for indigenous land titling. Several of the witnesses and expert witnesses (Marco Antonio Centeno Caffarena, Galo Claudio Enrique Gurdia Gurdia, Brooklyn Rivera Bryan, Charles Rice Hale, Lottie Marie Cunningham de Aguierre, Roque de Jesus Roldan Ortega) who rendered testimony to the Court at the public hearing on the merits in the instant case (supra paras. 62 and 83), expressed that in Nicaragua there is a general lack of knowledge, an uncertainty as to what must be done and to whom should a request for demarcation and titling be submitted.

125. In addition, a March, 1998 document, "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", prepared by the Central American and Caribbean Research Council and supplied by the State in the present case (supra paras. 64, 65, 80 and 96), recognizes "[...]lack of legislation assigning specific authority to INRA to grant title to indigenous communal lands" and points out that it is possible that the existence of "legal ambiguities has [...] contributed to the pronounced delay in the response by INRA to indigenous demands for communal titling". That diagnostic study adds that

[...] there is an incompatibility between the specific Agrarian Reform laws on the question of indigenous lands and the country’s legal system. That problem brings with it legal and conceptual confusion, and contributes to the political ineffectiveness of the institutions entrusted with resolving this issue.

[...]

[...] in Nicaragua the problem is the lack of laws to allow concrete application of the Constitutional principles, or [that] when laws do exist (case of the Autonomy Law) there has not been sufficient political will for them to be regulated.

[...]

[Nicaragua] lacks a clear legal delimitation on the status of national lands in relation to indigenous communal lands.

[...]

[...] beyond the relation between national and communal land, the very concept of indigenous communal land lacks a clear definition.

126. On the other hand, it has been proven that since 1990 no title deeds have been issued to indigenous communities (supra para. 103(5)).

127. In light of the above, this Court concludes that there is no effective procedure in Nicaragua for delimitation, demarcation, and titling of indigenous communal lands.

b) Administrative and judicial steps:

128. Due to the lack of specific and effective legislation for indigenous communities to exercise their rights and to the fact that the State has disposed of lands occupied by indigenous communities by granting a concession, the "General diagnostic study on land tenure in the indigenous communities of the Atlantic Coast", carried out by the Central American and Caribbean Research Council, points out that “‘amparo remedies’ have been filed several times, alleging that a concession by the State (normally to a logging firm) interferes with the communal rights of a specific indigenous community”.

129. It has been proven that the Awas Tingni Community has taken various steps before different Nicaraguan authorities (supra paras. 103(4), (o), (p), (r), as follows:

a) on July 11, 1995, they submitted a letter to the Minister of MARENA in which they requested that no further steps be taken to grant the concession to the SOLCARSA corporation without a prior agreement with the Community;

b) in March, 1996, a request was filed before the Regional Council of the RAAN to ensure their property rights to their ancestral communal lands, in accordance with the Constitution of Nicaragua, and for the Regional Council of the RAAN to prevent the granting of concessions for the utilization of natural resources in the area without the assent of the Community. The latter submitted several proposals for
113. In the instant case, the first amparo remedy was filed before the Appellate Court of the Sixth Region of Matagalpa on November 11, 1995, and the court decision was reached on December 5, 1995. On September 12, 1995, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

114. In the instant case, the first amparo remedy was filed before the Supreme Court of Justice on October 14, 1996, and the court decision was reached on August 2, 1997. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

115. In the instant case, the first amparo remedy was filed before the Civil Court of Justice on October 7, 1997, and the court decision was reached on November 4, 1997. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

116. In the instant case, the first amparo remedy was filed before the Supreme Court of Justice on October 14, 1998, and the court decision was reached on August 2, 1999. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

117. In the instant case, the first amparo remedy was filed before the Civil Court of Justice on November 7, 1999, and the court decision was reached on December 14, 1999. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

118. In the instant case, the first amparo remedy was filed before the Supreme Court of Justice on December 14, 1999, and the court decision was reached on August 2, 2000. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

119. In the instant case, the first amparo remedy was filed before the Civil Court of Justice on October 7, 2000, and the court decision was reached on November 4, 2000. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

120. In the instant case, the first amparo remedy was filed before the Supreme Court of Justice on October 14, 2000, and the court decision was reached on August 2, 2001. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

121. In the instant case, the first amparo remedy was filed before the Civil Court of Justice on November 7, 2001, and the court decision was reached on December 14, 2001. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

122. In the instant case, the first amparo remedy was filed before the Supreme Court of Justice on December 14, 2001, and the court decision was reached on August 2, 2002. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

123. In the instant case, the first amparo remedy was filed before the Civil Court of Justice on October 7, 2002, and the court decision was reached on November 4, 2002. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.

124. In the instant case, the first amparo remedy was filed before the Supreme Court of Justice on October 14, 2002, and the court decision was reached on August 2, 2003. On April 9, 1996, the Constitutional Court of Justice, pursuant to article 2 of the amparo law, granted the remedy to the amparo applicant.
136. Along these same lines, the Court has expressed that

[the general duty under article 2 of the American Convention involves adopting protective measures in two directions. On the one hand, suppressing norms and practices of any type that carry with them the violation of guarantees set forth in the convention. On the other hand, issuing norms and developing practices which are conducive to effective respect for such guarantees.]

137. As stated before, in this case Nicaragua has not adopted the adequate domestic legal measures to allow delimitation, demarcation, and titling of indigenous community lands, nor did it process the amparo remedy filed by members of the Awas Tingni Community within a reasonable time.

138. The Court believes it necessary to make the rights recognized by the Nicaraguan Constitution and legislation effective, in accordance with the American Convention. Therefore, pursuant to article 2 of the American Convention, the State must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the customary law, values, customs and mores of that Community.

139. From all the above, the Court concludes that the State violated article 25 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention.

IX
VIOLATION OF ARTICLE 21
Right to Private Property

Arguments of the Commission

140. Regarding article 21 of the Convention, the Commission argued that:

a) the Mayagna Community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory. There rights "exist even without State actions which specify them". Traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single social conformation throughout the centuries. The overall territory of the Community is possessed collectively, and the individuals and families enjoy subsidiary rights of use and occupation;

b) traditional patterns of use and occupation of territory by the indigenous communities of the Atlantic Coast of Nicaragua generate customary law property systems, they are property rights created by indigenous customary law norms and practices which must be protected, and they qualify as property rights protected by article 21 of the Convention. Non-recognition of the equality of property rights based on indigenous tradition is contrary to the principle of non-discrimination set forth in article 1(1) of the Convention;

c) the Constitution of Nicaragua and the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua recognize property rights whose origin is found in the customary law system of land tenure which has traditionally existed in the indigenous communities of the Atlantic Coast. Furthermore, the rights of the Community are protected by the American Convention and by provisions set forth in other international conventions to which Nicaragua is a party;

d) there is an international customary international law norm which affirms the rights of indigenous peoples to their traditional lands;

e) the State has not demarcated nor titled the indigenous lands of the Awas Tingni Community nor it has taken other effective measures to ensure the property rights of the Community to its ancestral lands and natural resources;

f) the life of the members of the Community fundamentally depends on agriculture, hunting and fishing in areas near their villages. The Community's relations to its land and resources are protected by other rights set forth in the American Convention, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence;

g) the National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast, created for the purpose of preparing a "Demarcation Project", has not contributed to establishing a mechanism for demarcation of the lands of indigenous peoples with their full participation;

h) most inhabitants of Awas Tingni arrived during the 1940s to the place where they have their main residence, having come from their former ancestral place: Tuburús. There was a movement from one place to another within their ancestral territory; the Mayagna ancestors were here since immemorial times;

i) there are lands that have traditionally been shared by Awas Tingni and other communities. The concept of property can consist of co-ownership or in access and use rights, according to the customs of indigenous communities of the Atlantic Coast;

j) the State breached article 21 of the Convention by granting the SOLCARS A corporation a logging concession on lands traditionally occupied by the Community, a concession which endangered the enjoyment of the rights of the indigenous communities, and by considering all lands not registered under formal title deed to be State lands;
k) the members of the Community “occupy and utilize a substantial part of the area of the concession”. The concession granted to the SOLCARSA corporation endangered the economic interests, survival, and cultural integrity of the Community and its members. “[T]he logging operations of SOLCARSA [...], on lands used and occupied by the Awas Tingni Community, specifically, may have damaged thus Community’s forests”. The concession and the actions of the State in connection with it are a violation of the right to property;

l) the complexity of the matter is no excuse for the State not to fulfill its obligations, nor for it to manage the un-titled indigenous lands as if they were State lands;

m) article 181 of the Constitution of Nicaragua refers to the approval of concessions by the State to lands belonging to the State, not to the utilization of resources on communal lands. That article does not authorize MARENA and the Regional Council of the RAAN to authorize logging on private or communal lands without the owner’s authorization;

n) the State must adopt appropriate measures for demarcation of the property of the Community and to fully guarantee the Community’s rights to its lands and resources;

o) in the instant case, the American Convention must be interpreted including the principles pertaining to collective rights of indigenous peoples, pursuant to article 29 of the Convention; and

p) the granting of the concession to SOLCARSA and omission by the State in not adopting measures to guarantee the rights of the Awas Tingni Community to the land and the natural resources, according to its traditional land use and occupation patterns, was a violation of articles 1 and 2 of the Convention.

Arguments of the State

141. Regarding article 21 of the Convention, the State alleged that:

a) there are “particularistic circumstances which place this claim outside the normal scope of indigenist law”. The Community is a small group of indigenous people which resulted from a communal separation and successive geographic shifts; their presence in the region has not been sufficiently documented; they possess lands which are not ancestral and on part of which title has been obtained by other indigenous communities, or other communities claim that they have ancestral possession rights precluding the alleged right of Awas Tingni. Land claims by various ethnic groups have led to the existence of complex conflicting interests, which require careful analysis by national authorities and a delicate process of solution of those conflicts to generate legal certainty. The Community recognized that its population includes persons coming from the Tilba-Lupia indigenous community, which received title deed from the State;

b) Law No. 14, known as the “Amendment to the Agrarian Reform Law” established a legal framework to conduct indigenous communal land titling. Under that law, “numerous indigenous communal land titlings took place”. However, the Community has not made any request to the competent governmental authorities for demarcation and titling;

c) the Community has recognized on different occasions that it received title to the land and it stated this explicitly in the contract it entered into with the MADENSA corporation;

d) The Commission was unable to prove that Awas Tingni was present before 1945 on the lands they claim; the Community itself has recognized that possession of the lands it claims goes back to that year. The State believes that it is a group that separated itself from a “mother” indigenous community, but that it claims separate and independent titling of lands the possession of which is not ancestral;

e) adverse possession does not apply in this case, as the Mayagna Community’s possession was “precarious”;

f) the process of indigenous titling of the communities of the Atlantic Coast is characterized by being complex, due to the following circumstances: a) the phenomenon of proliferation of indigenous communities, as a consequence of the dismemberment of groups of these; b) the phenomenon of grouping and regrouping of indigenous communities with and without title; c) the phenomenon of migration of indigenous communities to occupy lands that are not ancestral; d) the phenomenon of indigenous communities with title that claim ancestral lands as if they had never received title deeds, and e) human groups that claim indigenous titles without having formally accredited their status as indigenous communities according to the law;

g) the area of land claimed by the Community is disproportionate to the number of members of the Community, for which reason it does not have the right under the terms stated in its claim. The Mayagna Community states that it has about 600 members, and it irrationally claims an area of roughly 150,000 hectares, a claim that exceeds the subsistence needs of its members. The area’s biodiversity does not justify the long distances covered for hunting and fishing, which seems to be an argument used by the Community to increase the area they are claiming. Furthermore, a 1995 census indicates that the number of members of the Community is 576 persons, of whom only 43% are Mayagna;

h) in the course of submitting petitions to non-competent authorities, the Awas Tingni Community increased the area claimed, which demonstrates bad faith in its actions and became an obstacle to attaining “an expeditious solution”;

i) the logging concession granted to the SOLCARSA corporation was restricted to areas which were considered to be national lands. Since the process of land titling began on the Atlantic Coast, the State has left “corridors” or “areas of national lands” between the indigenous communities that have received title to their lands. The national authorities of MARENA granted a logging concession to a fraction of an area considered to be a “national lands corridor” and none of the communities disputed it “because they were aware that it was on a fraction of the corridor of national lands that existed between them”. However, the Mayagna Community claims all that area;
j) the logging concession granted to the SOLCARSA corporation caused no damage to the Mayagna Community and that firm did not begin logging activities derived from the concession;

k) the "Forest Management Agreement" signed by the Community, the MADENSA corporation, and the authorities of MARENA, "is not a valid precedent to preclude the legitimacy of the claim to communal ownership by the Mayagna Community. Actions by MARENA -due to its lack of competence in the matter- cannot be used as an allegation to demand recognition of the legitimacy of indigenous land titling claims, because the competent institution to receive and decide on such claims is INRA, currently under the Ministry of Agriculture and Forestry (MAF). The Commission itself accepts that in the aforementioned document "Nicaragua did not recognize ancestral possession, [but rather] simply committed to facilitating the titling of ancestral lands, which presupposed that a claim be submitted to the administrative, jurisdictional authority, and an effective demonstration of ancestry"; and

l) there is a legal framework and a competent authority to conduct land titling for indigenous communities. Nicaragua has promoted important initiatives for titling of communal lands of indigenous communities of the Atlantic Coast.

* * *

Considerations of the Court

142. Article 21 of the Convention declares that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

143. Article 21 of the American Convention recognizes the right to private property. In this regard, it establishes: a) that "[e]veryone has the right to the use and enjoyment of his property"; b) that such use and enjoyment can be subordinate, according to a legal mandate, to "social interest"; c) that a person may be deprived of his or her property for reasons of "public utility or social interest, and in the cases and according to the forms established by law"; and d) that when so deprived, a just compensation must be paid.

144. "Property" can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.\(^\text{56}\)

145. During the study and consideration of the preparatory work for the American Convention on Human Rights, the phrase "[e]veryone has the right to the use and enjoyment of private property, but the law may subordinate its use and enjoyment to public interest" was replaced by "[e]veryone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the social interest." In other words, it was decided to refer to the "use and enjoyment of his property" instead of "private property".\(^\text{57}\)

146. The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.\(^\text{58}\)

147. Article 29(b) of the Convention, in turn, establishes that no provision may be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

148. Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention - which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.

149. Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

150. In this regard, Law No. 28, published on October 30, 1987 in La Gaceta No. 238, the Official Gazette of the Republic of Nicaragua, which regulates the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua, states in article 36 that:

\[^\text{56}\] cfr. Ivcher Bronstein case, supra note 9, para. 122.

\[^\text{57}\] The right to private property was one of the most widely debated points within the Commission during the study and appraisal of the preparatory work for the American Convention on Human Rights. From the start, delegations expressed the existence of three ideological trends, i.e.: a trend to suppress from the draft text any reference to property rights; another trend to include the text in the Convention as submitted, and a third, compromise position which would strengthen the social function of property. Ultimately, the prevailing criterion was to include the right to property in the text of the Convention.

Communal property are the lands, waters, and forests that have traditionally belonged to the Communities of the Atlantic Coast, and they are subject to the following provisions:

1. Communal lands are inalienable; they cannot be donated, sold, encumbered nor taxed, and they are indistinguishable.
2. The inhabitants of the Communities have the right to cultivate plots on communal property and to the usufruct of goods obtained from the work carried out.

151. Indigenous peoples’ customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.

152. As has been pointed out, Nicaragua recognizes communal property of indigenous peoples, but has not regulated the specific procedure to materialize that recognition, and therefore no such title deeds have been granted since 1990. Furthermore, in the instant case the State has not objected to the claim of the Awas Tingni Community to be declared owner, even though the extent of the area claimed is disputed.

153. It is the opinion of the Court that, pursuant to article 5 of the Constitution of Nicaragua, the members of the Awas Tingni Community have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities. Nevertheless, the Court notes that the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property. Based on this understanding, the Court considers that the members of the Awas Tingni Community have the right that the State

a) carry out the delimitation, demarcation, and titling of the territory belonging to the Community; and
b) abstain from carrying out, until that delimitation, demarcation, and titling have been done, actions that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographical area where the members of the Community live and carry out their activities.

Based on the above, and taking into account the criterion of the Court with respect to applying article 29(b) of the Convention (supra para. 148), the Court believes that, in light of article 21 of the Convention, the State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property, and that it has granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled.

154. Together with the above, we must recall what has already been established by this Court, based on article 1(1) of the American Convention, regarding the obligation of the State to respect the rights and freedoms recognized by the Convention and to organize public power so as to ensure the full enjoyment of human rights by the persons under its jurisdiction. According to the rules of law pertaining to the international responsibility of the State and applicable under International Human Rights Law, actions or omissions by any public authority, whatever its hierarchical position, are chargeable to the State which is responsible under the terms set forth in the American Convention.

155. For all the above, the Court concludes that the State violated article 21 of the American Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention.

X

OTHER ARTICLES OF THE AMERICAN CONVENTION

156. In its brief with the final pleadings, the Commission alleged that given the nature of the relationship that the Awas Tingni Community has with its traditional land and natural resources, the State is responsible for the violation of other rights protected by the American Convention. The Commission stated that, by ignoring and rejecting the territorial claim of the Community and granting a logging concession within the traditional land of the Community without consulting the opinion of the Community, “the State breached a combination” of the following articles enshrined in the Convention: 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association), 17 (Rights of the Family); 22 (Freedom of Movement and Residence), and 23 (Right to Participate in Government).

* * *

Considerations of the Court

157. With respect to the alleged violation of articles 4, 11, 12, 16, 17, 22 and 23 of the Convention, as argued by the Commission in its brief on final pleadings, the Court has considered that even when the violation of any article of the Convention has not been alleged in the petition brief, this does not impede the violation being declared by the Court, if the proven facts lead to conclude that such a violation did in fact occur. However, in the instant case, the Court refers to what was decided in this same Judgment in connection with the right to property and the right to judicial protection of the members of the Awas Tingni Community, and it also dismisses the violation of rights protected by the abovementioned article because the Commission did not state the grounds for it in its brief on final arguments.

XI

APPLICATION OF ARTICLE 63(1)

Arguments of the Commission

158. In its application brief, the Commission requested that the Court, pursuant to article 63(1) of the Convention, declare that the State must:


1. Establish a juridical procedure, in accordance with relevant international and national legal norms, which will lead to prompt and specific official recognition and demarcation of the rights of the Awas Tingni Community to its communal natural resources and rights;
2. Abstain from granting or considering any concessions to utilize natural resources in the lands used and occupied by Awas Tingni, until the issue of land tenure affecting Awas Tingni has been resolved, or until a specific agreement has been reached on this matter between the State and the Community;
3. Pay equitable compensation for the monetary and moral damage suffered by the Community due to lack of specific official recognition of its rights to natural resources and lands and due to the concession to SOLCARSA, [and]
4. Pay the Indigenous Community for the costs it incurred in to defend its rights before the Courts in Nicaragua and in the procedures before the Commission and the Inter-American Court.

159. On August 22, 2001 the Commission filed the brief on reparations, costs and expenses, which had been requested by the Secretariat on July 31, 2001. The deadline for filing that brief expired on August 10, 2001, so it was received 12 days after expiration of the term. In this regard, the Court considers that the time elapsed cannot be considered reasonable, according to the criterion the Court has followed in its jurisprudence.

Under the circumstances of this case, the delay was not due to a mere mistake in calculating the term. Furthermore, the imperatives of legal certainty and procedural balance require that terms be respected, unless exceptional circumstances impede this, which did not occur in the instant case. Therefore, the Court rejects the brief filed by the Commission on August 22, 2001, because it was time-barred, and abstains from discussing its content.

Arguments of the State

160. The State, in turn, stated in its briefs responding to the petition and to the final arguments, that:

a) any claim to compensation due to lack of titling or granting of the logging concession to the SOLCARSA corporation is unfounded because:

i) the SOLCARSA concession caused no damage to the Community. In its submission on the facts, the Commission recognized that it is not clear whether there was damage to the forest in the areas claimed by the Community. Execution of the logging activity derived from the concession granted to SOLCARSA did not begin, because the State did not approve the First Management Plan for the logging operation. However, the corporation did in effect cause damage to the forest in the area of Cerro Waakambay, through illegal felling of trees outside the area of the logging concession granted to it. The illegal action by SOLCARSA, which was external to the concession, was a private action not linked to any governmental permissiveness, and which was punished by the State authorities;

b) any claim for compensation derived from actions of the courts of justice is unfounded because the Community:

i) did not request titling of its alleged ancestral lands through judicial procedures;
ii) did not exhaust domestic remedies;
iii) did not exercise due diligence in its procedural actions; and
iv) obtained the annulment of the logging concession, “the only judicial remedy requested”;

the alleged judicial delay attributed to the national courts did not cause any type of moral nor patrimonial damage to the detriment of the Community, because:

i) it was not displaced nor did it suffer invasion of the areas occupied;
ii) it has remained within the area it claims as ancestral, “hunting, fishing, farming, and visiting its sacred places”;
iii) its ancestral form of life (social cohesion, values, beliefs, customs, health standards, and productive patterns) was not altered; and
iv) it suffered no lost earnings nor consequential damages;

d) the State proved that there has been considerable progress regarding land titling of indigenous communities on the Atlantic Coast, such as:

i) making a contract for a study to diagnose the land tenure situation and the areas claimed by those communities; and

ii) preparing a draft bill for the “Special Law to Regulate the Communal Property System of the Indigenous Communities of the Atlantic Coast and BOSAWAS”, and conducting an extensive process of


\[62\] cfr. Case of "The Last Temptation of Christ", supra note 61, Whereas clause No. 4.
consultation with the communities, so as to substantially improve the existing legal and institutional framework; and

e) for the abovementioned reasons, the application for reparations filed by the Commission must be rejected.

161. Regarding costs, in its brief on final pleadings the State indicated that it must not be sentenced to such payment for the following reasons, including that:

a) Nicaragua showed good faith in its allegations;

b) the State proved that the evidence submitted by the Commission regarding ancestral possession of the Community was insufficient, and that its claim is excessive and over-dimensional to the detriment of third parties;

c) the operating costs of the Commission and of the Court are covered by the OAS budget;

d) “access to the Commission [and] the Court is subject to no schedule of fees or rates”;

e) article 45 of the Rules of Procedure states that the party proposing an item of evidence will cover the costs incurred for it; and

f) Nicaragua is one of the poorest States of the hemisphere and must commit its limited resources, among other uses, to funding the costly process of titling and demarcating the lands of indigenous communities.

Considerations of the Court

162. Article 63(1) of the American Convention establishes that

[I]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

163. In the instant case the Court established that Nicaragua breached articles 25 and 21 of the Convention in relation to articles 1(1) and 2 of the Convention. In this regard, the Court has reiterated in its constant jurisprudence that it is a principle of international law that any violation of an international obligation which has caused damage carries with it the obligation to provide adequate reparation for it.63

164. For the aforementioned reason, pursuant to article 2 of the American Convention on Human Rights, this Court considers that the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary laws, values, customs and mores. Furthermore, as a consequence of the aforementioned violations of rights protected by the Convention in the instant case, the Court rules that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awash Tingni Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores. Until the delimitation, demarcation, and titling of the lands of the members of the Community have been carried out, Nicaragua must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awash Tingni Community live and carry out their activities.

165. In the instant case, the Court notes that the Commission did not prove that there were material damages caused to the members of the Mayagna Community.

166. The Court considers that this Judgment is, in and of itself, a form of reparation to the members of the Awash Tingni Community.64

167. The Court considers that due to the situation in which the members of the Awash Tingni Community find themselves due to lack of delimitation, demarcation, and titling of their communal property, the immaterial damage caused must also be repaired, by way of substitution, through a monetary compensation. Under the circumstances of the case it is necessary to resort to this type of compensation, setting it in accordance with equity and based on a prudent estimate of the immaterial damage, which is not susceptible of precise valuation.65 Due to the above and taking into account the circumstances of the cases and what has been decided in similar cases, the Court considers that the State must invest, as reparation for the immaterial damages, in the course of 12 months, the total sum of US$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the

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benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Inter-American Commission. 66

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168. Regarding reimbursement for costs and expenses, this Court must prudently assess them, including expenses for actions taken by the Community before the authorities under domestic jurisdiction, as well as those generated in the course of the proceedings before the inter-American system. This assessment can be done on the basis of the principle of equity. 67

169. To this end, the Court considers that it is equitable to grant, through the Inter-American Commission, the total sum of US$ 30,000 (thirty thousand United States dollars) for expenses and costs incurred by the members of the Awas Tingni Community and their representatives, both those caused in domestic proceedings and in the international proceedings before the inter-American system of protection. To comply with the above, the State must make the respective payment within the term of 6 months from the time of notification of this Judgment.

*   *

170. The State can fulfill its obligations through payment in United States dollars or in an equivalent amount of Nicaraguan currency, using for the respective calculation the exchange rate between both currencies in the New York, United States of America exchange the day before that payment.

171. The payment of immaterial damages as well as of costs and expenses, as set forth in this Judgment, shall not be subject to any current or future tax. Furthermore, if the State were to delay payment, it must pay interest on the amount owed, at the banking rate for delay in Nicaragua. Finally, if for any reason it were not possible for the beneficiaries to receive their respective payments or to receive the respective benefits within the above stated term of twelve months, the State must deposit the respective amounts in their name to an account or certificate of deposit in a solvent financial institution, in United States dollars or their equivalent in Nicaraguan currency, under the most favorable conditions allowed by banking practices and legislation. If after ten years the payment has not been claimed, the amount will be returned, with interest earned, to the Nicaraguan State.

172. According to its regular practice, the Court reserves the authority to oversee full compliance with this Judgment. The proceeding will be concluded once the State has fully complied with the provisions set forth in this decision.

XII
OPERATIVE PARAGRAPHS


173. Therefore,

THE COURT,

By seven votes to one,

1. finds that the State violated the right to judicial protection enshrined in article 25 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention, in accordance with what was set forth in paragraph 139 of this Judgment.

Judge Montiel Argüello dissenting.

By seven votes to one,

2. finds that the State violated the right to property protected by article 21 of the American Convention on Human Rights, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention, in accordance with what was set forth in paragraph 155 of this Judgment.

Judge Montiel Argüello dissenting.

Unanimously,

3. decides that the State must adopt in its domestic law, pursuant to article 2 of the American Convention on Human Rights, the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores, pursuant to what was set forth in paragraphs 138 and 164 of this Judgment.

Unanimously,

4. decides that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni Community and, until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities, the above in accordance with what was set forth in paragraphs 153 and 164 of this Judgment.

Unanimously,

5. finds that this Judgment constitutes, in an of itself, a form of reparation for the members of the Mayagna (Sumo) Awas Tingni Community.

By seven votes to one,
6. finds that, in equity, the State must invest, as reparation for immaterial damages, in the course of 12 months, the total sum of US$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Mayagna (Sumo) Awas Tingni Community, by common agreement with the Community and under supervision by the Inter-American Commission of Human Rights, pursuant to what was set forth in paragraph 167 of this Judgment.

Judge Montiel Argüello dissenting.

By seven votes to one,

7. finds that, in equity, the State must pay the members of the Mayagna (Sumo) Awas Tingni Community, through the Inter-American Commission of Human Rights, the total sum of US$ 30,000 (thirty thousand United States dollars) for expenses and costs incurred by the members of that Community and their representatives, both those caused in domestic proceedings and in the international proceedings before the inter-American system of protection, pursuant to what was stated in paragraph 169 of this Judgment.

Judge Montiel Argüello dissenting.

Unanimously,

8. finds that the State must submit a report on measures taken to comply with this Judgment to the Inter-American Court of Human Rights every six months, counted from the date of notification of this Judgment.

Unanimously,

9. decides to oversee compliance with this Judgment and that this case will be concluded once the State has fully carried out the provisions set forth in this Judgment.

Judges Cançado Trindade, Pacheco-Gómez and Abreu-Burelli informed the Court of their Joint Opinion, Judges Salgado-Pesantes and García-Ramírez informed the Court of their Opinions, and Judge Montiel-Argüello informed the Court of his dissenting vote, all of which accompany this Judgment.

Done at San José, Costa Rica, on August 31, 2001, in Spanish and English, the Spanish text being authentic.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez
Hernán Salgado-Pesantes
JOINT SEPARATE OPINION OF JUDGES
A.A. CANÇADO TRINDADE, M. PACHECO GÓMEZ AND A. ABREU BURELLI

1. We, the undersigned Judges, vote in favour of the adoption of the present Judgment of the Inter-American Court of Human Rights on the merits in the case of the Community Mayagna (Sumo) Awas Tingni versus Nicaragua. Given the importance of the matter raised in the present case, we feel obliged to add the brief reflections that follow, about one of its central aspects, namely, the intertemporal dimension of the communal form of property prevailing among the members of the indigenous communities.

2. At the public hearing held in the headquarters of the Inter-American Court on 16, 17 and 18 November 2000, two members and representatives of the Community Mayagna (Sumo) Awas Tingni pointed out the vital importance of the relationship of the members of the Community with the lands they occupy, not only for their own subsistence, but also for their family, cultural and religious development. Hence their characterization of the territory as sacred, for encompassing not only the members of the Community who are alive, but also the mortal remains of their ancestors, as well as their divinities. Hence, for example, the great religious significance of the hills, inhabited by those divinities.

3. As one of the members of the Community referred to pointed out in his testimony in the public hearing before the Court,

"(...) Cerro Urus Asang is a sacred hill since our ancestors because therein we have buried our grandparents and therefore we call it sacred. Thus, Kiamak is also a sacred hill because there we have (...) the arrows of our grandparents. Then comes Caño Kuru Was, it is an old village. Every name we have mentioned in this framework is sacred(...)".

4. And he then added that

"(...) Our grandparents lived in this hill, they then had had as their small animals (...) the monkeys. The utensils of war of our ancestors, our grandparents, were the arrows. There are stored. (...) We maintain our history, since our grandparents. That is why we have [it] as Sacred Hill. (...) Asangpas Mugeni is spirit of the hill, is of equal form to a human being, but is a spirit [who] always lives under the hills. (...)"

5. As an anthropologist observed in his testimony in the public hearing before the Court, there are two types of sacred places of the members of the Mayagna Community: a) the hills, where the "spirits of the hill" stay, with whom one "ought to have a special relation"; and b) in the frontier zones, the cemeteries, where they bury their dead "within the Community", along the river Wawa, "visited frequently until nowadays by members of the Community", above all when they "go hunting", up to a certain point as a "spiritual act". As another anthropologist and sociologist added, in an expertise, in the same hearing, the lands of the indigenous peoples constitute a space which is, at the same time, geographical and social, symbolic and religious, of crucial importance for their cultural self-identification, their mental health, their social self-perception.

6. As it can be inferred from the testimonies and expertises rendered in the aforementioned public hearing, the Community has a tradition contrary to the privatization and the commercialization and sale (or rent) of the natural resources (and their exploitation). The communal concept of the land - including as a spiritual place - and its natural resources form part of their customary law; their link with the territory, even if not written, integrates their day-to-day life, and the right to communal property itself has a cultural dimension. In sum, the habitat forms an integral part of their culture, transmitted from generation to generation.

7. The Inter-American Court has duly acknowledged these elements, in paragraph 141 of the present Judgment, in which it points out that

"(...) Among the indigenous persons there exists a communitarian tradition about a communal form of the collective property of the land, in the sense that the ownership of this latter is not centered in an individual but rather in the group and his community. (...) To the indigenous communities the relationship with the land is not merely a question of possession and production but rather a material and spiritual element that they ought to enjoy fully, so as to preserve their cultural legacy and transmit it to future generations."

8. We consider it necessary to enlarge this conceptual element with an emphasis on the intertemporal dimension of what seems to us to characterize the relationship of the indigenous persons of the Community with their lands. Without the effective use and enjoyment of these latter, they would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communal. The feeling which can be inferred is in the sense that, just as the land they occupy belongs to them, they in turn belong to their land. They thus have the right to preserve their past and current cultural manifestations, and the power to develop them in the future.

9. Hence the importance of the strengthening of the spiritual and material relationship of the members of the Community with the lands they have occupied, not only to preserve the legacy of past generations, but also to undertake the responsibilities that they have assumed in respect of future generations. Hence, moreover, the necessary prevalence that they attribute to the element of conservation over the simple exploitation of natural resources. Their communal form of property, much wider than the civilist (private law) conception, ought to, in our view, be appreciated from this angle, also under Article 21 of the American Convention on Human Rights, in the light of the facts of the cas d'especie.  

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1. Testimony of Mr. Charlie Webster Mclean Cornelio, in: Inter-American Court of Human Rights (IACHR), Case of the Community Mayagna (Sumo) Awas Tingni - Transcripción de la Audiencia Pública sobre el Fondo Celebrado los Días 16, 17 y 18 de Noviembre de 2000 en la sede de la Corte, p. 26 (mimeographed, internal circulation).

2. Ibid., pp. 41-43.

3. Testimony of Mr. Theodore Macdonald, anthropologist, in ibid., pp. 67-68.

4. Expertise of Mr. Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist, in ibid., pp. 71-72.

5. Cf., e.g., the testimony of Mr. Charlie Webster Mclean Cornelio, member of the Community Mayagna, in ibid., p. 40, and the expertise of Mr. Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist, in ibid., p. 78.
10. The concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are part and that we ought to treat with care, and, in time, with other generations (past and future)\(^6\), in respect of which we have obligations.

11. Cultural manifestations of the kind form, in their turn, the substratum of the juridical norms which ought to govern the relations of the community members inter se and with their goods. As timely recalled by the present Judgment of the Court, the Political Constitution in force of Nicaragua itself provides about the preservation and the development of the cultural identity (in the national unity), and the proper forms of social organization of the indigenous peoples, as well as the maintenance of the communal forms of property of their lands and the enjoyment, use and benefit of them (Article 5)\(^7\).

12. These forms of cultural manifestation and social self-organization have, in this way, materialized, with the passing of time, into juridical norms and into case-law, at both international and national levels. This is not the first time that the Inter-American Court has kept in mind the cultural practices of collectivities. In the case of Aloeboetoe and Others versus Suriname \(\text{(Reparations, Judgment of 10.09.1993)}\), the Court took into account, in the determination of the amount of reparations to the relatives of the victims, the customary law itself of the maroon community (the saramacas, - to which the victims belonged), where polygamy prevailed, so as to extend the amount of the reparations for damages to the several widows and their sons\(^8\).

13. In the case of Bámaca Velásquez versus Guatemala \(\text{(Merits, Judgment of 25.11.2000)}\), the Court took into due account the right of the relatives of the person who had disappeared by force to a worthy grave for the mortal remains of this latter and the repercussion of the issue in the maya culture\(^9\). However, in this Judgment on the merits in the case of the Community Mayagna (Sumo) Awas Tingni, the Court, for the first time, goes into greater depth in the analysis of the matter, in an approximation to an integral interpretation of the indigenous cosmoinvention, as the central point of the present Judgment.

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7. Cf. also Articles 89 and 180 of the Political Constitution in force of Nicaragua.


CONCURRING OPINION OF
JUDGÉ HERNÁN SALGADO PESANTES

I would like to add a few comments in connection with this case.

1. In our hemisphere, land tenure by indigenous peoples and communities in the form of communal property or by ancestral tenure, is a recognized right that many Latin American countries have raised to the level of a constitutional right.

2. This right to the land—which is the entitlement of indigenous peoples—comes under the general heading of the right to property. However, it transcends the right to property in the traditional sense, which mainly concerns the right to private property. Communal or collective tenure, on the other hand, better serves the necessary social function that it is intended to have.

3. The anthropology of the XX century made it abundantly clear that indigenous cultures have a very unique bond with their ancestral lands. They rely upon the land for their survival and look to it for moral and material fulfillment.

4. In this case, there are a number of settlements of indigenous communities (traslapes). When a State delimits and demarcates communal lands, the overriding criterion must be proportionality. With the interested parties participating, the State deeds over those lands that all the inhabitants-members of the indigenous communities will need to carry on their way of life and ensure it for their posterity.

5. Finally, when the right to property is asserted, one must be careful to bear in mind that the enjoyment and exercise of the right to property carries with it duties, from moral to political to social. Overarching all these is a juridical duty, specifically the limitations that law in a democratic State imposes. In the words of the American Convention: “The law may subordinate such use and enjoyment to the interest of society.” (Art. 21(1)).

Hernán Salgado-Pesantes
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN THE
JUDGMENT ON THE MERITS AND REPARATIONS IN THE
“MAYAGNA (SUMO) AWAS TINGNI COMMUNITY CASE”

1. I have voted with the majority on the Court in the Judgment on the merits and reparations in the instant case, which finds that articles 21 and 25 of the American Convention on Human Rights were violated by the detriment of the Mayagna Awas Tingni Community. Before arriving at this decision, the Court carefully examined the arguments of the petitioners, who were represented before this Court by the Inter-American Commission on Human Rights. It also examined the position of the State, which explicitly acknowledged the rights of the Mayagna (Sumo) Awas Tingni Community and its members (par. 152 of the Judgment), the evidence offered at the hearing and other information in the case file. Building on this foundation, the Court has, in my view, correctly interpreted Article 21 of the American Convention on Human Rights.

2. When exercising its contentious jurisdiction, the Inter-American Court is duty-bound to observe the provisions of the American Convention, to interpret them in accordance with the rules that the Convention itself sets forth and those that can be applied under the legal regime governing international treaties, as set forth in the Vienna Convention on the Law of Treaties, of May 23, 1969. It must also heed the principle of interpretation that requires that the object and purpose of the treaties be considered (Article 31(1) of the Vienna Convention), referenced below, and the principle pro homine of the international law of human rights—frequently cited in this Court’s case-law— which requires the interpretation that is conducive to the fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement.

3. Article 29 of the American Convention, which concerns the Convention’s interpretation, states that no provision of the Convention shall be interpreted as restricting the exercise or enjoyment of any right or freedom recognized by virtue of the laws of any State Party (...).” In other words, even assuming, for the sake of argument, that the Convention contained provisions that restricted or limited pre-existing rights, which it does not, those persons protected under the legal regime that the Convention establishes would not forfeit the freedoms, prerogatives or authorities they have under the laws of the State to whose jurisdiction they are subject. The rights, prerogatives and authorities recognized under domestic laws are not supplanted by Convention-recognized rights; instead, they are adjusted to conform to the rights recognized under the Convention, or are added to an ever-growing body of human rights.

4. Article 31(1) of the Vienna Convention on the Law of Treaties provides as follows: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” In this regard, the object and purpose of the American Convention on Human Rights are to uphold human dignity and recognize the demands that the protection and fulfillment of the human person pose, to articulate attendant obligations, and to provide juridical instruments that preserve that human dignity and meet those demands. When examining the ordinary meaning of the terms of the treaty now being applied—namely, the American Convention—, one has to consider the scope and meaning—or scopes and meanings—that the term “property” has in the countries of the Americas.
5. In its Advisory Opinion OC-16/99 (The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process) the Inter-American Court of Human Rights held that "the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (...) but also the system of which it is part" (par. 113). It cited the International Court of Justice, which found that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31). This is precisely what the Inter-American Court has done in the judgment it delivered on the instant case.

6. Various international instruments on the life, culture and rights of indigenous peoples call for explicit recognition of their legal institutions, one of them being the concepts of property once and still prevalent among them. The review of these texts was informed by a wide array of beliefs, experiences and requirements. The finding was that the documents were legitimate and that the land tenure systems must be respected. It necessarily follows, then, that those systems must be recognized and protected. In the final analysis, the individual rights of indigenous persons and the collective rights of their peoples fit into the regime created by the more general instruments that apply to persons living in those territories. This information is useful, if not indispensable, for an interpretation of those Convention provisions that the Court must apply.

7. Geneva Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries was adopted by the 76th General Conference of the International Labour Organisation (Geneva, 1989) out of a concern for the survival of indigenous and tribal peoples' cultures and the institutions that their cultures have produced and protect. It provides that "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." (Article 13(1)). The Convention also provides that "[T]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised." (Article 14(1)).

8. The Draft Declaration on Discrimination against Indigenous Peoples, prepared by the United Nations Economic and Social Council's Sub-Commission on Prevention of Discrimination and Protection of Minorities (E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994) makes clear reference to these very same issues and sets the standards that the international legal community is to observe in matters bearing upon indigenous peoples and the members of their communities. Article 4 stipulates the following: "Indigenous peoples have the right to maintain and strengthen (...) their legal systems (...)". Article 25 provides that "Indigenous peoples have the right to protect (...) the distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard." In Article 26, the Draft Declaration recognizes indigenous peoples' right to "own, develop, control and use the lands and territories," and adds the following: "This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems (...) and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights."

9. The Proposed American Declaration on the Rights of Indigenous Peoples, which the Inter-American Commission on Human Rights approved on February 27, 1997, speaks to the existence, relevance and observance of the individual and collective rights of indigenous peoples. It provides the following: "Indigenous peoples have the right to the legal recognition of the varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and properties. (Article XVII.1). It further states that indigenous peoples "have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood." (Ibid., par. 2).

10. Various bodies of law within the Ibero-American world contain similar provisions, informed by the very same historical and cultural experience. A case in point is the Constitution of Nicaragua, the country to whose jurisdiction the Mayagna (Sumo) Awas Tingni Community is subject. That community is on Nicaragua's Atlantic Coast. Under the heading "Rights of the Atlantic Coastal Communities," that Constitution stipulates that: "The State recognizes the communal land-tenure systems of the Atlantic Coast communities. It also recognizes their right to enjoy, use and exploit the waters and forests on their communal lands. This recognition must be taken into account when interpreting and applying the American Convention, in keeping with the Convention's Article 29(a).

11. When examining this case, the Court considered the scope of Article 21 of the American Convention. Under the title "Right to Property," that article provides that "Everyone has the right to the use and enjoyment of his property." When the Court examined this question, it had before it the travaux preparatoires of the Convention. There one can trace the evolution of the language of Article 21 to its present-day wording. Originally, the article was to speak of the right to private property, specifically. Later, the proposed language changed until the authors finally settled on the wording we have today: "the right to the use and enjoyment of [one's] property." The language in which this right is framed was meant to accommodate all subjects protected by the Convention. Obviously, there is no single model for the use and enjoyment of property. Every people, according to its culture, interests, aspirations, customs, characteristics and beliefs, has its own distinctive formula for the use and enjoyment of property. In short, these traditional concepts have to be examined and understood from the same perspective.

12. A number of countries in the Americas are home to indigenous ethnic groups whose ancestors —this hemisphere's aborigines— built legal systems that predate the conquest and colonization and that are to some extent still in effect. These ethnic groups establish special de facto and de jure relationships with the land that they possessed and from whence they obtained their livelihood. Since the conquest, their legal institutions —which reflect their framers' way of thinking and have the full force of law— have withstood countless attempts to undermine them and have managed to survive to this day. In a number of countries, these indigenous legal institutions have been adopted into the national legal systems and are backed by specific international instruments that assert the lawful interests and traditional rights of the original inhabitants of the Americas and their descendents.

13. Such is the case with the indigenous property system, which does not preclude other forms of land ownership or tenure that are the product of differing
historical and cultural processes. Indeed, it and the other forms of property and land tenure fit into the broad and pluralistic universe of rights that the inhabitants of various American countries enjoy. This set of rights has spread because of shared basic beliefs—the core idea of the use and exploitation of goods—although there are significant differences as well—especially apropos the final disposition of those goods. But, taken together, these laws and rights are the property system that most of our countries have in common. To ignore the idiosyncratic versions of the right to use and enjoy property, recognized in Article 21 of the American Convention, and to pretend that there is only one way to use and enjoy property, is tantamount to denying protection of that right to millions of people, thereby withdrawing from them the recognition and protection of essential rights afforded to other people. Far from ensuring the equality of all persons, this would create an inequality that is utterly antithetical to the principles and to the purposes that inspire the hemispheric system for the protection of human rights.

14. In its analysis of the matter subject to its jurisdiction, the Inter-American Court regarded the rights to use and enjoy property, protected under Convention Article 21, from a perfectly valid perspective, that of the members of the indigenous communities. In my opinion, the approach taken for purposes of the present judgment does not in any way imply a disregard or denial of other related rights that differ in nature, such as the collective rights so frequently referenced in the domestic and international instruments that I have cited in this opinion. It must be recalled that individual subjective rights flow from and are protected by these community rights, which are an essential part of the juridical culture of many indigenous peoples and, by extension, of their members. In short, there is an intimate and inextricable link between individual and collective rights, a linkage that is a condition sine qua non for genuine protection of persons belonging to indigenous ethnic groups.

15. During the hearing held to receive evidence on the merits of the case that the Court has now decided, opinions were proffered that alluded directly to this very point. In his verbal opinion, summarized in the Judgment, expert witness Rodolfo Stavenhagen Gruenbaum pointed out that "(i)n certain historical contexts, the rights of the human person can be fully guaranteed and exercised only by recognizing the rights of the collectivity and of the community to which that person has belonged since birth and of which he is part, a community that affords him the elements necessary to be able to feel self-fulfilled as a human being, which also means a social and cultural being."

16. In the history of the countries of modern-day Latin America, collective expressions of indigenous law have been attacked time and time again. These attacks have directly violated the individual rights of the members of the communities and the rights of the communities as a whole. Another expert heard by the Court, Roque de Jesús Roldán Ortega, spoke to this aspect of the issue. In the opinion he gave before the Court, he stated the following: "The experience in Latin America with the communal property issue is very telling. For almost 180 years, the policy of the Latin American States was to liquidate forms of communal ownership and the autonomous forms of government of the indigenous peoples, to annihilate them not just culturally but physically as well."

17. The Judgment of the Inter-American Court of Human Rights in the Mayagna (Sumo) Awas Tingni Community Case contributes to the recognition of certain specific juridical relationships that together make up the body of law shared by a good portion of the inhabitants of the Americas, a body of law being increasingly accepted by and recognized in domestic laws and international instruments. The topic of this judgment, and by extension the judgment itself, is at that point where civil laws and economic, social and cultural laws converge. In other words, it stands at that juncture where civil law and social law meet. The American Convention, applied in accordance with the interpretation that it authorizes and in accordance with the rules of the Law of Treaties, must be and is a system of rules that affords the indigenous people of our hemisphere the same, certain protection that it affords to all people of the American countries who come under the American Convention’s umbrella.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary
DISSENTING OPINION OF JUDGE MONTIEL ARGÜELLO

1. I dissented on operative paragraphs 1, 2, 6 and 7 of the judgment the Court delivered in the Mayagna (Sumo) Awas Tingni Community Case.

2. I recognize that this is a highly complex case and that the Court and each of its Judges have deliberated upon it calmly and thoughtfully.

3. The Government of Nicaragua is very respectful of indigenous peoples’ rights, which are amply recognized in the Constitution and secondary laws.

4. In my judgment, this case did not involve a violation of Article 25 of the American Convention on Human Rights (hereinafter “the Convention”) which guarantees the existence of an effective judicial remedy against acts that violate fundamental rights. The Court has concluded otherwise, but did so on the basis of a false premise, i.e., that there is no clearly regulated procedure for titling indigenous communities’ properties. The truth is that the Instituto Nicaragüense de Reforma Agraria (Nicaraguan Agrarian Reform Institute - INRA), then the MIDINRA and now the Office of Rural Land Titling, have had property-tilting authorities. Their decisions can be challenged by means of a petition of amparo filed with the Supreme Court. That the existing legislation can be improved is not to say that it does not exist. As the Court acknowledges in its own judgment, the Government of Nicaragua has hired a consulting firm to conduct a comprehensive diagnostic study of all the indigenous communities and has introduced a bill in the Legislative Assembly, titled the “Statute Regulating the Communal Property System of the Atlantic Coast and Bosawas Indigenous Communities.”

5. Again in connection with Article 25 of the Convention, the Court took a number of petitions of amparo under consideration. The first was filed by the Community in September 1995. It was not seeking title to their lands; instead, it was challenging a logging concession that had been awarded. The petition argued that the concession would have a detrimental effect on their lands. The petition was declared inadmissible on the grounds that it was filed extemporaneously. The fact that the Supreme Court decision came down more than one year after the petition was filed was not prejudicial to the Community. The Court would never have granted cert because the petition was filed after the time limit.

6. The other amparo that the Court considered was the constitutionality challenge that two members of the Consejo Regional de la Región Autónoma Atlántico Norte (RAAN) filed in March 1996 and that, after various proceedings, was successful in getting the Court to nullify and cancel the logging concession in question. However, the nullification was based solely on the fact that the concession had not been approved by the Regional Council’s full membership; in other words, it had nothing to do with the demarcation of the Community’s lands and was not filed by the Community.

7. In its finding that Article 21 of the Convention, which guarantees the right to property, had been violated, the Court reasoned that Nicaragua has no procedure for putting into practice the recognition of the communal property of indigenous peoples. That premise is untrue, as the preceding paragraphs show. The fact that no titles of that nature have been awarded since 1990 does not mean that no procedure is in place. It only indicates the indigenous communities’ disinterest in seeking title to their lands. In the specific case of the Awas Tingni Community, it has never filed for a land deed with any competent authority. Instead, its measures were confined to attacking the logging concession mentioned previously. The only grounds for the allegation would have been if applications seeking title had been filed and then rejected.

8. The facts recounted in the preceding paragraphs show that articles 25 and 21 of the Convention, found to have been violated in the judgment of the Court, were not in fact violated.

9. As for the reparations that the Court agreed upon, I must go on record to state that as there was no violation of a Convention-protected right, Article 63 of the Convention does not apply.

Nor is it proper to agree upon an indemnity in the absence of damages. There were no damages in the instant case: no material damages because there was no logging in the concession area; no moral damages, because the fact that the lands were not demarcated did no harm to the traditional way of life of the indigenous people in the Awas Tingni Community.

Concerning the reimbursement of costs and expenses, in my judgment such damages should only be awarded when the State has had no rational reason for contesting the application.

10. The foregoing notwithstanding, it has to be said that the Court has been fair in setting the amounts to be awarded as compensation, and has taken into consideration the difficult economic situation that Nicaragua is experiencing.

Alejandro Montiel-Argüello
Judge ad hoc

Manuel E. Ventura-Robles
Secretario
European Court of Human Rights

Öneriyildiz v. Turkey
Judgment of 18 June 2002
FORMER FIRST SECTION

CASE OF ÖNER YILDIZ v. TURKEY

(Application no. 48939/99)

JUDGMENT

STRASBOURG

18 June 2002

THIS CASE WAS REFERRED TO THE GRAND CHAMBER, WHICH DELIVERED JUDGMENT IN THE CASE ON 30 November 2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.
In the case of Öner Yıldız v. Turkey,

The European Court of Human Rights, sitting as a Chamber composed of:

Mrs E. PALM, President,
Mrs W. THOMASSEN,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEN,
Mr C. BİRŞAN,
Mr J. CASADEVALL,
Mr R. MARUSTE,
and Mr M. O’BOYLE, Section Registrar,

Having deliberated in private on 22 May 2001, 16 October 2001, 23 April 2002 and 27 May 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 48939/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mr Ahmet Nuri Çınar and Mr Maşallah Öner Yıldız, on 18 January 1999.

2. The applicants were represented by Ms Esra Yıldız, of the Istanbul Bar. The Turkish Government ("the Government") were represented by their co-Agent, Mrs Deniz Akçay, assisted by Mrs Gökşen Acar, Counsel.

3. Relying on Articles 2, 8 and 13 of the Convention and on Article 1 of Protocol No. 1, the applicants claimed that the national authorities were responsible for the death of thirteen members of their families and for the destruction of their property as a result of a methane-gas explosion which had occurred on 28 April 1993 in the municipal rubbish tip of Ümraniye (Istanbul). They complained further that the administrative proceedings conducted in the present case were incompatible with the requirements of fairness and speed set forth in Article 6 § 1 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 22 May 2001, the Court decided to disjoin the application and reserve the proceedings in so far as they concerned Mr Ahmet Nuri Çınar, who had since died. It declared the application admissible with regard to the applicant, Maşallah Öner Yıldız ("the applicant"), who had applied to the Court both on his own behalf and on behalf of nine members of his family, namely his wife, Gülnaz Öner Yıldız, his concubine, Sıdıka Zorlu, and his children, Selahaddin, İdris, Mesut, Fatma, Zeynep, Remziye and Abdüllerim Öner Yıldız, who had all died in the accident of 28 April 1993, which is the subject of the present application.

6. On 14 September 2001 the applicant filed two documents: his supplementary observations and his claims for just satisfaction under Article 41 of the Convention. The Government filed observations on the merits of the case and on the claims for just satisfaction on 17 September and 12 October 2001 respectively. On 3 November 2001 the applicant replied to the Government’s observations on the merits. On 10 October 2001 the Government sent the Registry copies of documents relating to a case on which they relied in support of their submissions.

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 October 2001 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government
Mrs D. AKÇAY, co-Agent,
Mrs G. ACAR,
Mr S. KARAKUL, Counsel;

(b) for the applicant
Mr E. DENIZ,
Mr Ş. ACAR, Adviser.

The Court heard addresses by Mr Deniz, Mrs Akçay and Mrs Acar.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who is a Turkish national, was born in 1955 and is now living in Çobançeşme (Alibeyköy, Istanbul). At the material time he and the twelve members of his family were living in the slum quarter (gecekondu mahallesi) of Kazım Karabekir in Ümraniye (Istanbul).
In a judgment delivered on 2 May 1991 under case no. 1989/1088, the Court of Cassation, finding for M.C. and A.C., held that there had been interference with the exercise of their right over the land in question.

However, the Court of Cassation set aside the judgment on 2 March 1992. On 22 October 1992, the Court of Cassation followed the Court of Cassation's judgment and dismissed M.C. and A.C.'s claims.

On 22 January 1960, an easement was created de facto over the site in question, which belonged to the Forestry Commission, and therefore the city council and, ultimately, the ministerial authorities. The site was used as a rubbish tip by the districts of Beykoz, Üsküdar, Kadıköy and Karabekir. On 9 April 1991, Ümraniye District Council applied to the Third Division of the Üsküdar District Court for experts to be instructed to determine whether the rubbish tip complied with the relevant regulations.

The rubbish tip, which ultimately developed into the slums of Ümraniye, was spread out over a surface area of approximately 350,000 square metres and was used as a rubbish tip by the districts of Beykoz, Üsküdar, Kadıköy and Karabekir. From the mountain of refuse, and the tip was not equipped with drainage-water purification systems, nor had drainage or collection systems been installed. The experts concluded from this that the Ümraniye tip exposed humans and animals to every form of danger.

On 15 December 1989, M.C. and A.C. brought proceedings against the district council in the Fourth Division of the Üsküdar District Court to establish title to land. They complained of damage to their plantations and requested the works to be halted. In support of their request, on 21 August 1989, the city council water and mains authority had ordered a water meter to be installed in their house. Furthermore, copies of electricity bills show that M.C. and A.C., as consumers, regularly paid for the water they had used on the basis of the readings taken from a meter installed for that purpose.

In any waste collection site methane, carbon-dioxide and hydrogen-sulphide gases, among others, form. These substances must be collected under supervision and burnt. The tip in question is not equipped with such a system, however. If methane is mixed with air in a particular proportion, it can explode. This installation contains no means of preventing such an explosion occurring as a result of the decomposition of methane occurring naturally. The damage could be very substantial given the neighbouring dwellings.

On 27 May 1991, the City Council was made aware of the report to be ruled inadmissible on the ground that it had been ordered and prepared without the knowledge about it. On 9 June 1991, Nurettin Sözen, the mayor of Istanbul, requested the Environment Council, which had been advised of the report, to be ruled inadmissible on the ground that it had been ordered and prepared without the knowledge about it. However, the Environment Council, which had been advised of the report, to be ruled inadmissible on the ground that it had been ordered and prepared without the knowledge about it.

In any waste collection site methane, carbon-dioxide and hydrogen-sulphide gases, among others, form. These substances must be collected under supervision and burnt. The tip in question is not equipped with such a system, however. If methane is mixed with air in a particular proportion, it can explode. This installation contains no means of preventing such an explosion occurring as a result of the decomposition of methane occurring naturally.
the Istanbul Governor’s Office, the city council and Ümraniye District Council to remedy the problems identified in the present case:

“... The report prepared by the committee of experts indicates that the waste-collection site in question breaches the Environment Act and the Regulation on Solid-Waste Control and consequently poses a health hazard to men and animals. The measures provided for in Articles 24, 25, 26, 27, 30 and 38 of the Regulation on Solid-Waste Control must be implemented at the site of the tip ... I therefore ask for the necessary measures to be implemented ... and for our council to be informed of the outcome.”

15. On 27 August 1992 Şinasi Öktem, the mayor of Ümraniye, applied to the First Division of the Üsküdar District Court for the implementation of temporary measures to prevent the city council and the neighbouring district councils from using the waste-collection site. He requested, inter alia, that no further waste be dumped, that the tip be closed and the damage repaired.

On 3 November 1992 the mayors of Istanbul and Beykoz opposed that request. To that end Mr Sözen submitted, in particular, that a plan to redevelop the site of the tip had been put out to tender and would be implemented during the year 1993.

16. While those proceedings were still pending before the Fourth Civil Division of the Court of Cassation, Ümraniye District Council informed the mayor of Istanbul that from 15 May 1993 no dumping of waste would be authorised.

C. The accident

17. Prior to that date, however, at about 11 a.m. on 28 April 1993 a methane explosion occurred at the site. Following a landslide caused by mounting pressure, the refuse erupted from the mountain of waste and buried some ten slum dwellings situated below it, including the one belonging to the applicant. Thirty-nine people died, including nine members of the Öneryıldız family.

D. The proceedings instituted in the present case

1. The initiative of the Ministry of the Interior

18. Immediately after the accident two members of the municipal police force attempted to establish the facts. After taking evidence from the victims, including the applicant, who explained that he had built his house in 1988, they reported that thirteen huts had been engulfed.

On the same day a crisis committee, set up by the Istanbul Governor’s Office, also went to the site and found that the landslide had indeed been caused by a methane-gas explosion.

19. The next day, on 29 April 1993, the Ministry of the Interior (“the Ministry”) ordered the circumstances in which the catastrophe had occurred to be examined by the administrative investigation department (“the investigation department”) in order to determine whether proceedings should be instituted against the two mayors, Mr Sözen and Mr Öktem.

2. The criminal inquiry

20. While those administrative proceedings were under way, on 30 April 1993 the Üsküdar public prosecutor (“the public prosecutor”) went to the scene of the accident, accompanied by a committee of experts composed of three civil engineering professors from three different universities. In the light of his preliminary observations, he instructed the committee to determine the share of responsibility for the accident attributable to the public authorities and that attributable to the victims.

21. On 6 May 1993 the applicant lodged a complaint with the local police station. He stated that “if it was the authorities that, through their negligence, caused my house to be engulfed and caused my wives’ and children’s death, I hereby lodge a criminal complaint against the authority or authorities concerned”. The applicant’s complaint was added to the investigation file (no. 1993/6102) which had already been opened by the public prosecutor of his own motion.

22. On 14 May 1993 the public prosecutor heard evidence from a number of witnesses and victims of the accident in question. On 18 May 1993 the committee of experts submitted the report ordered by the public prosecutor. The experts confirmed that the landslide – affecting land which had been unstable as it was – could be explained both by the mounting pressure of the gas inside the tip and by the explosion of the tip. Reiterating the obligations and duties on the public authorities under the relevant regulations, the experts concluded that liability for the accident should be attributed as follows:

(i) 2/8 to the Istanbul City Council, which failed to act sufficiently early to prevent the technical problems which already existed when the tip was first created in 1970 and had continued to deteriorate since then, or to indicate to the district councils concerned an alternative waste-collection site, as it was obliged to do under Law no. 3030;

(ii) 2/8 to Ümraniye District Council for implementing a development plan for the area while omitting, contrary to Regulation no. 20814, to provide for a 1,000 metre-wide buffer zone to remain uninhabited, and for attracting illegal dwellings to the region and taking no steps to prevent them from being built, despite the experts’ report of 7 May 1991;

(iii) 2/8 to the inhabitants of the slum for endangering the members of their families by settling near a mountain of waste;
(iv) 1/8 to the Ministry of the Environment for failing to monitor the tip effectively in accordance with Regulation no. 20814 on solid-waste control;

(v) 1/8 to the Government for encouraging the spread of this type of illegal dwelling by granting an amnesty on a number of occasions and property titles to the occupants.

23. On 21 May 1993 the public prosecutor declined jurisdiction *ratione personae* and referred the case to the Governor of Istanbul, considering that it fell within the Prosecution of Civil Servants Act, the application of which was a matter for the administrative council of the province of Istanbul (“the administrative council”). The public prosecutor stated, in his order, that in respect of Istanbul City Council and Ümranıye District Council, the applicable provisions were Articles 230 and 455 § 2 of the Criminal Code.

On 27 May 1993, when the investigative department had completed the preliminary inquiry, the public prosecutor's file was transmitted to the Ministry.

3. **The outcome of the administrative inquiry**

24. On 27 May 1993, having regard to the conclusions of its own inquiry, the investigative department sought authorisation from the Ministry to commence a criminal investigation in respect of the two mayors implicated in the case.

25. The day after that request was made Ümranıye District Council made the following announcement to the press:

“The sole waste-collection site on the Anatolian side stood in the middle of our district of Ümranıye like an object of silent horror. It has broken its silence and caused death. We knew it and were expecting it. As a district council, we had been hammering at all possible doors for four years to have this waste-collection site removed. We were met with indifference by Istanbul City Council. It abandoned the decontamination works ... after laying two spades of concrete at the inauguration. The ministries and the Government were aware of the facts, but failed to take much notice. We had submitted the matter to the courts and they had found in our favour, but the judicial machinery could not be put into action. ... We are now faced with a responsibility and will all account for this to the inhabitants of Ümranıye...”

26. The authorisation sought by the investigative department was granted on 17 June 1993 and a chief inspector from the Ministry (“the chief inspector”) was accordingly put in charge of the case.

In the light of the investigation file compiled in the present case, the chief inspector took down Mr Sözen and Mr Öktem's defence. The latter stated, among other things, that in December 1989 his district council had begun decontamination works in the Hekimbaşi slum area, but that these had been suspended at the request of two inhabitants of the area (see paragraph 10 above).

27. The chief inspector finalised his report on 9 July 1993. It confirmed the conclusions reached by all the experts instructed hitherto and took account of all the evidence gathered by the public prosecutor. It also mentioned two other scientific opinions sent to the Istanbul Governor's Office in May 1993, one by the Ministry of the Environment and the other by a professor of civil engineering at Boğaziçi University. These two opinions confirmed that the fatal landslide had been caused by the methane explosion. The report also indicated that on 4 May 1993 the inspection department had requested the city council to inform it of the measures actually taken in the light of the expert report of 7 May 1991, and it reproduced Mr Sözen's reply:

“Our city council has both taken the measures necessary to ensure that the old sites can be used in the least harmful way possible until the end of 1993 and completed all the preparatory steps for the construction of one of the biggest and most modern installations ... ever undertaken in our country. We are also installing a temporary waste-collection site satisfying the requisite conditions. Alongside that, rehabilitation works are continuing at former sites [which have run their course]. In short, over the past three years our city council has been studying the problem of waste very seriously... [and], currently, the works are continuing...”

28. The chief inspector concluded, lastly, that the death of twenty-six people and the injuries to eleven others (figures available at the material time) on 28 April 1993 had been caused by the two mayors' failure to take appropriate steps in the exercise of their duties and that they should account for their negligence under Article 230 of the Criminal Code. In spite of, *inter alia*, the expert report and the recommendation of the Environment Office, they had knowingly breached their respective duties: Mr Öktem because he had failed to comply with his obligation to order the destruction of the illegal huts situated around the rubbish tip, as he was empowered to do under section 18 of Law no. 775, and Mr Sözen because he had refused to comply with the above-mentioned recommendation, had failed to rehabilitate the rubbish tip or order its closure, and had not complied with any of the provisions of section 10 of Law no. 3030, which required him to order the destruction of the slum dwellings in question, if necessary by his own means.

4. **Allocation of a subsidised dwelling to the Öneryıldız family**

29. In the meantime, the Department of Housing and Rudimentary Dwellings asked the applicant to attend its offices, informing him that, by an order (no. 1739) of 25 May 1993, the city council had allocated him a flat in the subsidised housing complex of Çobançeşme (Eyüp, Alibeyköy). On 18 June 1993 the applicant signed for possession of flat no. 7 in building C-1 of that complex. That transaction was officialised by an order (no. 3927) of 17 September 1993 of the city council. On 13 November 1993 the applicant signed a notarised declaration in lieu of a contract stipulating that the flat in question had been “sold” to him for 125,000,000 Turkish liras (TRL), a quarter of which was payable immediately and the remainder in
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have paid for that lack of foresight with their lives...

30. Both mayors appealed to the Supreme Administrative Court, which dismissed their appeal on 18 January 1995.

31. The proceedings began before the Division on 29 May 1995. At the hearing Mr Sözen stated, among other things, that he could not be expected to have complied with duties which were not incumbent on him or be held solely responsible for a situation which had endured since 1970. Nor could he be blamed for not having rehabilitated the Ümraniye tip when none of the measures which had been made

32. In a judgment of 4 April 1996, the Division found the two mayors guilty as charged, considering their defence to be unfounded. In reaching that conclusion, the judges held as follows:

33. The Division sentenced Mr Sözen and Mr Öktem to prison sentences provided for in Article 230 of the Criminal Code, namely three months, and to fines of TRL 160,000. Under section 4(1) of Law no. 647, the Division commuted the prison sentences into fines, so the penalties ultimately imposed were fines of TRL 610,000. Satisfied that the defendants had accepted the facts and had treated the case as one of unintentional homicide, within the meaning of Article 45 of that Code, the Court of Cassation upheld the Division’s judgment on 10 November 1997.

34. Both mayors appealed to the Supreme Court, which dismissed their appeal on 12 July 1998.

35. The applicant has apparently never been informed of those proceedings or given evidence of any of the administrative bodies of investigation or the criminal courts; nor does any court decision appear to have been served on him.

36. On 3 September 1993, the applicant sued the mayors of Ümraniye and Istanbul and the Ministries of the Interior and the Environment for both pecuniary and non-pecuniary damages. The amount claimed by the applicant was broken down as follows: TRL 500,000,000 in damages for the loss of his dwelling and household goods; TRL 25,000,000,000 in non-pecuniary damages for the applicant’s dwelling and household goods; TRL 20,000,000 for Mr Sözen’s three sons. Mr Öktem submitted that the groups of dwellings which had been buried had never been allowed to develop in Ümraniye until after 1989, and that since then the problem of illegal slum development had been tackled by the city council and Governor’s Office of indifference to the problems. Mr Öktem alleged that responsibility for preventing the construction of illegal dwellings lay with the forestry officials and that, in any event, his district council lacked the funds necessary to undertake the destruction of these huts.

37. In letters of 16 September and 2 November 1993 respectively, the applicant’s claims. The other authorities did not reply.

38. The Court of Cassation’s judgment on 18 May 1995 held...
ordered them to pay the applicant and his children TRL 100,000,000 in non-pecuniary damages and TRL 10,000,000 in pecuniary damages (at the material time those sums amounted to approximately 2,077 and 208 euros respectively).

The latter amount, determined on an equitable basis, was limited to the destruction of household goods, save the domestic electrical appliances, which the applicant was not supposed to own. On that point the court appears to have confined its assessment to the authorities’ submissions that “these dwellings had neither water nor electricity”. The court dismissed the remainder of the claim; in its view, the applicant could not claim to have been deprived of financial support because he had been partly responsible for the damage incurred and the victims had been young children or housewives who had not been in paid employment such as to contribute to the family’s living expenses. The court held that it also ill befitted the applicant to claim compensation for the destruction of his slum dwelling given that, following the accident, he had been allocated a subsidised flat and that, even if the Ümraniye District Council had not exercised its power to destroy the dwelling, nothing could have prevented it from doing so at any time.

The court decided, lastly, not to apply default interest to the damages awarded for non-pecuniary damage.

40. The parties appealed against that judgment to the Supreme Administrative Court, which dismissed their appeal in a judgment of 21 April 1998.

An application for rectification of the judgment, lodged by the City Council, was not successful either, whereupon the judgment became final and was served on the applicant on 10 August 1998.

The damages in question have still not been paid to date.

41. The Ümraniye tip no longer exists today. The local council had it covered with earth and installed air ducts on it. Furthermore, land-use plans are currently being prepared for the areas of Hekimbaşi and Kazım Karabekir. The city council has planted trees on a large area of the former site of the tip and has had sports grounds laid. Two monuments have also been erected there in memory of the victims of the accident of 28 April 1993.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Turkish criminal law

42. The relevant provisions of the Criminal Code read as follows:

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Article 230 §§ 1 and 3

“Any agent of the State who, in the exercise of his public duties ... acts negligently and delays or who, for no valid reason, refuses to comply with the lawful orders ... of his superiors shall be sentenced to a term of imprisonment of between three months and one year and to a fine of between 6,000 and 30,000 Turkish liras ... In every case, if third parties have suffered any damage on account of the negligence or delay by the civil servant in question, the latter shall also be required to compensate for such damage.”

Article 455 § 1 and 2

“Anyone who, through carelessness, negligence or inexperience in his profession or craft, or through non-compliance with laws, orders or instructions, causes the death of another shall be sentenced to a term of imprisonment of between two and five years and to a fine of between 20,000 and 150,000 Turkish liras.

If the act has caused the death of more than one person or has been the cause of the death of one person and the injuries of one or more others ... the perpetrator shall be sentenced to a term of imprisonment of between four and ten years and to a heavy fine of a minimum of 60,000 Turkish liras.”

Article 29 § 8

“The judge has full discretion to determine the principal sentence, which can vary between a minimum and maximum, taking account of factors such as the circumstances in which the offence was committed, the means used to commit it, the importance and seriousness of the offence, the time and place at which it was committed, the various special features of the offence, the seriousness of the damage caused and the risk [incurred], the degree of [criminal] intent ... the reasons and motives for the offence, the aim, the criminal record, the personal and social status of the perpetrator and his conduct following the act [committed]. Even where the minimum penalty is imposed, the reasons for the choice of sentence must be mentioned in the judgment.”

Article 59

“If the court considers that, other than the statutory mitigating circumstances, there are other circumstances favourable to reducing the penalty [imposed] on the perpetrator, capital punishment shall be commuted to life imprisonment and life imprisonment to a term of imprisonment of thirty years.

Other penalties shall be reduced by a maximum of one-sixth.”

43. Sections 4(1) and (6) of Law no. 647 on the Execution of Sentences read as follows:
Section 4(1)

“Apart from imprisonment, short custodial sentences may, having regard to the personality and state of the defendant and to the circumstances in which the offence was committed, be commuted by the court:

(1) to a heavy fine ... of 5,000 to 10,000 Turkish liras per day; ...”

Section 6(1)

“Anyone who has never been sentenced ... to a penalty other than a fine and is sentenced to ... a fine ... and/or a [maximum] term of one year's imprisonment may have his sentence suspended if the court is satisfied that [the offender], having regard to his criminal record and criminal tendencies, will not reoffend if his sentence is thus suspended ...”

44. Under the Turkish Code of Criminal Procedure a public prosecutor who – in any way whatsoever – is informed of a situation which gives rise to a suspicion that an offence has been committed must investigate the facts with a view to deciding whether or not criminal proceedings should be brought (Article 153). However, if the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Prosecution of Civil Servants Act of 1914, which restricts the public prosecutor's jurisdiction ratione personae with regard to that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, decide whether to prosecute.

An appeal to the Supreme Administrative Court lies against a decision of the council. If a decision not to prosecute is taken, the case is automatically referred to that court.

B. Administrative and civil remedies against agents of the State

1. Administrative proceedings

45. With regard to civil and administrative liability arising out of criminal offences, section 13 of Law no. 2577 on administrative procedure provides that anyone who has suffered damage as a result of an act committed by the administrative authorities may claim compensation from the authorities within one year of the alleged act. If this claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

46. With regard to the status and organisation of the administrative courts, the status of the court judges and the organisation of the courts are governed by Law no. 2576 of 6 January 1982 on the powers and constitution of the administrative courts and by Law no. 2575 on the Supreme Administrative Court. Under these Laws, it is in theory the law faculties which recruit judges to the administrative-court benches. Civil servants who are not trained lawyers but have graduated from a law faculty can be recruited on the basis of relevant experience.

Under the Turkish Constitution all administrative judges enjoy, while in service, constitutional safeguards identical to those of civilian judges (Article 140); they may not be removed from office or made to retire early without their consent (Article 139); they sit as individuals (Article 140); and their independence is enshrined in the Constitution, which prohibits any public authority from giving them instructions concerning their judicial activities or influencing them in the performance of their duties (Article 138 § 2).

2. Civil proceedings

47. Under the Code of Obligations, anyone who suffers damage as a result of an illegal act, be it a crime or a tort, may bring an action for damages for pecuniary loss (Articles 41-46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal courts as to a defendant's guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in theory, only bring an action against the public authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. Where an act is found to be tortious or criminal and, consequently, is no longer an “administrative” act or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

C. Enforcement of court decisions by the authorities

48. Article 138 (4) of the Constitution of 1982 provides:

“The bodies of executive and legislative power and the authorities must comply with court decisions; they cannot in any circumstances modify court decisions or defer enforcement thereof.”

Article 28 § 2 of the Code of Administrative Procedure provides:

“2. Decisions determining appeals on matters of both law and fact and concerning a specific amount shall be enforced ... in accordance with the provisions of the ordinary law.”
Under section 82(1) of Law no. 2004 on enforcement and bankruptcies, State property and property which, according to the appropriate law, is not subject to seizure cannot be seized. Section 19(7) of Law no. 1580 of 3 April 1930 on municipalities provides that municipal property can be seized only if it is not being used for a public service.

According to Turkish legal theory in this field, the effect of the above provisions is that if the authorities do not themselves comply with a final and enforceable court decision ordering compensation, the interested party can bring enforcement proceedings under the ordinary law. In that event the appropriate authority has power to impose on the administration the measures provided for by Law no. 2004, although seizure remains exceptional.

D. Regulations governing illegal buildings and sites for the storage of household waste

1. Slums

49. The information and documents in the Court’s possession show that, since 1960, when inhabitants of underprivileged areas started migrating in their masses to the larger rich provinces, Turkey has been confronted with the problem of slums, consisting in most cases of permanent structures to which further floors were soon added. It would appear that currently more than one-third of the population live in such dwellings. Researchers who have looked into the problem maintain that these built-up areas have not sprung up merely as a result of deficiencies in urban planning or shortcomings on the part of the municipal police. They point to the existence of more than eighteen amnesty laws which have been passed over the years in order to regularise the slum areas and, they believe, satisfy potential voters living in these dwellings.

50. Regarding the fight against slum development, the following are the main provisions of Turkish law:

Section 18 of Law no. 775 of 20 July 1966 provides that, after the Law enters into force, any illegal building, whether it is in the process of being built or is inhabited, must be immediately destroyed without any prior decision being necessary. Implementation of these measures is the responsibility of the administrative authorities, which may have recourse to the security forces and other means available to the State. With regard to dwellings built before the Law entered into force, section 21 provides that, under certain conditions, slum inhabitants can purchase the land they occupy and take out low-interest loans in order to finance the construction of buildings which conform to the regulations and urban-development plans. The built-up areas to which the provisions of section 21 apply are declared to be “slum rehabilitation and clearance zones” and are treated in accordance with a plan of action.

Under Law no. 1990 of 6 May 1976, amending Law no. 775, illegal constructions built before 1 November 1976 were also considered to be covered by the above-mentioned section 21. Law no. 2981 of 24 February 1984 concerning buildings which do not conform to the slum and town-planning legislation also provided for measures to be taken for the conservation, regularisation, rehabilitation and destruction of illegal buildings erected prior to that date.

Lastly, Law no. 4706 was passed on 29 June 2001. This Law, which is designed to strengthen the Turkish economy, lays down the terms and conditions of sale to third parties of real estate belonging to the Treasury.

2. Sites for the storage of household and industrial refuse

51. Pursuant to section 6-E, paragraph (j) of Law no. 3030 and Regulation 22 of the Public Administration Regulations implementing that Law, the city councils have a duty to designate waste sites for the deposit of household and industrial waste and to install or have installed systems for recycling and destroying the waste from such sites. Pursuant to Articles 5 and 22 of Regulation no. 20814 of 14 March 1991 on solid-waste control, district councils are responsible for organising the use of waste-collection sites and implementing all measures necessary to prevent rubbish tips from damaging the environment and the health of man and animals. Accordingly, no dwelling can be built at a distance of less than 1,000 metres from a rubbish tip. Regulation 31 empowers city councils to issue permits for the operation of district waste-collection sites.

52. The general information which the Court has been able to procure as to the risk of a methane explosion at such sites can be summarised as follows: methane (\(\text{CH}_4\)) and carbon dioxide (\(\text{CO}_2\)) are the two main products of methanogenesis, which is the final and longest stage of the anaerobic process. These substances are generated, inter alia, by the biological and chemical decomposition of waste. The risks of explosion and fire are mainly due to the large proportion of methane in the bio-gas. The risk of an explosion occurs when there is between 5% and 15% of \(\text{CH}_4\) in the air. Above 15% methane will catch fire, but not explode.

E. The work and conventions of the Council of Europe

53. Concerning the various texts adopted by the Council of Europe in the field of the environment and the industrial activities of the public authorities, mention should be made, among the work of the Parliamentary Assembly, of Resolution 587 (1975) on problems connected with the disposal of urban and industrial waste, Resolution 1087 (1996) on the consequences of the Chernobyl disaster, and Recommendation 1225 (1993)
THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

57. The applicant complained first that the death of nine members of his family in the accident of 28 April 1993 and the flaws in the relevant proceedings constituted a violation of Article 2 of the Convention, the relevant part of which reads:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. …"

58. The Government disputed that submission.

A. Applicability of Article 2 of the Convention

1. Arguments of those appearing before the Court

59. Drawing attention to the meaning of the verb “inflict” in Article 2 of the Convention, the Government submitted that the concept of a positive obligation deriving from that Article could not be construed as imposing on States a duty to protect the life of others in circumstances, such as those of the present case, giving rise to “allegations of negligence”.

60. In any event, they submitted that the operation of an installation for the storage of household waste, which involved only a very slight risk, should not be regarded as the exercise of a potentially dangerous activity or situation, comparable to those pertaining to the spheres of public health and nuclear or industrial installations.

61. The applicant replied, inter alia, that the death of his relatives had been caused by the overt negligence of the relevant authorities and therefore fell within the scope of Article 2 of the Convention.

2. The Court's assessment

62. The Court reiterates that the first sentence of Article 2 § 1 of the Convention enjoins the State not only to refrain from the intentional and unlawful taking of life, but also guarantees the right to life in general terms and, in certain well-defined circumstances, imposes an obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction (see, inter alia, Resolution 1087 (1996) cited above, that right must not be deemed to be limited to the risks associated with the use of nuclear energy in the civil sector.

63. Although not every presumed threat to life obliges the authorities, under the Convention, to take concrete measures to avoid that risk, the position is different, inter alia, if it is established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an individual or individuals and that they failed to take measures within the scope of their powers which might have been expected to avoid that risk (see, mutatis mutandis, Osman v. the United Kingdom, judgment of 28 October 1998, Reports 1998-VIII, p. 3159, § 116).
64. In the light of those principles, the Court must first point out that a violation of the right to life can be envisaged in relation to environmental issues relating not only to the spheres mentioned by the Government (see paragraph 60 above; see, among other authorities, the examples provided by the above-cited L.C.B. judgment; Guerra and Others v. Italy, judgment of 19 February 1998, Reports 1998-I, and Calvelli and Ciglio, cited above; see also, in respect of cases examined under Article 8 of the Convention, Botta v. Italy, judgment of 24 February 1998, Reports 1998-I, p. 422, §§ 33 and 34), but also to other areas liable to give rise to a serious risk for life or various aspects of the right to life.

In that connection it should be reiterated that the recent development of European standards in this respect merely confirms an increased awareness of the duties incumbent on the national public authorities in the environmental field, particularly with regard to installations for the storage of household waste and the risks inherent in operating them (see paragraphs 53 and 54 above).

65. In the Court's view, the positive obligation which derives from Article 2 (paragraphs 62 and 63) is indisputably also applicable to the sphere of public activities in question here; contrary to the Government's assertions (see paragraph 59 above), no distinction needs to be drawn between acts, omissions and "negligence" by the national authorities when examining whether they have complied with that obligation. Any other approach would be incompatible with the object and purpose of the Convention as an instrument for the protection of individual human beings which require that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, for example, McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47).

66. The Court accordingly concludes that Article 2 is applicable in the instant case.

B. Compliance with Article 2 of the Convention

1. Responsibility for the death of the applicant's relatives

67. In the instant case the Court's first task is to determine whether substantial grounds have been shown for believing that the respondent State did not comply with its duty to take all necessary measures to prevent lives from being unnecessarily exposed to danger and, ultimately, from being lost.

To that end it will examine the parties' submissions and the evidence in the case before it under two heads: the implementation of preventive regulations (see, for example, Leray and Others, and Calvelli and Ciglio, § 49, cited above) and respect for the public's right to information, as established by the case-law of the Convention (Guerra and Others, cited above, p. 228, § 60).

(a) The implementation of preventive measures in respect of the Ümraniye installation for the storage of waste and the neighbouring slum areas

(i) Arguments of those appearing before the Court

68. The Government considered unfounded the allegations that the State had not fulfilled its obligation to protect the lives of the members of the Öneryıldız family. They submitted that the Turkish authorities had always gone to great lengths to implement all measures possible to fight against the development of slums both in Ümraniye and throughout the country. The city council had, inter alia, undertaken one of the most ambitious rehabilitation projects in Turkey in respect of waste storage, and in early 1993 had raised funds for state-subsidised housing in order to rehouse the inhabitants of these slums.

69. With regard to the local district council, at the material time it had employed eight members of the municipal police force to carry out the lawful destruction of dwellings situated in the area surrounding the rubbish tip; their attempts to carry out their orders had been met with violent resistance on the part of the inhabitants, however. The difficulties had not stopped there, moreover. The Government cited as an example a case (case no. 89/1088) concerning an action to establish title to land which had been brought against the Ümraniye District Council by inhabitants of the slum seeking to halt rehabilitation work in the area which had commenced in December 1989.

70. Accordingly, the Government submitted, the applicant could not claim to have been in any way encouraged to set up home near the rubbish tip, in an area lacking any installations and public services, moreover.

71. At the hearing the applicant submitted that the problem of slums, in which one-third of Turkish citizens currently lived, had arisen as a result of the waves of immigration knowingly encouraged for political ends by the successive amnesty laws passed to legalise these dwellings. It therefore ill-befitted the Government, he argued, to declare now that they had done anything at all to prevent this problem from occurring.

72. In that connection the applicant rebutted the Government's argument that these areas were not equipped with any public services. Relying on supporting documents drawn up on behalf of two other inhabitants of the slum, he pointed out that the authorities concerned had not only provided the region with all the essential installations and services, but had also levied a land tax on the inhabitants.
The Court's assessment conclusions, which were disturbing to say the least. On the pretext of having started its own rehabilitative works (see paragraph 27 above), it did not comply with the technical shortcomings of the Prime Minister's Environmental Office (see paragraph 14 above) which, having advised the report, had ordered the technical shortcomings to have been remedied. When the mayor of Ümraniye finally attempted to obtain a decision from the judicial authorities to close the rubbish tip, the mayor of İstanbul again obstructed the proceedings by opposing that application, again on the ground that the major redevelopment plans were currently under way (see paragraph 15 above).

75. The Government referred to the decontamination works commenced by the Ümraniye District Council at the request of the Ümraniye District Council in December 1989, but halted by the technical standards of all the relevant authorities (see paragraphs 29 and 51 above). On that point the Government referred to the report of 18 May 1993 (see paragraph 22 above) which, having been advised of the report, had refused to accept the report without further ado. Indeed, although the Court is prepared to accept that the national authorities never encouraged the applicant to set up home in the vicinity of a rubbish tip (see paragraphs 27 and 69 above), or to examine in detail the range of measures taken to prevent the slums from spreading (see paragraphs 49, 50 and 65), it nonetheless remains to be determined whether, in the instant case, the national authorities can be deemed to have complied with those regulations.

76. At the hearing the Government also pointed out that the above-ground work of the obligation to rule on the significance of the city council's planned rehabilitation works, which had still not been effected at the material time (see paragraphs 27 and 69 above), or to examine in detail the range of measures allegedly taken to prevent the slums from spreading (see paragraphs 49, 50 and 65), it nonetheless remains to be determined whether, in the instant case, the national authorities can be deemed to have complied with those regulations.

77. These arguments do not satisfy the Court for the following reasons. Indeed, it had devoted only a single very short paragraph to the risks resulting from the accumulation of methane, without mentioning any risk of a “landslide”.
Despite the démarche to the national authorities, the applicant could not have known of the specific risks inherent in the process of methanogenesis and of the risk of explosions and landslides which were in possession of those authorities, and which the applicant cannot know of and which could not have been imparted to the applicant by any information.

Having regard to the latter finding, the Court must next determine whether the Turkish authorities at least endeavoured to respect the public's right to information.

2. The Court notes at the outset that the file is silent as to the many negligent omissions, at various levels, as regards the hazards posed by the Ümraniye rubbish tip. The authorities failed to do everything that could reasonably have been expected of them within the scope of their powers under the regulations in force to prevent those risks materialising.

82. On this subject the Government referred to the numerous seminars, meetings and press conferences organised by the Ümraniye District Council in order to raise public awareness of the environmental problems affecting the district. The applicant could not have known of the potential dangers which the relevant authorities had been aware of from the outset.

83. The Court reiterates that, in the Guerra and Others case, it held that the applicant needs to have reasonably been expected of him to have accepted the consequences of his own choice. He could accordingly be considered to have had no other possibility of meeting the risk.

Furthermore, they failed to comply with their duty to inform the inhabitants of certain slum areas of Ümraniye of the risks they might have been exposed to, and of the actions which could reasonably have been expected of them.

87. On the other hand, the applicant could not have known of the potential dangers which the relevant authorities had been aware of from the outset. Moreover, the authorities failed to comply with their duty to inform the applicant of the risks he and his family might have been exposed to, and of the actions which could reasonably have been expected of him.

The Court therefore arrives at the conclusion that in the present case the State had infringed Article 8 of the Convention for failing to communicate to the applicants the essential information about the health hazards and risks of landslides which he was reasonably aware of, and which they might reasonably have been expected to have accepted.

88. The Court therefore arrives at the conclusion that in the present case the State had infringed Article 8 of the Convention for failing to communicate to the applicants the essential information about the health hazards and risks of landslides which he was reasonably aware of, and which they might reasonably have been expected to have accepted.
continuing to live in the vicinity of the Hekimbaş rubbish tip (see, mutatis mutandis, L.C.B., cited above, p. 1404, §§ 40-41).

88. In these circumstances a violation of Article 2 of the Convention should be found under this head, unless the applicant's complaints can be considered to have been dealt with at domestic level by effective implementation of the relevant judicial machinery.

2. Redress afforded by legal avenues: compliance with the requirements deriving from the procedural obligation inherent in Article 2

89. It is the Court's task to determine how the courts should have reacted in the particular context of the instant case and to assess, in the light of the relevant principles of case-law, how the case was dealt with here.

(a) Determination of how the courts should have reacted in the circumstances of the case

90. The Court reiterates that the procedural obligation imposed on Contracting States under Article 2 of the Convention presupposes above all the setting-up of an efficient judicial system which, under certain circumstances, must include recourse to the law (see, among other authorities, the above-mentioned cases of Calvelli and Ciglio v. Italy, § 51, and Demiray v. Turkey, § 48), based on the implementation of investigations which are efficient and not arbitrary as to the assessment of the facts causing the death (Leray and Others, cited above). This obligation is based on the – more general – obligation under Article 13, and requires an "adequate and effective" domestic remedy in respect of the violation alleged allowing the appropriate national authority both to deal with the substance of an "arguable complaint" and to grant appropriate relief for the said violation.

91. The Court has held on several occasions that, with regard to the fundamental right to protection of life, Article 2 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the death (see, among many other authorities, Kaya v. Turkey, judgment of 19 February 1998, Reports 1998-I, pp. 324 and 329-30, §§ 86 and 105-07) and the putting in place of effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (Kılıç v. Turkey, no. 22492/93, § 62, ECHR 2000-III; Mahmut Kaya v. Turkey, no. 22535/93, § 85, ECHR 2000-III, and Osman, cited above, p. 3159, § 115; concerning Article 8, see X. and Y. v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 13, § 27).

92. If the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. As stated in the Calvelli and Ciglio case, in the specific sphere of medical negligence, such obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts (Calvelli and Ciglio ibid; see also, mutatis mutandis, Powell v. the United Kingdom (dec.), no. 45305/99, unreported).

93. However, having regard to the sector of public activities at the origin of the applicant's complaints (see paragraphs 51 and 64 above), to the number and status of the authorities found to have breached their duties, to the fact that the repercussions of the risk in question were likely to affect more than one individual (see paragraphs 22 and 81 above), and, lastly, to the tragic nature of the events which occurred in the instant case, the Court finds that the case of Mr Öneryıldız bears no comparison with that of the applicants Calvelli and Ciglio.

It concludes from this that, in the circumstances of the present case, a domestic remedy which could merely result in an award of compensation cannot be considered to be a proper avenue of redress or one capable of discharging the respondent State of its obligation to set up a criminal-law mechanism commensurate with the requirements of Article 2 of the Convention (see, also, the information provided in paragraph 55 above).

94. Indeed, the Court notes that administrative and criminal proceedings were instituted against those responsible for the accident of 28 April 1993. The first resulted in an order against the latter to pay damages (see paragraph 39 above) and the second to a finding of guilt (see paragraph 33 above).

The Court must now determine whether those proceedings can be deemed to have been adequate and effective.

(b) Adequacy and effectiveness of the legal remedies used

(i) Arguments of those appearing before the Court

95. In the alternative, the Government submitted that they should be considered to have complied with all the procedural requirements under Article 2 of the Convention. They maintained that the applicant was not in a position to make any comment on the proceedings relating to his case: he had never expressly complained of "homicide" to the authorities or attempted to exercise his right of intervention in the criminal proceedings; neither had he applied for rectification of the Supreme Administrative Court's judgment or brought civil proceedings for compensation under the Turkish Code of Obligations.
96. The Government maintained that the authorities, on the other hand, had done everything in their power to compensate the applicant for the damage he had sustained. Firstly, only a few weeks after the accident, the Fifth Criminal Division of the Istanbul Criminal Court finally sentenced the two mayors in question to fines of 610,000 Turkish liras (TRL) (equivalent at the material time to approximately 9.70 euros (EUR)), suspended, for negligent omissions in the performance of their duties within the meaning of Article 230 of the Criminal Code (see paragraphs 33 and 42 above).

97. Lastly, the criminal justice system had functioned very efficiently from the preliminary investigation up to the cassation proceedings: the mayors had been found guilty and given final sentences.

98. The applicant had been paid compensation, showing no indulgence towards them. Thirdly, the applicant had been awarded compensation, showing no indulgence towards them. The applicant had been paid compensation, showing no indulgence towards them. The applicant had been awarded compensation, showing no indulgence towards them.

99. The applicant had been awarded compensation, showing no indulgence towards them. The applicant had been awarded compensation, showing no indulgence towards them. The applicant had been awarded compensation, showing no indulgence towards them.

100. In the light of the arguments submitted by the parties, the Court considers that it must first examine the criminal proceedings, and then the possibility that all the remedies available under domestic law may, in certain circumstances, collectively satisfy the requirements of Article 2, even if none of them, taken alone, fully satisfy that provision.
In these circumstances, the Court cannot give any weight to the argument that the applicant did not avail himself of his right to join the criminal proceedings as a civil party. Indeed, even supposing that nothing to show that he was in a position to provide fresh evidence, which had not even considered it worthwhile to hear evidence from the applicant in his capacity as complainant (see paragraph 35 above). That amounts to a disregard for the State's obligation to deal with acts that cause death by applying all the criminal-law machinery set up under domestic law, involving all the procedures designed to penalise effectively those responsible.

In the Court's view, such a deficiency in the application of the Turkish criminal-law machinery could not be remedied either by the alleged effects of the criminal trial on the political career of the mayors concerned or the offer of accommodation made to the applicant (see paragraphs 96 and 97 above).

The Court concludes, on the strength of these observations, that the criminal-law remedy, as used in the present case, could not provide appropriate redress.

With regard to the first point, the Court notes that on 3 September 1993, Mr Öner addressed an initial claim for compensation to the mayors of Ümraniye and Istanbul and to the Ministers of the Interior and the Environment, but was met with implicit or explicit rejections (see paragraphs 36 and 37 above).

The Court considers, however, that it cannot be inferred from these passages alone that there was no acknowledgement, albeit tacit, of the applicant's right to life (see paragraph 32 above).

The judgment of 4 April 1996 does, admittedly, contain passages in which the Court of Cassation, criticising the judges for treating the case as a matter of fact, was aware that the往前 concerned the deaths which had occurred in the criminal trial on the political career of the mayors concerned or the offer of accommodation made to the applicant (see paragraphs 96 and 97 above).
Having regard to the undeniable importance of what was at stake in the proceedings to which he was a party (see paragraph 115 above), Mr Öneyildiz cannot be blamed for not having also brought enforcement proceedings in question for the applicant, who lost nine relatives (see, proceedings. Besides that, the Government have not shown in what respect the judgment of 30 November 1995, upheld by the Supreme Administrative Court, was not enforceable, contrary to what the relevant provisions of the Turkish Constitution appear to suggest (see paragraph 48 above).  

118. Accordingly, notwithstanding the existence of remedies by which the applicant could have compelled the Turkish authorities to comply with a final judicial decision, the authorities should at least have paid the compensation immediately, if only on account of the distressing situation he was in and considering that his failure to bring enforcement proceedings (see paragraph 49 above) was detrimental only to himself because the compensation in question did not even bear default interest (see paragraph 39 above).  

119. The Court therefore considers that the administrative proceedings were also ineffective in a number of respects.

120. This conclusion renders it unnecessary for the Court to rule also on the remedies available under the civil law referred to by the Government (see paragraph 95 above), the aim of which would not essentially have been different from that of the administrative remedy used by the applicant (see, mutatis mutandis, De Moore v. Belgium, judgment of 23 June 1994, Series A no. 292-A, p. 17, § 50).

115. Consequently, the Court cannot accept that the administrative proceedings were not effective in the sense that the applicant’s right to compensation was not recognised until 10 August 1998, when the proceedings definitively ended with service of the judgment of 30 November 1995 (see paragraph 22 above). Moreover, it is clear from the judgment delivered on 30 November 1995 that, in appraising the share of responsibility of each authority concerned, the tribunal of fact merely confirmed the conclusions of an expert report, which had been available since 18 May 1995 (see paragraph 22 above). The applicant’s right to compensation was not recognised until 10 August 1998, when the proceedings definitively ended with service of the judgment of 30 November 1995.

116. The Court also notes that the applicant was ultimately awarded a compensation of a clearly dubious amount, which, furthermore, has still not been paid to date. Consequently, the Court cannot accept that the administrative proceedings were ineffective in the sense that the applicant’s right to compensation was not recognised within a reasonable time.

117. Admittedly, the applicant has never requested payment of the compensation awarded him, a fact that he did not dispute moreover.
II. ALLEGED VIOLATIONS OF ARTICLES 6 AND 13 OF THE CONVENTION

123. The applicant complained of the excessive length of the proceedings in the Administrative Court, and submitted that they had been unfair, given the partial judgment in which they had culminated. In those respects the applicant relied on Article 6 § 1 of the Convention, the relevant part of which provides:

"1. In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

With regard to the facts in relation to Article 2 of the Convention, the applicant also complained that the criminal proceedings brought against those responsible for the death of his relatives and the administrative remedy used to claim compensation for the damage suffered had proved to be completely ineffective and therefore incompatible with the requirements of Article 13 of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

124. The Government submitted that all the foregoing complaints were unreasonable because the applicant had had the full benefit of the remedies available under domestic law which he now claimed were incompatible with the Convention.

125. Having regard to the special circumstances of the present case and to the reasoning which led the Court to find a violation of the procedural aspect of Article 2 of the Convention (see paragraphs 114, 119 and 121 above), the Court holds that it is not necessary to examine the case under Articles 6 § 1 and 13 as well.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

126. The applicant also complained of interference with his private and family life in so far as he had found himself in a situation of indescribable distress as a result of the negligent omissions and indifference of the authorities, which had violated his rights under Article 8 of the Convention, the relevant passages of which read as follows:

"1. Everyone has the right to respect for his private and family life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

127. The Government argued that this allegation was manifestly ill-founded and submitted, inter alia, that neither the accident in question nor the ensuing loss of lives could be deemed to be interference by the Turkish public authorities within the meaning of Article 8 of the Convention.

128. The Court observes that these complaints concern the same facts as those examined under Article 2 and, having regard to its conclusion under that provision (see paragraphs 87 and 122 above), considers it unnecessary to examine them separately.

IV. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

129. The applicant complained, lastly, that the loss of his house and all his household goods following the accident of 28 April 1993 amounted to a violation of Article 1 of Protocol No. 1, which reads:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

130. The Government disputed that submission.

A. Arguments of those appearing before the Court

1. The applicant

131. The applicant, who asserted that Turkish law recognised the right of acquisition of property by adverse possession, claimed that he had used his house continuously and for a sufficiently long time to be deemed to be the owner. On that point he alleged that the authorities' failure to intervene when the dwelling was inhabited and the State's provision of essential services and, above all, the scope of the laws passed over time regularising the dwellings in order to satisfy potential voters living in the built-up areas, suggested that his right of property had been tacitly acknowledged.

On that subject the applicant also referred to the new Law no. 4706 (see paragraph 50 above) according to which no one could argue that real estate belonging to the Treasury could not be purchased.

132. With regard to the issue of redress for the wrongs he had suffered, the applicant pointed out that, contrary to the provisions of the judgment of the Istanbul Administrative Court on the subject of subsidised housing, there had never been any question of providing him with accommodation...
free of charge and that at the date on which the sale had been agreed, his down payment alone would have been sufficient to purchase a flat comparable to the one offered him.

133. With regard to the compensation of TRL 10,000,000 awarded for pecuniary damage, the applicant criticised the – to his mind – contemptuous reasoning of the administrative courts, which found that the Öneryıldız family was not supposed to own household electrical appliances. The reason he had been unable to supply proof to the contrary was that it had been buried under the ruins.

At any rate, the compensation in question, which had still not been paid, had become insignificant owing to the high monetary depreciation observed in Turkey since the above-mentioned judgment had been delivered.

2. The Government

134. The Government denied that there had been any interference in breach of Article 1 of Protocol No. 1 because, they alleged, the applicant's dwelling had been “doubly illegal”. Firstly, as it had been built without a permit it could not as such give rise to “a right of property” or constitute “a possession” for the purposes of that provision; moreover, no such recognition would ever have been forthcoming under domestic law, either tacitly or expressly.

135. Secondly, the applicant could not claim any right to the land he had occupied, which was then and still is property belonging to the Treasury, because, under section 18(2) of Law no. 1617, it could not be acquired by adverse possession.

At the hearing the Government also stressed that, contrary to the applicant's suggestion, the “amnesties” regarding the construction of dwellings, far from serving electoral aims, were merely intended to monitor the essential services in the slums and ensure their integration into the existing urban fabric. In any event, the Government submitted, no “ordinary amnesty” could ever have offset the illegal occupation of the land on which the applicant had built his slum dwelling.

136. In the alternative, the Government requested the Court to take account of the fact that, shortly after the accident in question, the applicant had been provided with subsidised housing for the modest price of TRL 125,000,000, one quarter of which had been payable immediately and the remainder in token monthly instalments staggered over a long period: that sale had had “an entirely social purpose”.

137. Besides that, the Government reiterated that the Administrative Court had awarded the applicant substantial (and in no way negligible) compensation for pecuniary damage.

B. The Court's assessment

1. Preliminary observations

138. In the light of the parties' arguments and the evidence in its possession, the Court notes at the outset that the more general questions raised by the present case, relating, inter alia, to the regularising laws passed in Turkey and the operation of public installations (see paragraphs 49, 50, 71, 131 and 135 above) are of general interest and any doubt which may arise as to the measures taken by the national authorities in that area, in the Court's opinion, a matter for public and political debate which falls outside the scope of application of Article 1 of Protocol No. 1.

The Court, which must as far as possible confine itself to examining the issues raised by the actual case before it, considers that it does not therefore have to examine those issues.

2. Existence of a “possession”

139. The Court reiterates that the concept of “possessions” in Article 1 of Protocol No. 1 has an autonomous meaning and certain rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision (see Iatridis v. Greece [GC], no. 31107/96, § 54, ECHR 1999-II, and Beyeler v. Italy [GC], no. 33202/96, § 100, ECHR 2000-I).

Although it is true that the determination and identification of a right of property is governed by the national legal system and that the applicant must establish both the exact nature of the right he claims and his prerogative to freely enjoy that right, the Court considers that neither the lack of recognition by the domestic laws of a private interest such as a “right” nor the fact that these laws do not regard such interest as a “right of property”, does not necessarily prevent the interest in question, in some circumstances, from being regarded as a “possession” within the meaning of Article 1 of Protocol No. 1 (see, mutatis mutandis, Tre Traktörer AB v. Sweden, judgment of 7 July 1989, Series A no. 159, p. 21, § 53, and Van Marle and Others v. the Netherlands, judgment of 26 June 1986, Series A no. 101, p. 13, § 40).

The issue that accordingly needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see, among other authorities, Zwierzyński v. Poland, no. 34049/96, § 63, ECHR 2001-VI).

140. In that connection the Court notes at the outset that title to the land on which the applicant had built his slum dwelling was vested in the Treasury. The applicant was, moreover, unable to establish that he had any property right or claim in respect of the land in question; neither could he
show that he had brought any proceedings of any kind to establish a right of acquisition by adverse possession (see paragraphs 11 and 131 above).

The Court considers that the dwelling built by the applicant on the land in question calls for a different assessment. It must be accepted, however, that notwithstanding that breach of the planning rules and the lack of any title, the applicant was not guaranteed to all intents and purposes the owner of the dwelling he had built up completely. Since 1988 he had been living in that dwelling, therefore he had been unable to lodge his relatives there and, until the accident of 28 April 1993 (see paragraph 81 above). It goes without saying that the same is true of the burial of the applicant’s slum dwelling. Accordingly, the Court holds that the accumulation of omissions by the administrative authorities regarding the measures necessary to avoid the risk...
of a methane-gas explosion and an ensuing landslide (see paragraph 87 above) to peaceful enjoyment of his "possession" and, for the purposes of the examination of this part of the application, can be regarded as "interference".

4. Justification of the "interference"

147. Having regard to the foregoing, the Court reiterates that the applicant was definitively deprived of his home and all the possessions used to run his daily family life. In that connection it merely needs to be pointed out that the negligent omissions under the domestic legislation (see paragraphs 33 and 39 above) are manifestly in breach of the Court's established case-law (see paragraph 88 above).

148. This conclusion makes it unnecessary for the Court to take its examination further (see mutatis mutandis Iatridis v. Greece, cited above, § 62).

That being so, the Court must determine in this respect also (see paragraph 88 above) whether the applicant's complaints can be regarded as having been addressed domestically. In that connection it should be pointed out that even if the authorities had envisaged demolishing the slum dwelling, the Court in its judgment of 20 November 1995, Series A no. 332, P. 23, § 39, in the instant case, the Court presupposed that in the event such a measure had to be taken, the authorities would at least have required the applicant to remove as many possessions as possible, including certain furnishings which could be removed from his dwelling. The administrative court never considered those requests, however.

In continuing its examination of the statements of the defendant authorities, the Court reiterates that the issue was whether the Kızılarık area was connected to the electricity network, and that the evidence which militated against the defence put forward by the authorities (see paragraphs 10 and 72 above). The Court notes that the length of the administrative proceedings is also a factor to be taken into account in determining whether there has been adequate compensation for the alleged violation (see judgment of 23 April 1987, Series A no. 117, p. 66, § 76). As the Court has already found above, the applicant's right to compensation with a view to awarding him compensation proportionate to the loss actually sustained in respect of the complaint submitted by the applicant (see paragraphs 21, 39 and 129 above).

5. Redress for the applicant's claims

149. In that respect it notes that, in a judgment of 30 November 1995 T.R. 10,000,000 (approximately EUR 210), the applicant was awarded T.R. 10,000,000 (approximately EUR 210) in pecuniary damages for one category of household goods: the administrative court ruled that he could not claim compensation for his dwelling because it could have been destroyed at any time by municipal workers; nor could he claim damages for the loss of any household electrical appliances because the dwelling had not been supplied with electricity. In view of the circumstances of the case, the Court is not satisfied by that assessment.

150. Firstly, the argument that the administrative authorities could have destroyed his dwelling because it could have been destroyed at any time by municipal workers is unfounded. The authorities have acknowledged and then afforded redress for the violation alleged.
The Court therefore concludes that there has been a breach of Article 1 of Protocol No. 1.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. The parties’ submissions

156. The applicant claimed, under the head of pecuniary damage sustained by himself and his three minor children, a total sum of 400,000 US dollars (USD), which he broke down as follows:

(i) USD 2,000 for funeral expenses for the nine members of his family who had died. In that connection the applicant relied on a newspaper article which reported that another victim of the same accident, C.O., had been billed 550,000,000 Turkish liras (TRL) by the city council for the burial of his wife and four children;

(ii) USD 100,000 for the loss of financial support as a result of the death of his wife and concubine, who had had daytime jobs as cleaners;

(iii) USD 150,000 for the loss of the financial support which his seven children who had died could have provided in future;

(iv) USD 50,000 for loss of the financial support with which the children's mother would have provided her children in the future;

(v) USD 98,000 for the total destruction of his house and household goods. The applicant accepted that he was not in a position to provide any evidence in support of his claims under this head and left it to the Court's discretion to assess the relevant damage.

The applicant also claimed, on his own behalf and on behalf of his surviving children, compensation of USD 800,000 for non-pecuniary damage.

157. As their main submission, the Government maintained that no redress was necessary in the instant case. In the alternative, they asked the Court to dismiss the applicant's claims, which they considered to be exorbitant and based on notional estimates.

With regard to the alleged loss of financial support, they confined themselves to the submission that the claim was merely speculative.

With regard to the dwelling and chattels, the Government stressed that the applicant had submitted no evidence in support of that claim. They submitted that the applicant had never acquired title to the slum dwelling in question and reiterated that a much more comfortable flat had been offered him in the district of Alibeyköy for a sum which, at the material time, was the equivalent of USD 9,237 (9,966 euros), only one quarter of which had been made as a down payment. In that connection they submitted examples of advertisements for similar flats in that district at prices of, on average, between TRL 11,000,000,000 and 19,000,000,000 (approximately 7,900 and 13,700 euros respectively). They also supplied a list drawn up by the city council showing that house prices in Alibeyköy-Çobançeşme varied between TRL 9,100,000,000 and 13,000,000,000 (approximately 6,600 and 9,400 euros respectively). With regard to the household goods, the Government submitted catalogues of such goods and drew attention to the need to take account of the compensation which had been awarded by the Administrative Court under that head.

With regard to the head of non-pecuniary damages, the Government submitted that the claim was excessive and tended towards an unjust enrichment, contrary to the spirit of Article 41 of the Convention. In that connection they criticised the applicant for deliberately choosing not to claim payment of the compensation awarded by the Administrative Court under that head, in the hope of increasing his chances of being awarded a higher sum by the Court.

2. The Court’s assessment

158. Regarding the pecuniary damage referred to by the applicant, the Court's case-law has established that there must be a clear causal link between the damage claimed and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of financial support (see, among other authorities, Barberà, Messegué and Jabardo v. Spain, judgment of 13 June 1994 (Article 50), Series A no. 285-C, pp. 57-58, §§ 16-20; Salman v. Turkey [GC], no. 21986/93, § 137, ECHR 2000-VII; and Demiray v. Turkey, no. 27308/95, § 67, ECHR 2000-XII).

With regard first to the violation found of Article 2 (see paragraph 122 above), the Court considers that such a link does exist with regard to the claim for reimbursement of funeral expenses. Although the applicant's claim under that head has not been duly documented, the Court assesses the damage on an equitable basis, under Article 41 of the Convention, at 1,000 euros (EUR).

The file does not contain any evidence of the income of the applicant's wife, concubine and children before their death. The amounts claimed under that head are therefore speculative, as the Government have pointed out.
However, having regard to the evidence pertaining to the applicant's family and the evidence bearing on the applicant's living conditions and socio-economic situation, the Court recognises that if the deceased were still alive, they would have been able to contribute to supporting the family. It therefore considers that the compensation should be awarded to the applicant and her surviving children, that the costs and expenses should be recovered from the respondent Government and that the injury suffered was non-pecuniary damage.

158. Regarding pecuniary damage, the Court notes that the applicant submitted copies of postal receipts and a bill for translation services. The Court is minded to award the applicant a sum of EUR 1,500 under this head. That said, the Court agrees with the Government that the amount of EUR 1,500 claimed for translation expenses was excessive and unjustified. The Court will accordingly take account of the methods of calculation used in comparable cases (see paragraphs 39 and 154 above).

159. As regards the alleged loss of the slum dwelling, the Court has made its assessment on the basis of its own calculations, having regard to the reasonable cost of a dwelling in the area of 30% of the average market price of flats in the area of Çobançe, in Istanbul, plus the cost of the household items shown in the catalogues submitted to the Court and the economic data concerning the sale of a flat to the applicant by the city council (see paragraph 29 above). The Court observes that the amount of EUR 133,000 claimed by the applicant is in line with the Court's practice (see, respectively, Akdivar and Others v. Turkey, judgment of 1 April 1998, Reports of Judgments and decisions of 1998-II, and Menteş and Others v. Turkey, judgment of 24 July 1998, Reports of Judgments and decisions of 1998-IV). The Court assesses the damage suffered at EUR 133,000.

160. In respect of non-pecuniary damage, the Court considers that the applicant undoubtedly suffered a great deal as a result of the violation of Article 2 it has found: not only did he lose several members of his family, but he must also have felt powerless in the face of the unsatisfactory workings of justice with regard to those responsible. The Court agrees with the Government that the amount of EUR 150,000 claimed is excessive and unjustified. The Court will accordingly take account of the methods of calculation used in comparable cases (see paragraphs 157 above and 39 above). Having regard to the particular circumstances of the case and the suffering which must also have affected the applicant's surviving children, the Court awards an aggregate sum of EUR 16,000. That said, it notes that the applicant has not submitted any bill of costs and fees. In accordance with Rule 60 § 2 of the Rules of Court, the Court cannot accordingly accept that request as such. The applicant, however, has presented evidence in the form of photocopying, translation, fax and other expenses, which he has assessed at USD 790 in all, USD 200 of which were the cost of traveling to the Supreme Administrative Court in Ankara. In support of his claim, the applicant submitted copies of postal receipts and a bill for translation services. The Court is minded to award the applicant a sum of USD 500 for the expenses incurred in support of his claim. That said, the Court agrees with the Government that the amount of USD 200 for the journey between Ankara and Istanbul was not directly related to the instant case and that the amount of USD 500 claimed for translation expenses was unacceptable because USD 184.

161. With regard next to the breach the Court has found of Article 2 of the Convention, the Court notes firstly that the applicant has not supplied a breakdown of the number of hours worked by his lawyer at the rate of USD 150 per hour, as determined by the Istanbul Bar's scale of minimum fees. He also claimed reimbursement for photocopying, translation, fax and other expenses, which he assessed at USD 790 in all, USD 200 of which were the cost of traveling to the Supreme Administrative Court in Ankara. The Court notes that the applicant submitted copies of postal receipts and a bill for translation services. The Court is minded to award the applicant a sum of USD 500 for these expenses. That said, the Court agrees with the Government that the amount of USD 200 for the journey between Ankara and Istanbul was not directly related to the instant case and that the amount of USD 500 claimed for translation expenses was unacceptable because USD 184.

162. As regards the alleged loss of the slum dwelling, the Court has made its assessment on the basis of its own calculations, having regard to the reasonable cost of a dwelling in the area of 30% of the average market price of flats in the area of Çobançe, in Istanbul, plus the cost of the household items shown in the catalogues submitted to the Court and the economic data concerning the sale of a flat to the applicant by the city council (see paragraph 29 above). The Court observes that the amount of EUR 133,000 claimed by the applicant is in line with the Court's practice (see, respectively, Akdivar and Others v. Turkey, judgment of 1 April 1998, Reports of Judgments and decisions of 1998-II, and Menteş and Others v. Turkey, judgment of 24 July 1998, Reports of Judgments and decisions of 1998-IV). The Court assesses the damage suffered at EUR 133,000.

163. As regards the value of the chattels and despite the lack of any indication by the applicant, the Court considers, having regard to the particular circumstances of the case and the suffering which must also have affected the applicant's surviving children, that the applicant should be awarded EUR 1,500 under this head.

164. In conclusion, the Court awards the applicant EUR 154,000 in pecuniary and non-pecuniary damages, on the understanding that this sum, to be converted into Turkish liras at the date applicable on the date of settlement, shall be exempt from all taxes and duties.

B. Costs and expenses

165. The applicant claimed USD 30,000 in legal fees for 200 hours of work by his lawyer at the rate of USD 150 per hour, as determined by the Istanbul Bar's scale of minimum fees. He also claimed reimbursement for photocopying, translation, fax and other expenses, which he assessed at USD 790 in all, USD 200 of which were the cost of traveling to the Supreme Administrative Court in Ankara. In support of his claim, the applicant submitted copies of postal receipts and a bill for translation services. The Court is minded to award the applicant a sum of USD 500 for these expenses. That said, the Court agrees with the Government that the amount of USD 200 for the journey between Ankara and Istanbul was not directly related to the instant case and that the amount of USD 500 claimed for translation expenses was unacceptable because USD 184.

166. The Government submitted that the applicant's claims for costs and expenses were also excessive and unjustified. They maintained, moreover, that the USD 200 for the journey between Ankara and Istanbul was not directly related to the instant case and that the amount of USD 500 claimed for translation expenses was unacceptable because USD 184.

167. The Court notes firstly that the applicant has not supplied a breakdown of the number of hours worked by his lawyer at the rate of USD 150 per hour, as determined by the Istanbul Bar's scale of minimum fees. He also claimed reimbursement for photocopying, translation, fax and other expenses, which he assessed at USD 790 in all, USD 200 of which were the cost of traveling to the Supreme Administrative Court in Ankara. In support of his claim, the applicant submitted copies of postal receipts and a bill for translation services. The Court is minded to award the applicant a sum of USD 500 for these expenses. That said, the Court agrees with the Government that the amount of USD 200 for the journey between Ankara and Istanbul was not directly related to the instant case and that the amount of USD 500 claimed for translation expenses was unacceptable because USD 184.

168. The Court notes that the applicant has not supplied a breakdown of the number of hours worked by his lawyer at the rate of USD 150 per hour, as determined by the Istanbul Bar's scale of minimum fees. He also claimed reimbursement for photocopying, translation, fax and other expenses, which he assessed at USD 790 in all, USD 200 of which were the cost of traveling to the Supreme Administrative Court in Ankara. In support of his claim, the applicant submitted copies of postal receipts and a bill for translation services. The Court is minded to award the applicant a sum of USD 500 for these expenses. That said, the Court agrees with the Government that the amount of USD 200 for the journey between Ankara and Istanbul was not directly related to the instant case and that the amount of USD 500 claimed for translation expenses was unacceptable because USD 184.
considers it reasonable to award the applicant EUR 10,000, less the EUR 2,286.50 paid by the Council of Europe by way of legal aid. That sum, to be converted into Turkish liras at the rate applicable at the date of settlement, shall also be exempt from all taxes and duties.

C. Default interest

168. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. Holds by five votes to two that there has been a violation of Article 2 of the Convention;

2. Holds unanimously that there is no need to examine separately the complaints lodged under Article 6 § 1 and Articles 8 and 13 of the Convention;

3. Holds by four votes to three that there has been a violation of Article 1 of Protocol No. 1 of the Convention;

4. Holds by five votes to two that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 154,000 (one hundred and fifty-four thousand euros) in respect of pecuniary and non-pecuniary damage;

5. Holds unanimously
   (a) that the respondent State is to pay the applicant, on the same terms as those set out under 4 above, EUR 10,000 (ten thousand euros) in respect of costs and expenses, less the EUR 2,286.50 (two thousand two hundred and eighty-six euros fifty cents) already received from the Council of Europe; and
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.
1. As the State breached its obligation to take the necessary and adequate measures to protect the lives of those affected by the accident, it failed to comply with its positive obligations under Article 2 of the Convention.

2. Article 1 of Protocol No. 1 guarantees in substance the right of property and, according to the established case-law of the Convention institutions, aims to protect only existing possessions and does not also be regarded as "possessions" for the purposes of this provision. It is also true that the failure to give legal recognition to an interest determined as a "right of ownership" does not necessarily mean that the State has failed to comply with its positive obligations under Article 1 of Protocol No. 1 which it describes as being of "key importance".

3. As noted by the Court in its preliminary observations (see paragraph 138 of the judgment) on the "more general questions raised by the present case" which are "of general interest", the Court could have taken the same view with regard to this "implicit tolerance" that stems from the domestic legal system and it is for the applicant to show the precise nature of the right to ownership by adverse possession or that he could legitimately have obtained a building permit and the dwelling did not conform to the technical and health regulations or to the town-planning and building laws.

4. Admittedly, the notion of "possessions" for the purposes of this provision is also true that the failure to give legal recognition to an interest determined as a "right of ownership" does not necessarily mean that the State has failed to comply with its positive obligations under Article 1 of Protocol No. 1 which it describes as being of "key importance". However, my view differs from that of the majority regarding a violation of Article 1 of Protocol No. 1 because I consider this provision to be inapplicable in the circumstances of this case.

5. That majority regarding a violation of Article 1 of Protocol No. 1 does not consider the applicant's action under Article 1 of Protocol No. 1, nor, in my view, should they be used by the Court to justify a conclusion which is tantamount to removing the applicant from the ambit of the Convention. Nor, in my view, should they be used by the Court to justify a conclusion which is tantamount to removing the applicant from the ambit of the Convention.

6. My view on the inapplicability of Article 1 of Protocol No. 1 does not prevent the Court from finding that there had been a violation of Article 2 of the Convention. However, my view differs from that of the majority regarding a violation of Article 1 of Protocol No. 1 which it describes as being of "key importance".

7. That majority regarding a violation of Article 1 of Protocol No. 1 because I consider this provision to be inapplicable in the circumstances of this case. However, I consider that neither this implicit tolerance nor other humanitarian considerations suffice to legitimise the applicant's action under Article 1 of Protocol No. 1, nor, in my view, should they be used by the Court to justify a conclusion which is tantamount to removing the applicant from the ambit of the Convention.
PARTLY DISSENTING OPINION OF JUDGES TÜRMELEN AND MARUSTE

We regret we are unable to agree with the majority's opinion concerning Article 2 of the Convention.

We agree with the majority that the first sentence of Article 2 creates an obligation for the State not only to refrain from the intentional taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This principle also applies to the environment field. Therefore, Article 2 is applicable.

The expert report of 7 May 1991 underscored the existence of a real and immediate danger due to the methane gas that was emitted from the rubbish tip. In view of this fact, we can also agree with the majority that both the mayor of Ümraniye and the mayor of Istanbul knew or ought to have known at the time that there was a real and immediate risk to the lives of those living in the vicinity of the tip. Due to negligence, they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (Keenan v. United Kingdom, 3 April 2001, paragraphe 89).

On the other hand, the fact that the applicant also contributed to the loss of lives by constructing a house illegally close to the tip, a location strictly prohibited by law, cannot be disregarded. In the Chapman v. United Kingdom case, it was stated by the Court that “where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interests between the right of the individual ... and the right of others in the community. The Court will be slow to grant protection of those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site” (judgment of 18 January 2001, paragraph 102). Although the Chapman judgment was related to Article 8 of the Convention and was about building a dwelling on an environmentally protected site, the general principle quoted above also applies mutatis mutandis to our case.

It is not possible to say that the authorities remained passive after the accident. Three separate investigations were conducted by the police, by the crisis committee established by the Governor of Istanbul and by the Ministry of Interior.

As a result of the investigations, criminal proceedings were brought against the two mayors by the Public Prosecutor of Üsküdar. The Fifth Chamber of the Istanbul Criminal Court found them guilty of negligence in the course of their duty and sentenced them to three-months' imprisonment and a fine. The prison sentences were commuted to fines in accordance with Law no. 647. The Court of Cassation confirmed the judgment of the court of first instance. The applicant was not an intervening party in the criminal proceedings and therefore had no right to oppose the judgment of the Court of first instance before the Court of Cassation.

The applicant applied to the Administrative Court for compensation. This court decided to award the applicant an amount of 100,000,000 Turkish liras (TRL) for non-pecuniary damage and 10,000,000 TRL for pecuniary damage.

In addition, the Government sold a house to the applicant on very favourable terms and he is still living there.

Several conclusions flow from the above-mentioned facts:

The national system affords a remedy in the criminal courts as well as in the civil courts (which the applicant did not make use of) and the administrative courts. Criminal proceedings was brought against the two mayors and they were convicted. Their conviction was upheld by the Court of Cassation. It is an established principle of the Court's case-law that the assessment of the facts is a matter for the national courts. This is a consequence of the subsidiary role of the Strasbourg Court. The national court in this case examined the facts and decided to apply Article 230 of the Turkish Criminal Code and not Article 455. There is nothing in the judgment to suggest that the Turkish courts acted arbitrarily. Under the circumstances, to find a violation of Article 2 due to the fact that the national court did not apply Article 455 of the Criminal Code is in our opinion, a clear example of the Court acting as a court of fourth instance.

In view of the above, we cannot share the conclusion reached by the majority that the local remedies considered as a whole were inadequate or ineffective and did not satisfy the procedural obligation in Article 2 of the Convention to carry out an effective investigation.

Moreover, even if we accept that the criminal-law remedy in this specific case was not adequate, in view of the Calvelli and Ciglio judgment where the Grand Chamber stated that “if the infringement of the right to life or to personal integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case” (Calvelli and Ciglio v. Italy, no. 32967/96, 17 January 2002, § 51), the compensation awarded by the Administrative Court should have been a sufficient basis on which to find that there has been no violation of Article 2. In Calvelli and Ciglio, the Court reached the conclusion that there was no violation of Article 2 in spite of the fact that the doctor was not prosecuted under the criminal law.

We are not persuaded by the reasons adduced by the majority in paragraph 94 to distinguish this case from the Calvelli and Ciglio judgment.

On the contrary, both cases fall under a special category of Article 2 cases, in which loss of life is not due to the use of force by the authorities, but to the negligence of the public authorities.
We conclude therefore that there has been no violation of Article 2 of the Convention.
United Nations Compensation Commission Governing Council

Report and Recommendations made by the Panel of Commissioners concerning the Third Installment of “F4” Claims, 18 December 2003
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Introduction

1. The Governing Council of the United Nations Compensation Commission (the “Commission”), at its thirtieth session held from 14 to 16 December 1998, appointed the “F4” Panel of Commissioners (the “Panel”), composed of Messrs. Thomas A. Mensah (Chairman), José R. Allen and Peter H. Sand to review claims for direct environmental damage and depletion of natural resources resulting from Iraq’s invasion and occupation of Kuwait. This is the third report of the Panel. It contains the recommendations of the Panel to the Governing Council on the third instalment of “F4” claims (the “third ‘F4’ instalment”), submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (the “Rules”) (S/AC.26/1992/10).

2. The third “F4” instalment consists of three claims by the Government of the State of Kuwait (“Kuwait”) and two claims by the Government of the Kingdom of Saudi Arabia (“Saudi Arabia”) (collectively the “Claimants”). The three claims of Kuwait are claim Nos. 5000452, 5000453 and 5000450. The two claims of Saudi Arabia are claim Nos. 5000451 and 5000360. The claims were submitted to the Panel in accordance with article 32 of the Rules on 20 March 2002.

3. By Procedural Order No. 5 dated 28 March 2003, the Panel deferred a portion of claim No. 5000451 of Saudi Arabia to the fourth instalment of category “F4” claims (“the fourth ‘F4’ instalment”). By Procedural Order No. 6 dated 9 July 2003, the Panel deferred portions of claim No. 5000450 of Kuwait to the fourth “F4” instalment. The total compensation sought in the claims reviewed in this report is 10,004,219,582 United States dollars (USD).

4. The claims reviewed in this report are summarized in table 1. The “amount claimed” column shows the compensation sought by the Claimants (with amendments, where applicable) expressed in United States dollars and corrected, where necessary, for computational errors.

<table>
<thead>
<tr>
<th>Country</th>
<th>Claim No.</th>
<th>Amount claimed (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kuwait</td>
<td>5000256</td>
<td>185,167,546</td>
</tr>
<tr>
<td></td>
<td>5000430</td>
<td>5,050,105,158</td>
</tr>
<tr>
<td></td>
<td>5000452</td>
<td>52,471</td>
</tr>
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<td>Saudi Arabia</td>
<td>5000451</td>
<td>4,748,292,230</td>
</tr>
<tr>
<td></td>
<td>5000360</td>
<td>20,602,177</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>10,004,219,582</td>
</tr>
</tbody>
</table>

I. OVERVIEW OF THE THIRD “F4” INSTALMENT

5. The claims in the third “F4” instalment are for expenses resulting from measures already taken or to be undertaken in the future to clean and restore environment alleged to have been damaged as a direct result of Iraq’s invasion and occupation of Kuwait.

6. The Claimants seek compensation for expenses resulting from cleaning and restoration measures undertaken or to be undertaken by them to remediate damage from:
   (a) Oil released from damaged oil wells in Kuwait;
   (b) Pollutants released from oil well fires and firefighting activities in Kuwait;
   (c) Oil spills into the Persian Gulf from pipelines, offshore terminals and tankers;
   (d) Laying and clearance of mines;
   (e) Movements of military vehicles and personnel; and
   (f) Construction of military fortifications.

II. PROCEDURAL HISTORY

A. Article 16 reports

7. Significant factual and legal issues raised by the claims in the third “F4” instalment were included in the Executive Secretary’s twenty-ninth report, dated 28 October 1999; the thirty-first report, dated 28 April 2000; and the thirty-seventh report, dated 18 October 2001, issued pursuant to article 16 of the Rules. These reports were circulated to the members of the Governing Council, to Governments that have filed claims with the Commission and to the Government of the Republic of Iraq (“Iraq”). In accordance with article 16(3) of the Rules, a number of Governments, including Iraq, submitted information and views in response to these reports.

B. Article 34 notifications

8. Pursuant to article 34 of the Rules notifications were sent to Kuwait and Saudi Arabia requesting additional information and documentation to assist the Panel in its review of the claims in the third “F4” instalment.

C. Classification of claims and transmittal of claim files

9. On 30 July 2001, the Panel issued Procedural Order No. 1, classifying the claims in the third “F4” instalment as “unusually large or complex”, within the meaning of article 38(d) of the Rules. Procedural Order No. 1 directed the secretariat to send to Iraq copies of the claim files, comprising the claim form, the statement of claim and associated exhibits, for each of the claims in the third “F4”
instalment. The secretariat transmitted copies of the claim files to Iraq. The secretariat also transmitted copies of Procedural Order No. 1 to Iraq and the Claimants.

10. On 28 January 2002, the Panel issued Procedural Order No. 2, directing the secretariat to send to Iraq copies of the claim file for claim No. 5000452. This claim had been transferred by the Executive Secretary to the “F4” category of claims from the “F3” category and was allocated to the third “F4” instalment on 5 December 2001. The secretariat transmitted a copy of the claim file to Iraq. The secretariat also transmitted copies of Procedural Order No. 2 to Iraq and Kuwait.


D. Monitoring and assessment data

12. On 13 September 2002, the Panel decided that monitoring and assessment data should be made available to Iraq. This decision was intended to further one of the objectives of Governing Council decision 124, namely “assisting the ‘F4’ Panel of Commissioners in the conduct of its tasks, through ensuring the full development of the facts and relevant technical issues, and in obtaining the full range of views including those of Iraq” (S/AC.26/Dec.124 (2001), annex, para. 2).

13. On 13 September 2002, the Panel issued Procedural Order No. 3, by which it requested the Claimants to identify previously submitted monitoring and assessment data and to provide any other monitoring and assessment data that they considered to be relevant to their claims in the third “F4” instalment.

14. In accordance with the decision of the Panel, the monitoring and assessment data referred to in paragraph 13 were transmitted to Iraq.

E. Oral proceedings

15. On 24 January 2003, the Panel issued Procedural Order No. 4 by which it informed the Claimants and Iraq that oral proceedings would be held on 25 and 26 March 2003. The procedural order listed the issues to be considered at the oral proceedings as follows:

(a) On what basis should the Panel determine whether and to what extent environmental damage resulted from causes other than the effects of Iraq’s invasion and occupation of Kuwait?

(b) What should be the appropriate objectives of remediation measures?

(c) What standards should be applied in determining remediation goals in particular circumstances?

(d) To what extent will remediation goals and standards be affected where there is evidence that the environment was not in “pristine condition” prior to Iraq’s invasion and occupation of Kuwait?

16. Procedural Order No. 4 invited the Claimants and Iraq to identify any other legal, factual or scientific issues that they wished to address at the oral proceedings. After considering the responses received from the Claimants and Iraq, the Panel decided that the following additional issues would be addressed at the oral proceedings:

(a) How appropriate is high temperature thermal desorption as a method for remediation of the types of damage for which it is proposed to be used in the “F4” third instalment of claims?

(b) To what extent is damage resulting from remediation measures compensable?

17. Oral proceedings were held at the Palais des Nations in Geneva on 25 and 26 March 2003. Representatives and experts of Iraq and the Claimants attended the oral proceedings and presented their views.

III. LEGAL FRAMEWORK

A. Mandate of the Panel

18. The mandate of the Panel is to review the “F4” claims and, where appropriate, recommend compensation.

19. In discharging its mandate, the Panel has borne in mind the observations of the Secretary-General of the United Nations, in his report to the Security Council of 2 May 1991, that:

“The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element.”

B. Applicable law

20. Article 31 of the Rules sets out the applicable law for the review of claims, as follows:

“In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.”

21. Paragraph 16 of Security Council resolution 687 (1991) reaffirms that Iraq is “liable under international law for any direct loss, damage, including environmental damage and the depletion of
natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait”.

C. Compensable losses or expenses

22. Governing Council decision 7 (S/AC.26/1991/7/Rev. 1) provides guidance regarding the losses or expenses that may be considered as “direct loss, damage, or injury” resulting from Iraq’s invasion and occupation of Kuwait, in accordance with paragraph 16 of Security Council resolution 687 (1991).

23. Paragraph 34 of Governing Council decision 7 provides that “direct loss, damage, or injury” includes any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure of persons from or their inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage-taking or other illegal detention.

24. Paragraph 35 of Governing Council decision 7 provides that “direct environmental damage and the depletion of natural resources” includes losses or expenses resulting from:

(a) Abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;

(b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;

(c) Reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;

(d) Reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and

(e) Depletion of or damage to natural resources.

25. As the Panel observed in its report on the second instalment of “F4” claims (the “second ’F4’ report”), paragraph 35 of Governing Council decision 7 does not purport to give an exhaustive list of the activities and events that can give rise to compensable losses or expenses; rather it should be considered as providing guidance regarding the types of activities and events that can result in compensable losses or expenses.

D. Evidentiary requirements

26. Article 35(1) of the Rules provides that “[e]ach claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991)”. Article 35(1) also provides that it is for each panel to determine “the admissibility, relevance, materiality and weight of any documents and other evidence submitted”.

27. Article 35(3) of the Rules provides that category “F” claims “must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss”. In addition, Governing Council decision 46 (S/AC.26/Dec.46 (1998)) states that, for category “F” claims, “no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant”.

28. When recommending compensation for environmental damage or loss that has been found to be a direct result of Iraq’s invasion and occupation of Kuwait, the Panel has in every case assured itself that the applicable evidentiary requirements regarding the circumstances and amount of the damage or loss claimed have been satisfied.

E. Legal issues

29. In reviewing the claims in the third “F4” instalment, the Panel considered a number of legal issues relating to the claims. Some of these issues were raised by Iraq in its written responses or in submissions during the oral proceedings and were commented upon by the Claimants during the oral proceedings.

1. Amendment of claims based on results of monitoring and assessment activities

30. The Claimants have submitted amendments to some of the claims based on results of monitoring and assessment activities. In some cases, these amendments increase the amount of compensation claimed, while others decrease the claimed amounts.

31. Iraq has questioned these amendments. It contends that the amendments and the data on which they are based should not be accepted by the Panel because they were submitted after the expiry of the applicable time limits.

32. In its report on the first instalment of “F4” claims (the “first ’F4’ report”), the Panel anticipated that the results of some monitoring and assessment activities would assist its review of related substantive claims. The Panel recalled that “the Governing Council’s decision to authorize expedited review of monitoring and assessment claims was, in large part, intended to make funds available to claimants to finance activities that might produce information to support their substantive ’F4’ claims”.

33. In the view of the Panel, the possibility that the amounts claimed might increase or decrease
in the light of data and information obtained from monitoring and assessment activities is implicit in the decision of the Governing Council to authorize separate funding for monitoring and assessment activities prior to the review of related substantive claims. The Panel, therefore, finds that it is appropriate to receive and consider amendments to the amounts claimed, provided that such amendments are based on information and data obtained from monitoring and assessment activities.

2. Threshold for compensable damage

33. Security Council resolution 687 (1991) provides that Iraq is “liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources … as a result of Iraq’s unlawful invasion and occupation of Kuwait”. According to Iraq, this means that the Panel must have regard to the applicable rules of international law in determining whether any environmental damage or loss alleged to have resulted from “Iraq’s invasion and occupation of Kuwait” qualifies for compensation in accordance with Security Council resolution 687 (1991). Specifically, Iraq argues that damage resulting from the invasion and occupation of Kuwait is not compensable unless it reaches the “threshold” that is generally accepted in international law for compensation in cases of state responsibility for transboundary environmental damage. According to Iraq, the applicable threshold is that the damage must be at least “significant”, and no compensation should be awarded for damage that is below this threshold.

34. As noted in paragraph 20, the primary sources of the law to be applied by the Panel in the review of claims for compensation are listed in article 31 of the Rules. These are “Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council”.

35. For the claims in the third “F4” instalment, the Panel finds that Security Council resolution 687 (1991) and the relevant decisions of the Governing Council provide sufficient guidance. Resolution 687 states clearly that compensation is payable for “any direct loss, damage … or injury” that resulted from Iraq’s invasion and occupation of Kuwait. In addition, paragraph 35 of Governing Council decision 7 states that “direct environmental damage and the depletion of natural resources” include losses or expenses resulting from “reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment”. In the view of the Panel, the key issues for decision in connection with the claims in the third “F4” instalment are: (a) whether the environmental damage for which compensation is sought resulted directly from Iraq’s invasion and occupation of Kuwait; (b) whether measures already taken by a claimant to remediate environmental damage were “reasonable”; and (c) whether measures proposed to be undertaken by a claimant qualify as “future measures which can be documented as reasonably necessary to clean and restore the environment”.

36. In considering the reasonableness of remediation measures, it is appropriate to have regard to the extent of the damage involved. However, in the view of the Panel, this is not the only factor to be considered. Other factors, such as the location and nature of the damage and its actual or potential effects on the environment may also be relevant. Thus, for example, where damage that might otherwise be characterized as “insignificant” is caused to an area of special ecological sensitivity, or where the damage, in conjunction with other factors, poses a risk of further or more serious environmental harm, it may not be unreasonable to take remediation measures in order to prevent or minimize potential additional damage.

3. Parallel or concurrent causes of environmental damage

37. Iraq contends that some of the damage for which compensation is sought by the Claimants cannot be attributed solely to “Iraq’s invasion and occupation of Kuwait”. It alleges that some of the damage resulted from other factors that existed before and after the invasion and occupation of Kuwait. According to Iraq, the environment in the claimant countries was not in “pristine condition” prior to the invasion and occupation. In particular, Iraq refers to exploration for oil, the operation of refineries and petrochemical industries and the large number of oil tankers operating in the Persian Gulf as sources of environmental damage both before and after the invasion and occupation. With respect to Kuwait’s claim for damage to its terrestrial resources from military activities, Iraq asserts that any damage still remaining is the result of mismanagement and destructive land use, especially the failure to control livestock grazing and the use of off-road vehicles in sensitive areas of the desert. Iraq maintains, therefore, that “it is impossible to limit the causes of environmental pollution in a particular region to one cause and hold one state liable for that and obligate it to compensate the damages, especially when many factors and states contributed to the pollution”.

38. With regard to Iraq’s liability for environmental damage where there are parallel or concurrent causes, the Panel recalls that in its second “F4” report it notes that “Iraq is, of course, not liable for damage that was unrelated to its invasion and occupation of Kuwait, nor for losses or expenses that are not a direct result of the invasion and occupation. However, Iraq is not exonerated from liability for loss or damage that resulted directly from the invasion and occupation simply because other factors might have contributed to the loss or damage. Whether or not any environmental damage or loss for which compensation is claimed was a direct result of Iraq’s invasion and occupation of Kuwait will depend on the evidence presented in relation to each particular loss or damage”.

39. In reviewing each of the claims in the third “F4” instalment, the Panel has considered whether, and if so to what extent, the evidence available indicates that the damage for which compensation is sought was wholly or partly the result of factors unrelated to Iraq’s invasion and occupation of Kuwait. It has also considered whether the claimant has aggravated or otherwise contributed to the damage, either by failing to take appropriate steps to mitigate damage or by negligent or other improper action. Where, on the basis of the evidence, the Panel finds that damage resulted from causes wholly unconnected with Iraq’s invasion and occupation of Kuwait, no compensation is recommended for such damage or loss. Where the evidence shows that damage resulted directly from Iraq’s invasion and occupation of Kuwait but that other factors have contributed to the damage for
which compensation is claimed, due account is taken of the contribution from such other factors in order to determine the level of compensation that is appropriate for the portion of the damage which is directly attributable to Iraq’s invasion and occupation of Kuwait.7

4. Duty of the claimant to prevent and mitigate environmental damage

40. Iraq also argues that some of the damage for which the Claimants seek compensation has been caused or contributed to by the Claimants themselves, either because they failed to take steps to mitigate damage resulting from the invasion and occupation of Kuwait or because the damage had been aggravated by the acts or omissions of the Claimants after the invasion and occupation. For example, Iraq claims that Saudi Arabia’s failure to remove oil from its coastal areas over 12 years after the end of the invasion and occupation constitutes a breach of Saudi Arabia’s obligation under international law to mitigate the damage. Iraq claims that Saudi Arabia’s failure to act has allowed a sediment layer to form over the oil contamination, thus doubling the quantity of material to be remediated. Iraq also alleges that any damage to Kuwait’s groundwater resources must be attributed to the negligence of Kuwait. It claims, first, that Kuwait was negligent in constructing oil recovery pits in areas above its aquifers and, secondly, that Kuwait should have taken action to remove oil recovery pits and oil lakes from above the aquifers as soon as it became aware that they had the potential to contaminate groundwater.

41. According to Iraq, failure by a claimant to take reasonable and timely measures to mitigate damage from the invasion and occupation of Kuwait amounts to contributory negligence and justifies rejection of the claim for compensation or a corresponding reduction in the compensation to be awarded to the claimant. Iraq also contends that action by a claimant that causes additional damage or aggravates damage from the invasion and occupation constitutes an intervening factor that breaks the chain of causation so that the damage involved can no longer be attributed to “Iraq’s invasion and occupation of Kuwait”.8

42. The Panel stresses that each claimant has a duty to mitigate environmental damage to the extent possible and reasonable in the circumstances. Indeed, in the view of the Panel, that duty is a necessary consequence of the common concern for the protection and conservation of the environment, and entails obligations towards the international community and future generations. The duty to mitigate damage encompasses both a positive obligation to take appropriate measures to respond to a situation that poses a clear threat of environmental damage as well as the duty to ensure that any measures taken do not aggravate the damage already caused or increase the risk of future damage. Thus, if a claimant fails to take reasonable action to respond to a situation that poses a clear threat of environmental damage, the failure to act may constitute a breach of the duty to mitigate and could provide justification for denying compensation in whole or in part. By the same token, where a claimant takes measures that are unreasonable, inappropriate or negligent in the circumstances and thereby aggravates the damage or increases the risk of damage, the claimant may be required to bear some responsibility for the portion of the loss or damage that is attributable to its own acts or omissions.

43. In the view of the Panel, whether an act or omission of a claimant constitutes failure to mitigate damage depends on the circumstances of each claim and the evidence available. The test is whether the claimant acted reasonably, having regard to all the circumstances with which it was confronted. Where a claimant fails to respond to a crisis that presents a clear threat of environmental damage, such inaction should rightly be considered as a breach of the claimant’s duty to mitigate damage. On the other hand, a claimant confronted with a situation that poses multiple threats of serious environmental damage may not be able to deal with all the threats at the same time or in the same way. In such a situation, a decision by the claimant to take or not to take measures, based on its judgment of the urgency of the various threats, would not necessarily constitute a violation of the duty to mitigate damage. As previously noted by the Panel, the reasonableness or appropriateness of the measures taken or not taken by a claimant in such a situation must be evaluated by reference to the circumstances in which the decision was taken. For example, in its second “F4” report, the Panel found that the decision taken by the contractors engaged by Kuwait for mine clearance to detonate some unexploded ordnance where it was found, instead of recovering and storing the ordnance in an appropriate facility, was reasonable in the circumstances, given the dangerous conditions present at the time.8 The Panel also found that the decision of Kuwait “to select contractors from a limited number of specially designated countries was … not unreasonable, particularly in view of the special circumstance in which the decision was taken”.9 The same considerations apply to the decisions of claimants regarding measures to prevent or mitigate environmental damage resulting from Iraq’s invasion and occupation of Kuwait.

5. Remediation objectives

44. The Claimants state that the objective of the remediation measures taken or proposed by them is to restore the environment to the condition in which it would have been if Iraq’s invasion and occupation of Kuwait had not occurred.

45. While accepting this objective in principle, Iraq argues that, in determining the appropriate objectives of remediation, due account should be taken of the fact that the environment in the claimant countries was not in “pristine condition” prior to the invasion and occupation of Kuwait. According to Iraq, it should not be held responsible for expenses to remediate damage that predated the invasion and occupation of Kuwait. Consequently, Iraq maintains that any compensation awarded for remediation should be limited to the damage that resulted directly from the invasion and occupation. According to Iraq, compensation should not be awarded for measures to restore the environment to a “pristine condition”, because that would result in “unjust enrichment” for the Claimants.

46. Iraq further argues that, in any case, remediation is justified only where environmental assessment, risk assessment and analysis of alternatives show that the risks posed by the environmental damage exceed the potential risks posed by the proposed remediation measures. In particular, due consideration should be given to the possibility of natural recovery. Furthermore, Iraq maintains that remediation measures that involve “grossly disproportionate costs” are unreasonable and should be rejected in favour of less expensive measures.

47. With respect to the claims in the third “F4” instalment, the Panel considers that the appropriate objective of remediation is to restore the damaged environment or resource to the condition in which it would have been if Iraq’s invasion and occupation of Kuwait had not occurred. In applying this
52. In view of the complexity of the issues raised by the claims and the need to consider scientific, engineering, and cost issues in evaluating the claims, the Panel sought the assistance of a multi-disciplinary team of independent experts retained by the Commissions [243], [243]. Expert consultants were retained by the Commissions in the fields of desert ecology, coastal ecology, coastal geomorphology, geology, hydrogeology, water quality, indoor air quality, health risk assessment, chemistry, water treatment and remediation techniques, marine biology, coastal engineering, civil engineering, and ordnance disposal.

53. At the direction of the Panel, the Panel's expert consultants undertook on-site inspections in Kuwait and in Saudi Arabia. The purpose of the inspections was to enable the expert consultants to obtain information that would assist the Panel to assess the nature and extent of environmental damage resulting from Iraq's invasion and occupation of Kuwait.

54. Where necessary, the Panel requested additional information from the Commissions to clarify their claims.

55. In making its findings and formulating its recommendations on the claims, the Panel has taken account of all the information and evidence made available to it, including the evidence and information provided by the Claimants in the claim documents and in response to requests for additional information. The information and views submitted by Governments in response to article 16 reports; the written responses submitted by Iraq; the views presented by Iraq and the Claimants during oral proceedings; the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

56. In order to avoid multiple recovery of compensation, the Panel instructed the secretariat to carry out cross-filing and cross-category checks of the claims. On the basis of these checks, the Panel is satisfied that there is no risk of duplication of awards of compensation.

57. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

IV. REVIEW OF THE THIRD “F4” INSTALMENT CLAIMS

59. The Panel recognizes the need for claimants to consider the potential adverse impacts of remediation measures with potential transboundary impacts are subject to the requirements of international law relating to preventing or minimizing any adverse transboundary impacts.

60. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

61. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

62. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

63. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

64. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

65. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

66. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

67. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

68. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

69. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

70. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

71. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

72. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

73. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

74. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

75. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

76. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

77. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

78. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.

79. In considering future measures proposed by a claimant to clean and restore the damaged environment, primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition. For, even if the environment was in pristine condition prior to Iraq's invasion and occupation of Kuwait, it might not be feasible or reasonable to fully recreate pre-existing physical conditions.

80. The Panel has evaluated the reasonableness of the measures set out in the evidence provided by the Claimants in the claim documents and in response to requests for additional information and the information submitted by Governments in response to article 16 reports. The views presented by Iraq and the Claimants during oral proceedings, the expert consultants' reports; the written responses submitted by Iraq and the Claimants during the oral proceedings; and the reports of the Panel's expert consultants.
The amounts recommended for the claims are based on the proposed measures as modified. This is consistent with the approach adopted by the Panel in its previous reports.

The Panel's analysis of the third "F4" instalment claims is set forth in chapters V and VI of this report.

A glossary of scientific and technical terms is appended to this report.

V. CLAIMS OF THE STATE OF KUWAIT

A. Overview

In the third "F4" instalment, Kuwait submitted three claims for expenses for measures to remediate environmental damage that it alleges resulted from Iraq's invasion and occupation of Kuwait. Claim No. 5000256 is for future measures to remediate damage to groundwater resources. Claim No. 5000450 is for future measures to remediate damage to terrestrial resources. Claim No. 5000452 is for expenses incurred for the cleaning and restoration of the exterior of the Central Bank of Kuwait's building.

Kuwait alleges that the detonation of oil wells by Iraqi forces during the final days of their occupation of Kuwait resulted in the release of over 1 billion barrels of crude oil into the environment, much of which was ignited and burned for many months. According to Kuwait, fallout from the burning oil, in the form of soot and oil droplets, contaminated the soil as well as buildings and other structures in Kuwait. In addition, sea water used to fight the oil well fires, together with oil and dissolved hydrocarbons, seeped into the soil and infiltrated the aquifers in Umm-Al Aish and Raudhatain in the north-east of the country.

According to Kuwait, the desert soil and vegetation were severely disrupted by the construction of military fortifications, including ditches, berms, bunkers, trenches, and pits; the laying and clearance of mines; and the extensive movement of military vehicles and personnel. These activities are alleged to have resulted in, inter alia, accelerated soil erosion, increased sand movement and increased incidence of dust and sand storms. Kuwait asserts that the construction of military fortifications and movement of military vehicles and personnel also caused significant damage to natural vegetation and wildlife.

B. Claim No. 5000256 – Damage to groundwater resources

Kuwait seeks compensation in the amount of USD 185,167,546 for the expense of future measures to remediate two freshwater aquifers that it alleges have been contaminated as a result of Iraq's invasion and occupation of Kuwait. This amount represents an increase in the original amount claimed, reflecting an amendment requested by Kuwait on the basis of new information obtained from its monitoring and assessment projects.

Kuwait states that during efforts to extinguish burning oil wells, pits were dug to hold firefighting water from the Persian Gulf. After the fires were extinguished, oil that had spilled from damaged wells was diverted into some of these pits and stored until the oil was recovered by Kuwait Oil Company. Additional pits dedicated to the recovery of spilled oil were constructed. Kuwait refers to all the pits for the recovery of spilled oil as "oil recovery pits".

Kuwait alleges that the Umm Al-Aish aquifer, near the Sabriyah oil field, and the Raudhatain aquifer, located near the Raudhatain oil field, have been contaminated by oil from damaged oil wells and by sea water used to fight the oil fires. According to Kuwait, large quantities of hydrocarbons and sea water from the surface reached the aquifers through infiltration. Kuwait adds that, since 1991, the oil recovery pits, contaminated wadis and oil lakes have continued to act as conduits of pollution of these aquifers.

According to Kuwait, Raudhatain and Umm Al-Aish are the only two aquifers in the country that contain freshwater. In both aquifers, freshwater lenses sit on top of brackish water. Kuwait states that water from the freshwater lenses of the two aquifers was potable prior to Iraq's invasion and occupation of Kuwait, but some of it is no longer suitable for drinking due to contamination.

Kuwait has submitted results of monitoring and assessment studies which show contamination by total petroleum hydrocarbons ("TPH") and total dissolved solids ("TDS") in the northern part of the Umm Al-Aish aquifer and the southern part of the Raudhatain aquifer.

Iraq argues that Kuwait has not provided evidence to support the claim of damage to the freshwater lens of the Raudhatain aquifer. Iraq also contends that the presence of TPH in the aquifers is not sufficient proof of environmental damage or health risks because, according to it, there are no established TPH standards for drinking water.

In any case, Iraq contends that TPH and TDS contamination in the aquifers is not the result of Iraq's invasion and occupation of Kuwait. According to Iraq, any groundwater contamination in Kuwait is the result of mismanagement and improper land use. In particular, Iraq asserts that the increased salinity of the water in the aquifers has been caused by over-pumping of water from the aquifers prior to 1990. Iraq also contends that Kuwait was negligent in locating oil recovery pits above the aquifers.

In the view of the Panel, some of the data presented by Kuwait to support this claim are difficult to interpret. In particular, the methods used to identify and measure the levels of TPH and TDS raise issues regarding quality assurance, data comparability and data interpretation. Furthermore, the absence of pre-invasion data on TPH levels makes it difficult to assess the full significance of post-invasion data.

In spite of these shortcomings, the Panel finds, on the totality of the evidence presented to it, that there is TPH and TDS contamination in the freshwater lenses of the northern Umm Al-Aish and southern Raudhatain aquifers, and that this contamination resulted from the infiltration of large quantities of sea water used to fight the oil well fires and contaminants from the oil recovery pits and the oil lakes. Analysis of TDS in the aquifers suggests that the contamination resulted from
infiltration of sea water used to fight the oil well fires rather than from over-pumping of water from the aquifers.

72. In the view of the Panel, the TPH and TDS contamination makes this water unsuitable for human consumption and it is, therefore, reasonable for Kuwait to take measures to improve the quality of the water. Moreover, considering the urgent need for quick action to extinguish the oil well fires and to control the release of oil from the damaged oil wells, Kuwait was neither unreasonable nor negligent in constructing the oil recovery pits close to where the firefighting and oil recovery activities were being undertaken.

73. With regard to Iraq's assertion that Kuwait had failed to take timely and appropriate steps to remove the oil lakes and oil recovery pits, the Panel notes that removal was initially prevented by mine clearance and further delayed by oil field reconstruction operations. Until recently, there was also a lack of monitoring data identifying the location, nature and extent of surface and groundwater contamination. Although earlier removal of oil lakes and pits might have reduced the degree and volume of contaminated groundwater, the failure to do so was not unreasonable in light of the factors noted above.

74. Accordingly, the Panel finds that contamination of the Raudhatain and Umm Al-Aish aquifers by oil from damaged oil wells and by sea water used to fight the oil well fires constitutes environmental damage directly resulting from Iraq's invasion and occupation of Kuwait, and a programme to remediate the damage would constitute reasonable measures to clean and restore the environment.

75. Kuwait proposes to remediate the two aquifers by pumping contaminated groundwater from the aquifers, treating it in a dedicated facility and re-injecting the treated water into the aquifers. Treatment would include carbon adsorption to remove high molecular weight hydrocarbons; treatment to remove natural organic matter; and a membrane process utilizing ultrafiltration followed by reverse osmosis, to reduce salinity levels to drinking water standards. Kuwait also proposes to flush residual contamination from the soil and vadose zone above the aquifers.

76. Iraq questions the appropriateness of the model used by Kuwait to determine the location and extent of the contaminated plumes because the model has not been calibrated with site-specific parameters and data. It states that the values used in the model to calculate the rate of natural recharge of freshwater in the aquifers are too low.

77. Accordingly, the Panel finds that contamination of the Raudhatain and Umm Al-Aish aquifers by oil from damaged oil wells and by sea water used to fight the oil well fires constitutes environmental damage directly resulting from Iraq's invasion and occupation of Kuwait, and a programme to remediate the damage would constitute reasonable measures to clean and restore the environment.

78. In the view of the Panel, restoration of water quality in the aquifers is an appropriate objective, and the remediation measures proposed by Kuwait are reasonable, subject to some modifications based on alternative approaches. The Panel considers that extraction of contaminated groundwater and its replacement with injected potable water is a reasonable remediation measure. However, treatment of the contaminated groundwater in a dedicated facility might not be necessary. As an alternative, contaminated groundwater could be pumped into holding ponds and allowed to evaporate. Potable water would be obtained from other sources to recharge the freshwater lenses. Following the development of more specific information on the identity of the contaminants in the groundwater, Kuwait may decide to treat the extracted groundwater for reuse. Furthermore, the available evidence indicates that flushing of the vadose zone is not necessary because there is little risk to the aquifers from any residual contaminants in that zone. Details of these modifications are set out in annex I.

79. The Panel finds that, with the modifications outlined in annex I, the remediation measures proposed by Kuwait constitute measures that are reasonably necessary to clean and restore the environment, within the meaning of paragraph 35(b) of Governing Council decision 7.

80. The expenses of the remediation measures have been adjusted to take account of the modifications in annex I including:

(a) The reduced volume of water that needs to be extracted from the aquifers;

(b) The elimination of a dedicated treatment facility;

(c) The elimination of the flushing of the vadose zone; and

(d) The extra cost of continuous monitoring of the remediation measures.

81. Accordingly, the Panel recommends compensation in the amount of USD 41,531,463 for this claim.

82. For the reasons indicated in paragraph 196, no date of loss for the purposes of interest is indicated for the recommended award.

83. The Panel has not considered the issue of compensation for loss of use of groundwater resources. This issue will be considered in the fifth instalment of "F4" claims as part of claim No. 5000460.

C. Claim No. 5000450 – Damage to terrestrial resources

1. Introduction

84. Kuwait seeks compensation in the amount of USD 5,050,105,158 for expenses of future measures to remediate damage to its terrestrial environment resulting from Iraq’s invasion and occupation of Kuwait. This amount represents a decrease in the original amount claimed, reflecting amendments made by Kuwait on the basis of new information obtained from its monitoring and assessment projects.11

85. Claim No. 5000450 comprises five claim units for future measures to be undertaken by Kuwait to remediate environmental damage alleged to have resulted from Iraq’s invasion and occupation of Kuwait. Kuwait requested the Panel to consider these claim units as separate claims. However, the
Panel decided to treat claim No. 5000450 as a single claim but to review the claim units separately. Accordingly, the Panel’s recommendations on the claim units are presented separately in this report.

86. The first claim unit relates to future measures to remediate areas in Kuwait damaged by the construction and backfilling of military fortifications built by Iraqi forces.

87. The second claim unit relates to future measures to remediate areas in and around wellhead pits constructed by Kuwait to fight the oil well fires.

88. The third claim unit relates to future measures to remediate areas damaged by airborne pollutants from the oil well fires that accumulated in desert areas in the form of tarecrete.

89. The fourth claim unit relates to future measures to revegetate desert areas damaged by military fortifications; the laying and clearance of mines; oil releases; tarecrete; movements of military vehicles and personnel; and berms and sand walls.

90. The fifth claim unit is for expenses incurred in cleaning and restoring the facades and air distribution systems of Kuwait government buildings damaged by pollutants from the oil well fires.

91. As stated in paragraph 3, two other units of claim No. 5000450 (relating to measures to remediate raised roads contaminated by the oil well fires and measures to remediate areas contaminated as a result of the disposal of mines and other remnants of war) have been deferred to the fourth “F4” instalment.

2. Remediation of areas damaged by military fortifications

92. Kuwait seeks compensation in the amount of USD 14,170,924 for future measures to remediate areas damaged by the construction and backfilling of military fortifications.

93. According to Kuwait, over 240,000 military fortifications, comprising antitank ditches, berms, bunker trenches and pits, were constructed in Kuwait by the military forces of Iraq during their invasion and occupation of Kuwait. Kuwait submitted data, collected during operations to clear mines and other remnants of war, to support these numbers.

94. Kuwait alleges that the fortifications have caused damage to its desert environment. It states that the construction and subsequent backfilling of these fortifications, representing a total area of approximately 6.25 square kilometres scattered over a large area of its desert, exposed soil and other materials to wind erosion which adversely affected the desert ecosystem, including its biodiversity, soil-water relationships and the long-term productivity of the soil. Kuwait also submitted information to support its contention that the construction and backfilling of military fortifications have contributed to increased sand mobilization in the affected areas.

95. Iraq contends that the location of the military fortifications is unclear and that the estimate of the average size of fortifications lacks “tangible evidence”. Iraq also claims that uncontrolled livestock grazing is the “principal issue that affects sand movement, vegetation cover and the ability of the desert to repair itself”. Indeed, Iraq asserts that areas that have been fenced since 1991 “show remarkable levels of vegetation”.

96. Iraq also argues that Kuwait “does not provide clear evidence that persistent environmental damage linked to the Conflict and post-Conflict activities is still present”. Iraq states that, given the general climatic conditions and dust and sand storm activities in the region, military fortifications in such small areas could have only a negligible impact on sand movements in Kuwait. Iraq also asserts that natural revegetation has occurred in desert areas in Iraq which were similarly damaged.

97. As noted by the Panel in its second “F4” report, there is evidence that Iraqi forces fortified the country against military action by the Allied Coalition Forces. There is also evidence that the construction and backfilling of military fortifications adversely affected plant growth and soil functioning, and increased wind erosion and sand mobilization. The evidence also shows that there has been very little natural recovery at military fortification sites that have been protected from livestock grazing. The Panel, therefore, concludes that construction and backfilling of military fortifications was the major cause of environmental damage at these sites. However, the Panel observes that uncontrolled livestock grazing, both before and after Iraq’s invasion and occupation of Kuwait, also caused damage in unfenced areas where military fortifications were located. Accordingly, the Panel finds that the ecological impacts are not attributable solely to Iraq’s invasion and occupation of Kuwait.

98. Based on the evidence available, the Panel considers that Kuwait’s estimate of the total area affected by military fortifications is reasonable. Moreover, although the small area affected by military fortifications is unlikely to be a major contributor to sand mobilization, the Panel is satisfied that the construction and backfilling of military fortifications have caused environmental damage through destabilization or compaction of different soil types.

99. The Panel, therefore, finds that damage to Kuwait’s desert areas from the construction and backfilling of military fortification sites constitutes environmental damage directly resulting from Iraq’s invasion and occupation of Kuwait, and a programme to remediate the damage would constitute reasonable measures to clean and restore the environment.

100. Kuwait proposes to stabilize the areas damaged by the construction and backfilling of military fortifications by applying a 2.5-centimetre layer of gravel to control erosion and encourage the re-establishment of indigenous species.

101. Iraq argues that the proposed gravel stabilization “is not technically documented” and “will have significant adverse environmental effects”. Iraq suggests that Kuwait should instead address damage to the desert through “a national plan to organize and efficiently manage grazing”.

102. The Panel considers that gravel stabilization is an established remediation technique; and it is appropriate for those soil types in Kuwait where there is clear evidence of the presence of a physical soil crust and low concentrations of loose sand upwind of the areas to be remediated. Gravel
111. The Panel therefore, finds that damage to areas in and around wellhead pits from oil contamination constitutes environmental damage directly resulting from Iraq’s invasion and occupation of Kuwait, and a programme to remediate the damage would constitute reasonable measures to clean and restore the environment.

112. Kuwait proposes to excavate contaminated soil and treat it, using high temperature thermal desorption to remove the petroleum contamination. The treated soil would be used to backfill the wellhead pits, and the top of the pits would be stabilized with gravel. Kuwait also proposes to revegetate the remediated areas. The claim unit relating to the revegetation programme of these areas is reviewed in paragraphs 149 to 150 of this report.

113. Iraq contends that using high temperature thermal desorption to treat excavated soil could have serious adverse environmental impacts. Iraq also questions the use of gravel to stabilize the remediated areas.

114. In the view of the Panel, treatment of excavated soil by high temperature thermal desorption is not warranted in the circumstances of this claim. Other remediation alternatives, such as landfilling, have proven to be equally effective, and they involve significantly less expense.

115. As stated in paragraph 102, the Panel considers that the use of gravel stabilization is an appropriate remediation technique.

116. The Panel has indicated modifications to the remediation programme that dispense with high temperature thermal desorption treatment of excavated material. Moreover, as stated in paragraph 149, the Panel considers that revegetation is not warranted in these areas. The areas involved are relatively small and can be expected to revegetate naturally, if protected from grazing and off-road vehicles. Details of the modifications are set out in annex III.

117. The Panel finds that, with the modifications outlined in annex III, the remediation measures proposed by Kuwait constitute measures that are reasonably necessary to clean and restore the environment, within the meaning of paragraph 35(b) of Governing Council decision 7.

118. The expenses of the proposed remediation programme have been adjusted to take account of the modifications in annex III, including:

(a) Reduction in the volume of soil to be excavated;

(b) Elimination of high temperature thermal desorption treatment of excavated material; and

(c) Landfilling of excavated material.

119. Accordingly, the Panel recommends compensation in the amount of USD 8,252,657 for this claim unit.
4. Remediation of areas damaged by tarcrete

120. Kuwait seeks compensation in the amount of USD 928,820,719 for expenses of future measures to remediate areas damaged by tarcrete.

121. According to Kuwait, contamination from the oil well fires was deposited over approximately 271 square kilometres of its desert areas, where it formed tarcrete. Kuwait alleges that the tarcrete degraded the desert ecosystem and resulted in plant death and loss of vegetative cover. Kuwait also states that tarcrete interferes with the growth and reproduction of some species, and alters the composition of desert vegetation.

122. Kuwait provided evidence to show that the presence of tarcrete has resulted in chemical contamination of the affected desert areas. Kuwait also provided data from soil sampling to define the chemical composition of tarcrete and tarcrete-affected soils.

123. Iraq argues that the area alleged to be affected by tarcrete is “ill-defined and unclear”. Iraq also argues that there is no evidence that tarcrete poses a risk of long-term environmental damage. Indeed, Iraq claims that tarcrete could have a positive effect in promoting soil stabilization, and it alleges that tarcrete has in fact contributed to an increase in the vegetative cover in some parts of Kuwait. Iraq further asserts that, in any case, Kuwait has not undertaken an appropriate risk assessment to demonstrate that there is need for remediation.

124. The Panel finds that monitoring and assessment information submitted by Kuwait has provided a reasonably accurate approximation of the areas damaged by tarcrete. There is clear evidence that tarcrete can impair ecological recovery. While there has been natural recovery in some areas, large areas of tarcrete remain and this has impaired ecological functions such as water infiltration, nutrient cycling and the growth of vegetation.

125. The Panel, therefore, finds that damage to Kuwait’s desert areas from tarcrete constitutes environmental damage directly resulting from Iraq’s invasion and occupation of Kuwait, and a programme to remediate the damage would constitute reasonable measures to clean and restore the environment.

126. Kuwait proposes to remove tarcrete by hand and treat it by high temperature thermal desorption. It proposes to dispose of the treated material in existing quarries and pits near the oil fields. The areas from which tarcrete is removed would be stabilized with gravel and revegetated. The revegetation component of the remediation programme is discussed in paragraphs 151 to 152.

127. Iraq claims that the proposed remediation will cause “additional damage”. It states that “tarcrete is stable and does not present a risk whereas the excavation of tarcrete for treatment will be destructive to vegetation and soils”. Instead, it suggests that consideration should be given to alternative remediation approaches that would accelerate the recovery process.

128. In the view of the Panel, the physical removal of tarcrete could damage the affected soil, impair natural recovery and reduce the chances of successful revegetation. Furthermore, treatment of excavated soil by high temperature thermal desorption is not warranted in the circumstances.

129. The Panel has outlined a modified remediation programme that involves fragmentation of the tarcrete, instead of removal and treatment by high temperature thermal desorption. Furthermore, as indicated in paragraph 151, the Panel does not consider that any revegetation measures are warranted in the areas damaged by tarcrete. After fragmentation of the tarcrete, natural recovery can be accelerated by the application of organic amendments to provide additional nutrients. Details of the modified remediation programme are set out in annex IV.

130. The Panel finds that, with the modifications outlined in annex IV, the remediation measures proposed by Kuwait constitute measures that are reasonably necessary to clean and restore the environment, within the meaning of paragraph 35(b) of Governing Council decision 7.

131. The expenses of the proposed remediation programme have been adjusted to take account of the modifications in annex IV, including:

(a) On-site manual fragmentation of tarcrete for part of the affected areas;
(b) Elimination of high temperature thermal desorption treatment; and
(c) Addition of organic soil amendments to all affected areas.

132. Accordingly, the Panel recommends compensation in the amount of USD 166,513,110 for this claim unit.

5. Revegetation of damaged terrestrial ecosystems

133. Kuwait seeks a total compensation in the amount of USD 4,039,217,642 for expenses of future measures to revegetate areas of its desert that it alleges have been damaged as a result of Iraq’s invasion and occupation of Kuwait.

134. This compensation is sought for a comprehensive and integrated programme to revegetate the areas alleged to have been affected by military activities; the areas in and around the wellhead pits; and the areas alleged to have been damaged by tarcrete. Kuwait states that such a programme is necessary because vegetative cover provides an essential mechanism for desert surface stabilization. It also helps to regulate the distribution of rainfall and provides sustenance for wildlife.

(a) Areas affected by military activities

135. Kuwait alleges that the construction and backfilling of military fortifications, mine laying and mine clearance, movement of vehicles and personnel and construction of berms and sand walls (collectively referred to as “military activities”), caused soil compaction which “disrupts the soil’s natural permeability and infiltration properties, resulting in reduced water storage capacity”. Kuwait
which could have negative environmental impacts. A modified revegetation programme based on these considerations is outlined in annex V.

145. The Panel finds that, with the modifications outlined in annex V, the remediation measures proposed by Kuwait constitute measures that are reasonably necessary to clean and restore the environment, within the meaning of paragraph 35(b) of Governing Council decision 7.

146. The expenses of the proposed revegetation programme for areas affected by military activities have been adjusted to take account of the modifications indicated in annex V.

147. The Panel has made a further adjustment to the costs of the revegetation programme to take account of the contribution of other factors unrelated to Iraq’s invasion and occupation of Kuwait, including, in particular, uncontrolled livestock grazing and the use of off-road vehicles in sensitive desert areas. In the view of the Panel, the need for revegetation is due, in part, to these other factors.

148. Accordingly, the Panel recommends compensation in the amount of USD 460,028,550 for this unit of the claim.

(b) Areas damaged in and around wellhead pits

149. Kuwait proposes a revegetation programme for the areas in and around wellhead pits. In its review of the remediation programme for these areas, the Panel has recommended an award that includes remediation measures that rely on natural revegetation (see paragraph 116). Accordingly, the Panel finds no need for a revegetation programme for these areas.

150. Consequently, the Panel recommends no compensation for this segment of the claim.

(c) Areas damaged by tarcrete

151. Kuwait proposes a revegetation programme for the areas affected by tarcrete. In its review of the remediation programme for the areas affected by tarcrete, the Panel has recommended an award that includes remediation measures that rely on natural vegetation (see paragraph 129). Accordingly, the Panel finds no need for a revegetation programme for these areas.

152. Consequently, the Panel recommends no compensation for this segment of the claim.

6. Cleaning of government buildings

153. Kuwait seeks compensation in the amount of USD 33,619,681 for expenses to clean and repair 2,066 government buildings alleged to have been damaged as a result of Iraq’s invasion and occupation of Kuwait.

154. Kuwait alleges that the buildings require repairs “as a result of damages associated with oil fires and smoke”. According to Kuwait, the facades of the buildings were contaminated by air pollution. Kuwait also alleges that some of the contaminants entered the air conditioning systems and that this could have long-term adverse health consequences for the occupants of the buildings.
155. The Panel finds that damage to government building facades and air conditioning systems by releases from the oil well fires would constitute environmental damage directly resulting from Iraq’s invasion and occupation of Kuwait. However, Kuwait has not presented evidence sufficient to demonstrate the circumstances and amount of the claimed loss. Consequently, the Panel finds that Kuwait has failed to meet the evidentiary requirements for compensation specified in article 35(3) of the Rules.

156. Accordingly, the Panel recommends no compensation for this claim unit.

7. Recommended award for claim No. 5000450

157. The Panel’s recommendation for compensation for claim No. 5000450 is summarized in table 2.

<table>
<thead>
<tr>
<th>Claim No.</th>
<th>Claim unit</th>
<th>Amount claimed (USD)</th>
<th>Amount recommended (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>5000450</td>
<td>Remediation of areas damaged by military fortifications</td>
<td>14,170,924</td>
<td>9,019,717</td>
</tr>
<tr>
<td></td>
<td>Remediation of areas in and around wellhead pits</td>
<td>34,276,192</td>
<td>8,252,657</td>
</tr>
<tr>
<td></td>
<td>Remediation of areas damaged by tarcrete</td>
<td>928,820,719</td>
<td>166,513,110</td>
</tr>
<tr>
<td></td>
<td>Revegetation of damaged terrestrial ecosystems</td>
<td>4,039,217,642</td>
<td>460,028,550</td>
</tr>
<tr>
<td></td>
<td>Cleaning of government buildings</td>
<td>33,619,681</td>
<td>nil</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>5,050,105,158</strong></td>
<td><strong>643,814,034</strong></td>
</tr>
</tbody>
</table>

158. The Panel has not considered the issue of compensation for loss of use of terrestrial resources. This issue will be considered in the fifth instalment of “F4” claims as part of claim No. 5000460.

159. For the reasons indicated in paragraph 196, no date of loss for the purposes of interest is indicated for this recommended award.

D. Claim No. 5000452 – Damage to the Central Bank of Kuwait building

160. The Central Bank of Kuwait (the “Central Bank”) seeks compensation in the amount of USD 52,471, for expenses incurred to clean and restore the exterior of its building in Kuwait City. The amount claimed includes interest in the amount of USD 7,185.

161. The Central Bank alleges that the building was damaged by airborne pollutants from the oil well fires resulting from Iraq’s invasion and occupation of Kuwait. The oil well fires released oil, smoke and other pollutants in an airborne plume that settled over Kuwait City between 15 February and 30 May 1991. The Central Bank submitted contracts and invoices for cleaning and restoration work performed in 1993 on the exterior of the building and the wood carvings around the windows.

162. Iraq contends that the Central Bank has not provided evidence that environmental damage occurred. Iraq further states that “it is unclear whether the repairs have been performed” and that “at least part of the work could have been regular maintenance works not related to the Conflict”.

163. As noted in paragraph 23 of its second “F4” report, the Panel considers that expenses of measures undertaken to prevent or abate harmful impacts of airborne contaminants on property could qualify as environmental damage within the meaning of paragraph 16 of Security Council resolution 687 (1991) and paragraph 35 of Governing Council decision 7, provided that the expenses are a direct result of Iraq’s invasion and occupation of Kuwait.

164. The Panel finds that the remediation activities undertaken by the Central Bank constituted reasonable measures to clean and restore environment that was damaged as a direct result of Iraq’s invasion and occupation of Kuwait. Consequently, the expenses of those activities qualify for compensation in accordance with paragraph 35(b) of Governing Council decision 7.

165. However, the evidence presented does not enable the Panel to substantiate the full amount of the expenses claimed because the Central Bank has not provided evidence that shows the exact nature and scope of the work undertaken. Accordingly, the Panel has made an adjustment to account for the risk of overstatement in the claimed amount.

166. For the reasons stated in paragraph 195 the Panel makes no recommendation regarding the interest claimed in the amount of USD 7,185.

167. Accordingly, the Panel recommends compensation in the amount of USD 36,230 for this claim.

168. In accordance with the approach set out in paragraph 196, the Panel finds that the date of loss for this claim is 31 August 1993.

Table 3. Summary of recommended awards for the claims of Kuwait

<table>
<thead>
<tr>
<th>Claim No.</th>
<th>Subject matter</th>
<th>Amount claimed (USD)</th>
<th>Amount recommended (USD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>5000256</td>
<td>Damage to groundwater resources</td>
<td>185,167,546</td>
<td>41,531,463</td>
</tr>
<tr>
<td>5000450</td>
<td>Damage to terrestrial resources</td>
<td>5,050,105,158</td>
<td>643,814,034</td>
</tr>
<tr>
<td>5000452</td>
<td>Damage to the Central Bank of Kuwait building</td>
<td>52,471</td>
<td>36,230</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>5,235,325,175</strong></td>
<td><strong>685,381,727</strong></td>
</tr>
</tbody>
</table>
VI. CLAIMS OF THE KINGDOM OF SAUDI ARABIA

A. Claim No. 5000451 – Damage to coastal resources

169. Saudi Arabia seeks compensation in the amount of USD 4,748,292,230 for expenses of future
measures to remediate damage to its coastal environment resulting from Iraq’s invasion and
occupation of Kuwait.  This amount represents a decrease of the original amount claimed, reflecting
the Panel’s decision that biological assessment studies submitted by Saudi Arabia are incomplete, rely on a “coarse”
methodology, and have been misinterpreted by Saudi Arabia.

176. As noted in paragraph 23, Governing Council decision 7 states that direct loss, damage, or
injury includes any loss suffered as a result of military operations by either side during the period
August 1990 to 2 March 1991.  According to Decision 7, damage caused by oil releases are compensable
whether they resulted from military operations by Iraq or the Allied Coalition Forces.  In the view of
the Panel, evidence available from a variety of sources supports the conclusion that the overwhelming
majority of the oil currently present in the areas which Saudi Arabia proposes to remediate originated
from Iraq’s invasion and occupation of Kuwait.

177. The Panel observes that, while there has been some attenuation of oil contamination since Iraq’s
invasion and occupation of Kuwait, recent studies indicate that there are still areas with high levels of oil
contamination along its shoreline.  The data, which were collected at more than 19,500
sampling sites in the area proposed for remediation, indicate that there are large areas where oil
contamination continues to impair coastal resources and where there has been little or no biological
recovery.

178. The Panel, therefore, finds that damage from oil contamination to the shoreline between the
Kuwait border and Abu Ali constitutes environmental damage directly resulting from Iraq’s invasion
and occupation of Kuwait and a programme to remediate the damage would constitute reasonable
measures to clean and restore the environment.

179. Saudi Arabia proposes to remediate 20 areas, totaling approximately 73 square kilometres.

B. Claim No. 5000483 – Damage to biological resources

173. Saudi Arabia explains that the damage to its shoreline results from the toxicological effects of
chemical constituents of oil as well as the physical effects of settlement of sediment layers by oil.  According to Saudi Arabia, the continued presence of layers of oil-contaminated
sediments and tar mat at many sites on the shoreline is preventing natural recolonization and
ecological recovery in sections of the supra-tidal and inter-tidal regions.  As a result, many areas of
the shoreline are devoid of plant and animal life or show significant reduction in biological
diversity.

174. Iraq states that there is no dispute that the oil spill occurred or that it had immediately caused
environmental damage to wildlife and the benthic and sessile marine life of the Kuwaiti coastline.  Iraq
also contends that it is not liable for damages resulting from the ongoing pollution.

However, Iraq contends that the damage to Saudi Arabia’s shoreline cannot be attributed solely to the
events of 1991.  Points out that the region is constantly exposed to accidental spills and routine
offshore oil and gas exploration and production activities, operational discharges from vessels, urban
run-offs and similar sources.

170. Saudi Arabia states that the oil released as a result of Iraq’s invasion and occupation of Kuwait
distributed all previous inputs of oil into the Persian Gulf from spills, refinery operations, natural seeps,
exploration and production activities, operational discharges from vessels, urban run-offs and similar
sources.

174. Iraq states that there is no dispute that the oil spill occurred or that it had immediately caused
environmental damage to wildlife and the benthic and sessile marine life of the Kuwaiti coastline.  Iraq
also contends that it is not liable for damages resulting from the ongoing pollution.

However, Iraq contends that the damage to Saudi Arabia’s shoreline cannot be attributed solely to the
events of 1991.  Points out that the region is constantly exposed to accidental spills and routine
offshore oil and gas exploration and production activities, operational discharges from vessels, urban
run-offs and similar sources.

171. Saudi Arabia asserts that the oil released as a result of Iraq’s invasion and occupation of Kuwait
was dwarfed all previous inputs of oil into the Persian Gulf as a result of Iraq’s invasion and occupation of Kuwait.

172. According to Saudi Arabia, the 1991 oil spill caused extensive oil contamination to a total of
more than 600 kilometres of shoreline, from the border with Kuwait to Abu Ali.  Saudi Arabia states
that chemical analysis and core fragmentation, of over 3,000 sediment samples, collected in the
area proposed for remediation, indicates that the oil currently found in that area is predominantly of
Kuwaiti origin.  The chemical analysis and collection of underlying data were carried out as part of a
survey of the entire affected shoreline that was funded by an award in the first instalment of “F4” claims.

177. The Panel, therefore, finds that damage from oil contamination to the shoreline between the
Kuwait border and Abu Ali constitutes environmental damage directly resulting from Iraq’s invasion
and occupation of Kuwait, and a programme to remediate the damage would constitute reasonable
measures to clean and restore the environment.
180. Iraq states that the proposed remediation would have “large scale and deleterious environmental impacts”, and argues that Saudi Arabia has failed to assess these impacts. It also asserts that high temperature thermal desorption is not a suitable method for remediation of the oil-contaminated coastal sediments.

181. The Panel has some concerns with the remediation programme proposed by Saudi Arabia. The extensive excavation proposed by Saudi Arabia poses a risk of causing substantial environmental harm to areas that are already experiencing natural recovery, as well as to other sensitive areas where excavation may cause more harm than good. Furthermore, the extensive infrastructural work related to this excavation, such as construction and deconstruction of numerous seawalls, dikes and access roads for the transport of excavated material could have considerable adverse impacts on the coastal and marine environment. The Panel also considers that the problems relating to the disposal of excavated material and the backfilling of excavated sites have not been adequately addressed.

182. The Panel does not consider that treatment of oil-contaminated material by high temperature thermal desorption is warranted in the circumstances of this claim. The evidence presented does not justify the use of high temperature thermal desorption rather than other disposal options, such as landfilling, which is an accepted waste management practice throughout the world and is routinely utilized for the disposal of oil-contaminated material.

183. The Panel has evaluated a modified remediation programme that will target the impediments to ecological recovery and accelerate natural recovery without posing unacceptable risks of adverse environmental impacts. Details of the modified programme are set out in annex VI.

184. The Panel finds that, with the modifications outlined in annex VI, the remediation measures proposed by Saudi Arabia constitute measures that are reasonably necessary to clean and restore the environment, within the meaning of paragraph 35(b) of Governing Council decision 7.

185. The expenses of the proposed remediation programme have been adjusted to take account of the modifications in annex VI, including:

(a) Reduction in the total area and volume of materials to be remediated;
(b) Emphasis on in situ treatment methods;
(c) Elimination of high temperature thermal desorption treatment of excavated material; and
(d) Landfilling of excavated material.

186. The recommended award includes provision for long-term monitoring of the remediation activities. The Panel considers it appropriate to integrate continuous monitoring into the design and implementation of the remediation programme. This will make the programme flexible and more able to respond to new information.

187. The Panel, therefore, recommends compensation in the amount of USD 463,319,284 for this claim.

188. For the reasons indicated in paragraph 196, no date of loss for the purposes of interest is indicated for this recommended award.

189. The Panel has not considered the issue of compensation for loss of use of coastal resources. This issue will be considered, as necessary, in the fifth instalment of “F4” claims as part of claim No. 5000463.

B. Claim No. 5000360 – Monitoring of coastal remediation activities

190. Saudi Arabia seeks compensation in the amount of USD 20,602,177 for a project to assess the effectiveness of clean-up and remediation measures in coastal areas affected by oil pollution resulting from Iraq’s invasion and occupation of Kuwait, and to determine whether additional remediation is required. This amount represents an increase in the original amount claimed, reflecting an amendment requested by Saudi Arabia on the basis of new information obtained from its monitoring and assessment projects.

191. As indicated in paragraph 186, the Panel has included appropriate provision for the costs of long-term monitoring of the remediation activities in the award recommended for claim No. 5000451.

192. Accordingly, the Panel recommends no compensation for this claim.

Table 4. Summary of recommended awards for the claims of Saudi Arabia

<table>
<thead>
<tr>
<th>Claim No.</th>
<th>Subject matter</th>
<th>Amount claimed (USD)</th>
<th>Amount recommended (USD)</th>
</tr>
</thead>
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<td>5000451</td>
<td>Damage to coastal resources</td>
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<td>463,319,284</td>
</tr>
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VII. RELATED ISSUES

A. Currency exchange rates

193. The Commission issues awards in United States dollars. Some losses were claimed in United States dollars after conversion from other currencies. In keeping with the practice of other panels of Commissioners, the Panel has used currency exchange rates reported in the United Nations Monthly Bulletin of Statistics.

194. For claim No. 5000452, the Panel has used the monthly currency exchange rates reported in the United Nations Monthly Bulletin of Statistics for the months in which losses were incurred.
B. Interest

195. Governing Council decision 16 (S/AC.26/1992/16) provides that “[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful Claimants for the loss of use of the principal amount of the award”. It also provides that the Governing Council will consider the methods of calculation and payment of interest at the appropriate time, and that interest will be paid after the principal amount of awards. Accordingly, the Panel must determine the date from which interest will run, where relevant.

196. The majority of the third instalment remediation claims are for financial expenditures that have not yet been incurred. In such cases, no interest is due and, accordingly, no date of loss has been indicated. With respect to completed remediation activities, the Panel has selected the approximate mid-point of the period during which expenses were incurred as the date of loss.

VIII. SUMMARY OF RECOMMENDATIONS

197. Based on the foregoing, the Panel recommends that the amounts set out in table 5 be awarded in respect of the claims included in the third “F4” instalment.

Table 5. Summary of recommended awards for the third “F4” instalment

<table>
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<td>5000450</td>
<td>5,050,105,158</td>
<td>643,814,034</td>
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<tr>
<td></td>
<td>5000452</td>
<td>52,471</td>
<td>36,230</td>
</tr>
<tr>
<td>Kuwait subtotal</td>
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<td>685,381,727</td>
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<td>Saudi Arabia</td>
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<td>4,748,292,230</td>
<td>463,319,284</td>
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<tr>
<td></td>
<td>5000360</td>
<td>20,602,177</td>
<td>nil</td>
</tr>
<tr>
<td>Saudi Arabia subtotal</td>
<td></td>
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<tr>
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<td>1,148,701,011</td>
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</tbody>
</table>

Geneva, 11 July 2003

(Signed) Thomas A. Mensah
Chairman

(Signed) José R. Allen
Commissioner

(Signed) Peter H. Sand
Commissioner
1 See paragraph 29 of the “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘F4’ claims”, S/AC.26/2001/16 (“first ‘F4’ report”). In the first “F4” report, the Panel recommended awards for monitoring and assessment projects to identify and evaluate damage or loss suffered as a result of Iraq’s invasion and occupation of Kuwait. Some of these projects were intended to provide information to assist with the review of substantive claims by producing scientific and technical information about the nature and extent of environmental damage and potential remediation measures. Data produced by the following monitoring and assessment projects were transmitted to Iraq: claim Nos. 5000374, 5000375, 5000376, 5000433, 5000434, 5000435, 5000409, 5000359, 5000363, 5000411.


4 Ibid.

5 Ibid.


7 First “F4” report, paragraphs 33-34; second “F4” report, paragraph 40.

8 Paragraphs 100-101.

9 Second “F4” report, paragraph 94.

10 The increase in claimed costs is based on information produced by monitoring and assessment projects that were funded by awards in the first instalment of “F4” claims for claim Nos. 5000374, 5000375 and 5000376 (see Table 7 of first “F4” report).

11 The decrease in claimed costs is primarily due to Kuwait’s decision to use less costly remediation techniques for tarcrete-affected areas and areas that need to be revegetated. This decision was based on information produced by monitoring and assessment projects that were funded by awards in the first instalment of “F4” claims for claim Nos. 5000433 and 5000434 (see Table 7 of first “F4” report).

12 As stated in paragraph 3, a portion of claim No. 5000451, relating to measures to remove sunken oil from the marine environment, has been deferred to the fourth “F4” instalment.

13 The decrease in claimed costs is primarily due to a reduction in Saudi Arabia’s estimated volume of contaminated sediment to be excavated and treated by the high temperature thermal desorption process. The reduction in estimated sediment volume was primarily based on data collected as part of the monitoring and assessment programme which was funded by the award for claim No. 5000409 (the “shoreline survey”: see Table 9 of first “F4” report), as well as modifications to the proposed remediation programme. Relevant information was produced by monitoring and assessment projects that were funded by awards in the first instalment of “F4” claims for claim Nos. 5000359, 5000363, 5000409 and 5000411 (see Table 9 of first “F4” report).
TECHNICAL ANNEXES TO THE REPORT ON THE THIRD "F4" INSTALMENT

Introduction

1. In reviewing the remediation measures proposed by the Claimants, the Panel found that modifications in the design, methodologies and the nature and extent of work to be undertaken would improve the net environmental benefit and reduce the cost of some of the measures. The general outlines and objectives of the modifications have been indicated in the parts of the report dealing with the relevant claims. In some cases the Panel considers it useful to set out technical details of the modifications. As stated in paragraph 57 of the report, these details are indicated in the respective annexes.

2. The Panel recognizes that, in implementing the remediation activities, claimants may find it necessary to make further modifications, to take account of new information or changing environmental conditions. In this regard, the Panel stresses that its findings regarding the proposed remediation measures, and its suggestions of possible modifications, have been based on information available to it on the environmental conditions in Kuwait and Saudi Arabia prior to March 2003.

3. As noted in paragraph 50 of the report, remediation programmes must be implemented with utmost caution, taking due account of the need to avoid potential adverse environmental impacts of remediation activities. This requires the use of flexible and site-specific approaches, incorporating a broad set of remediation techniques that are capable of addressing the wide range of habitats, the varying levels of contamination and the different ecological conditions present.

4. The Panel has been guided by the following principles in considering modifications to the remediation programmes proposed by the Claimants:

(a) Remediation approaches or techniques that pose unacceptable risks of ecological harm should be avoided.

(b) Remediation activities should be undertaken only if they are likely to result in more positive than negative effects.

(c) Remediation techniques that facilitate natural recovery processes should be preferred, and active remediation should build on and enhance natural recovery that has already occurred.

(d) Remediation should rely on proven and well-established technologies and techniques in preference to experimental or untested approaches.

(e) The effectiveness of remediation activities should be monitored to ensure that remediation targets are met. Remediation programmes should be designed to be sufficiently flexible and responsive to new information obtained from such monitoring.

(f) Where more than one remediation approach or technique is appropriate to achieve the desired remediation goal, the most cost-effective option should be selected.

(g) Remediation decisions should consider both the short-term and long-term effects of remediation activities on neighbouring ecosystems, including transboundary effects.
suspected. The ponds are to be lined with a 1.5-millimetre high density polyethylene (HDPE) liner. A geotextile fabric cushion is to be placed under the liner to prevent abrasion or puncture by the soils below. It is advisable to consider building two or more ponds at each freshwater field in order to minimize the piping needed to reach the ponds from extraction wells.

7. Sludge caused by TDS and by windborne particles deposited in the ponds will need to be removed from the evaporation ponds on a regular basis during operations. Once dried, the sludge is to be disposed in a landfill. When no longer needed, ponds are to be closed in place by removing the liner and geotextile on the berms and then back-filling the ponds with clean soil. The liners at the bottom of the ponds could be left in place. No hazardous materials or TDS are to remain once the ponds are closed.

8. When the specific contaminants in the groundwater have been identified and studies on the feasibility of alternative treatment methods are completed, it might be preferable to treat contaminated groundwater for reuse rather than disposing of it in evaporation ponds. Alternative disposal methods such as deep well injection of contaminated groundwater with oil production brines might also be considered. Any change of remediation measures is to be based on a consideration of the full range of benefits and costs of treating contaminated groundwater for reuse as compared to disposal.

9. Extraction of a total of 15 million cubic metres of contaminated groundwater over a period of 12 to 15 years will reduce the volume of freshwater at Umm Al-Aish and Raudhatain. While natural recharge from rainfall will replace the extracted water over time, this process could last many years. Thus, to restore the freshwater deposits, potable water will need to be recharged in the general areas where extraction takes place. The volume of water recharged over time will have to be equal to the volume of contaminated groundwater extracted.

10. Construction of the recharge well system is to be delayed for several years after groundwater extraction begins. This will allow time for the initial plume extraction areas to be ready for recharge; and will also give enough time for a determination to be made whether it is advisable to treat the extracted water to potable standards and recharge it to the aquifers.

11. For recharging the aquifers with potable water, approximately eight recharge wells at Raudhatain and four recharge wells at Umm Al-Aish will be sufficient. Each well is to have a 20-centimetre diameter bore and be cased with stainless steel. Well depths are to range between approximately 70 metres at Raudhatain and approximately 61 metres at Umm Al-Aish. These depths would allow recharge to all three aquifer layers that contain freshwater. Wells at each area would be piped to a 200-cubic-metre tank, and recharge wells would be fed by gravity flow from the tank. Provision is to be made for annual maintenance on each well and for power to run the pumps that distribute the potable water to the storage tanks.

12. Potable water for recharge could be produced by treatment of contaminated groundwater, as discussed in paragraph 8 of this annex. Alternately, potable water for recharge could be purchased from existing desalination plants, or could be produced near Umm Al-Aish and Raudhatain using reverse osmosis technology to desalinate brackish groundwater. A reverse osmosis plant with capacity...
of approximately 3,800 cubic metres per day could be constructed near Umm Al-Aish and Raudhatain. Potable water from this reverse osmosis plant could be piped to the 200-cubic-metre tanks serving the recharge wells. Two supply wells could be used to produce brackish groundwater for treatment, at distances of up to 1.5 kilometres from the reverse osmosis plant. In addition to potable water, the reverse osmosis plant would produce a concentrated brine waste stream that could be disposed into a deep injection well drilled into the saline groundwater below and away from the freshwater aquifers.

13. Continuous monitoring will be required to evaluate the progress of the remediation actions outlined in paragraphs 2 and 3 of this annex, and to monitor the status of the groundwater contamination plumes to be remediated using natural recovery. This monitoring will be additional to the monitoring and assessment projects funded by awards in the first instalment of "F4" claims (claim Nos. 5000374, 5000375, 5000376).

Annex I

MODIFICATIONS TO REMEDIATION PROGRAMME – CLAIM NO. 5000450

KUWAIT – REMEDIATION OF AREAS DAMAGED BY MILITARY FORTIFICATIONS (PARAGRAPHS 92 TO 105)

1. Kuwait proposes to apply a 2.5-centimetre layer of gravel to the disturbed soil surface in order to stabilize the 6.25 square kilometres of desert damaged by construction and backfilling of fortifications. Gravel stabilization is an established remediation technique and is appropriate for soils with a physical crust and low concentrations of loose sand upwind of the areas to be remediated.

2. In this case, gravel stabilization is suitable for sites located in areas where soil conditions suggest that the greatest benefits will be derived. These are the desert pavement and compacted sites that exhibit a much lower natural recovery response, generally in areas with five of Kuwait’s soil types, namely, calcigypsids, haplocalcids, petrogypsids, torripsamments and petrocalcids.

3. A reduced gravel stabilization programme can be implemented faster, i.e. in 635 crew-weeks, instead of 1,040 crew-weeks as proposed by Kuwait.

4. Although gravel stabilization can promote revegetation in these areas, full restoration of ecological functions will not occur without restrictions on uncontrolled land use. In particular, it will be necessary for measures to be taken to protect the sites from overgrazing by livestock and the use of off-road vehicles.
MODIFICATIONS TO REMEDIATION PROGRAMME – CLAIM NO. 5000450

KUWAIT – REMEDIATION OF AREAS IN AND AROUND WELLHEAD PITS (PARAGRAPHS 106 TO 119)

1. Kuwait proposes to remediate hydrocarbon contamination at 163 wellhead pits by excavating contaminated soil and treating it with high thermal temperature desorption, backfilling the excavated pits with the treated soil, and stabilizing the surface of the backfilled pits with a 2.5-centimetre layer of gravel.

2. A remediation programme combining excavation and off-site landfilling for some wellhead pits and a closure-in-place option for others would be a less costly approach. Moreover, it is more likely to protect human health and restore ecological functions in the wellhead pit areas.

3. For purposes of remediation, wellhead pits are to be divided into two categories. The first category includes 19 wellhead pits that are directly above the freshwater aquifers in Kuwait's northern oil fields. The second category includes all the remaining wellhead pits identified in the claim. For both categories, further testing needs to be conducted and remediation implemented, as necessary, to eliminate any risks to the aquifers or other parts of the environment.

4. For the 19 wellhead pits that pose direct risks to freshwater aquifers, the appropriate remediation is excavation and landfilling. To prevent leakage of contaminants from the wellhead pits to groundwater, the landfill approach needs to include a clean closure of the pits. This involves the removal of all petroleum-contaminated soil located within the pits or surrounding berms. The excavations are then backfilled with clean soil and provided with a 2.5-centimetre stabilizing layer of gravel to prevent wind erosion and promote revegetation. The clean fill for the pits can be taken from the landfill excavation or from local sources of fill material.

5. The same 19 wellhead pits are appropriate for clean closure (i.e. they need to be excavated until there is no visible oil contamination and then backfilled with clean soil). The total excavated material from the 19 pits would be approximately 70,000 cubic metres. This would require a single, square landfill facility of about 100 metres on each side, with a depth of approximately 10 metres. The landfill could be constructed such that, once closed, it would be completely below grade, with no visible presence.

6. Once a landfill is suitably closed, there is an extremely low risk of infiltration of hydrocarbons into the underlying groundwater. Hence, the construction of the landfill with an appropriate liner system and cap will prevent any potential contaminants from migrating into the underlying groundwater, especially given the low rainfall in the area. As an additional precaution it may be advisable to locate the landfill inside the fenced oil field areas in order to bring it under institutional control applicable to those areas. Furthermore, any landfill facilities constructed within...
Annex IV
MODIFICATIONS TO REMEDIATION PROGRAMME – CLAIM NO. 5000450
KUWAIT – REMEDIATION OF AREAS DAMAGED BY TARCRETE
(PARAGRAPHS 120 TO 132)

1. Kuwait proposes to remediate tarcrete contamination in an area of 271.5 square kilometres by manually excavating the tarcrete layer and stabilizing excavated areas with a 2.5-centimetre layer of gravel; treating the contaminated soil using high thermal temperature desorption; and disposing of the treated material in existing quarries and gash pits. The modifications indicated in this annex are intended to build on the natural recovery that has already taken place, and they rely on in situ fragmentation of tarcrete followed by the application of organic amendments to the areas of fragmented tarcrete.

2. A remediation programme that leaves the tarcrete in place but manipulates it to enhance natural recovery processes is more likely to result in successful recovery than a programme that involves physical excavation. Indeed, excavation of tarcrete could reduce the success of any revegetation efforts. Manual fragmentation of the tarcrete in situ will accelerate ongoing natural fragmentation while minimizing damage to existing vegetation and soil resources.

3. Manual fragmentation of tarcrete should not require any specialized equipment or procedures. Labourers would break the tarcrete into pieces using shovels and picks. However, instead of excavating it, they would further fragment the tarcrete and leave it in place.

4. Once the tarcrete is fragmented, application of appropriate organic amendments to the fragmented tarcrete will provide additional nutrients and accelerate the recovery process. Appropriate organic matter should be low in available nutrients and slow to decompose. Sources of such organic matter include wheat or barley straw, bark or wood chips, fully composted biosolids, olive cake residue or other readily available organic material. This type of organic matter is more appropriate for improving the physical characteristics of the soil because matter with a higher concentration of nutrient sources would encourage the growth of undesirable invasive weed species.

5. Adding slowly decomposing materials of these types can accelerate development of more complete soil processes by improving soil physical conditions, stimulating microbial activity and regulating levels of available nitrogen. However, further field testing of different amendments will be necessary to identify the most effective organic matter for tarcrete areas, the appropriate application rate and the timing of the application.

6. Organic soil amendments will also help to provide shelters and construction materials for soil invertebrates such as termites, which produce surface structures in these environments that result in the progressive burial of stones, gravel and solid deposits including tarcrete fragments. The organic matter will also be used by a number of other invertebrate decomposers and thus indirectly stimulate their predators, especially ants, whose activities are also beneficial to the soil. These organisms are able to use low quality organic residues that they fragment and partly digest.

7. Fragmentation of tarcrete and addition of soil amendments will be beneficial throughout the area affected by tarcrete. Even where the tarcrete is already fragmenting, further break-up of the surface can be expected to accelerate the ecosystem recovery process. The only exception would be the area just outside the Burgan oil field fence (approximately 71 square kilometres) where the tarcrete has already been completely broken up by livestock grazing. This area would benefit from the addition of soil amendments only if it is adequately fenced to prevent further grazing by domestic livestock during the recovery period.

8. From a physical and biological perspective, fragmentation of the tarcrete has a variety of benefits that enhance the ecological recovery process. At all sites, fragmented tarcrete will promote recovery of vegetation by serving as a medium for trapping seeds and organic matter and storing moisture.

9. Enhancing natural recovery through manual fragmentation of tarcrete will require two important support activities. First, the site will need to be monitored for unexploded ordnance during the tarcrete fragmentation process in order to minimize risks to workers at the sites. Second, additional security measures will be needed in the areas controlled by the Kuwait Oil Company because of the increased number of workers who will be engaged in tarcrete fragmentation in those areas.

10. A long-term remediation monitoring plan that collects relevant data before, during and after implementation of remediation should be carefully integrated into the remediation programme. During the course of the project, remediation activities are to be adapted in response to data and analysis developed through the monitoring programme. This provides opportunities to identify and address negative impacts of remediation activities, if any arise. It will also assist in identifying successful remediation approaches.
matter will also be used by a number of other invertebrate decomposers and thus indirectly stimulate their predators, especially ants, whose activities are beneficial to the soil.

7. It will be necessary to develop a local facility with the capability to produce the large numbers of seeds and plants required by the programme. Since the focus of the revegetation effort will be on a wide variety of native species which are not necessarily amenable to greenhouse-scale production, it would be useful to establish a germination laboratory to provide ongoing seed testing and evaluation during the life of the project.

8. Drought can drastically affect vegetation, especially in stressed, degraded or recovering systems. It is, therefore, necessary to provide for an irrigation system for the revegetation areas, in the event that rainfall is inadequate to support recovery and establishment of newly planted vegetation. However, instead of supplying water to the irrigation system by trucks, it would be more cost-effective to have an on-site water supply and drip irrigation system for each revegetation island. Such a system would consist of an on-site well, a water treatment system for purifying brackish water and a drip irrigation system. Grass for these areas will most probably be established from seed, and a combination of precipitation and residual moisture from the drip irrigation system can provide adequate moisture for its healthy growth.

9. A number of maintenance and monitoring efforts will be needed to ensure the success of the revegetation program. Careful monitoring will need to be conducted to assess the effectiveness of the production and planting methods, species selection, amendments and irrigation program. The results of the monitoring will make it possible for the programme to be modified as necessary to maximize its success. Two-person monitoring teams, consisting of an ecologist and a technician, will need to spend one to two per cent of the initial planting level each year, for a total replanting effort equal to 90 per cent of the initial effort. The results of the monitoring will make it possible for the programme to be modified as necessary to maximize its success.

10. It will not be necessary to undertake inoculation of plants and application of fertilizer. Existing communities of the appropriate organisms in the areas to be remediated will be adequate to support the revegetation effort. If the soil used to grow seedlings is taken from local sources, it will already contain appropriate organisms. Additional fertilizer beyond the organic amendments would encourage excessive growth of undesirable invasive weed species.

11. Shelter belts, designed to trap mobile sand upwind of the revegetation islands, are an integral component of the revegetation programme. The proposal to use a biological wind-break of trees and fences is appropriate, but with some modifications:

(a) First, three rows of trees in each shelter belt will be sufficient.

(b) Second, impounding fencing is only needed before the trees are fully established. Thereafter, experience suggests that the trees will successfully impound mobile sand. If sand
overwhelms a fence before the trees are fully established, it will be more cost-effective to construct a replacement fence.

(c) Finally, monitoring of the shelter belts could be combined with monitoring of the revegetation islands. The monitoring teams for the revegetation islands, as described in paragraph 9 of this annex, should be able to effectively monitor the success of the shelter belt programme as part of their work at each revegetation island.

Annex VI

MODIFICATIONS TO REMEDIATION PROGRAMME – CLAIM NO. 5000451

SAUDI ARABIA – DAMAGE TO COASTAL RESOURCES (Paragraphs 169 to 189)

1. Saudi Arabia proposes to remediate 20 areas along its coastline between the Kuwait border and Abu Ali. In these areas, it proposes to excavate and remove material that is visibly contaminated. During the excavation, salt marsh and tidal flat areas would be isolated from the sea by the construction of seawalls and dikes; these would be progressively removed as the work is completed in each area. Following sediment excavation, residual contamination in remaining sediments would be treated with bio-remediation techniques. The excavated material would be treated using high temperature thermal desorption at a number of facilities to be constructed for that purpose. Treated sediments would be blended with dredged subtidal sediments and replaced in excavated areas. The salt marshes would be revegetated after bio-remediation treatment. Saudi Arabia states that it will review and modify the remediation programme as additional information from its monitoring and assessment studies becomes available.

2. It is preferable to rely on natural recovery in areas where the presence of oil is not impeding ecological recovery or where active remediation could result in adverse impacts approaching or exceeding expected environmental benefits. This appears to be the case especially in the following areas:

(a) Areas of sabkha, marsh, tidal flat and rocky shoreline habitat where there is only light oil contamination;

(b) Areas where residual oil has not formed a barrier to recolonization and is unlikely to do so in the future, usually because it is present in relatively low concentrations or below the working depths of the crabs, snails and other fauna and flora; and

(c) Salt marshes where natural recolonization by salt marsh plants has occurred or is in progress.

3. Remediation in these areas would be counterproductive because it is likely to reverse some of the recovery that has already occurred. Furthermore, the physical alteration of the shoreline could result in slower subsequent recovery.

4. In areas where active remediation is found to be appropriate, more reliance is to be placed on in situ techniques that are commonly used by oil spill remediation experts to deal with shoreline pollution from oil spills. These techniques include tilling, mixing, sediment relocation and channelling, as described below:

(a) Tilling/mixing – Surface oil and algal mat is broken up and subsurface oil is exposed to accelerate the natural removal and weathering of oil by the atmosphere, waves and tidal processes. Tilling and raking are used to break up the oil-contaminated sediment layer. Digging and ploughing...
turn over or displace the sediments or algal mat. These techniques may be most appropriate for breaking up surface and near-surface layers of oil and algal mat.

(b) Sediment relocation – Oil-contaminated material is moved from the upper to the lower shore to accelerate the natural weathering and removal of oil. The physical action of the waves in the lower shore zone is greater and is sustained for longer periods compared to the upper shore. Tidal action returns the cleaned sediments to the natural topographic contour over time. This technique would be applicable at open beaches where there is sufficient wave action to physically rework the oil-contaminated sediments.

(c) Manual channelling – Salt marsh sediment is scored with a hoe to increase the amount of time that tidal water is present in the vicinity of the sediment (“micro-canalization”) and to encourage tidal water to penetrate further into the sediments.

(d) Mechanical channelling – Sediment is removed to clear channels blocked by oil or filled with sediment (due to the cessation of tidal flow), altering the local hydrology. The objective is to allow return of the tidal flow to restore the hydrological character of the affected area.

5. Channelling should be considered for use in supratidal areas without halophytes where improving water circulation may be a necessary precursor to tilling or break-up of algal mats or oil-contaminated sediment. In some cases, the supratidal zone is not heavily contaminated with oil, but is dominated by thick algal mats that are a barrier to reclamation. In other cases, the supratidal zone has developed into a hyper-saline lagoon. Careful channelling (whether manual or mechanical) will help to improve water circulation to accelerate weathering of the oil-contaminated sediments and to provide a route for reclamation by crabs and other fauna. Careful, detailed surveys will be needed to design the channelling work.

6. Oil containment booms and other equipment, such as sorbent materials and oil skimmers, are to be used to collect and remove oil that might be released on the water surface by the treatment activities to reduce the risk of adverse impacts on sensitive biota.

7. Ex situ techniques, especially sediment removal, are to be utilized only as a minor component of the overall remedial approach and generally limited to very specific areas where a discrete layer of asphalt pavement or heavily oil-contaminated sediment is present at or near the surface. Excavated areas need to be filled to restore the surface of the site to pre-excavation conditions. To achieve this it is advisable to use material with similar physical and chemical characteristics as the original soil in the area.

8. It is advisable to consider beneficial reuse of excavated material in order to reduce the volume of material that will need to be disposed of.

9. Marsh areas are to be considered for revegetation after the sediment has been sufficiently remediated with one or more of the treatment technologies described above to make it suitable for halophyte growth. Planting is an appropriate means to enhance the natural recolonization of the

habitat and thereby accelerate recovery. Halophytes are extremely sensitive to small changes in environmental conditions, such as tidal elevations; hence prior remediation activities need to be carefully chosen and implemented. Halophytes do not necessarily require the sediment to be completely free of visible oil before they begin to recolonize and slowly break up the remaining oil, making the sediment more acceptable for recolonization by crabs and other fauna. Revegetation is likely to be time-consuming and labour-intensive; however, it is unlikely to have adverse environmental effects and has the potential to significantly accelerate the restoration of a natural, healthy biotic community in these areas.

10. Planning needs to focus on developing detailed, site-specific guidance for clean-up teams, and is to be based on existing rapid assessment data and additional field visits by multidisciplinary remediation planning teams.

11. Multiple rounds of treatment will be required in some areas. In many areas, it is unlikely that a single round of treatment will be sufficient to meet restoration goals. At some sites it may be clear from the outset that multiple treatments will need to be applied over time (for example, micro-canalization of marsh sediments, followed by tilling or targeted break-up of algal mat to allow other biota to recolonize). Also, initial remediation efforts may be less successful than expected in some areas, and these areas will require additional attention.

12. A long-term monitoring plan that collects relevant data before, during and after remediation activities needs to be carefully integrated into the remediation programme. During the course of remediation, it is essential for remediation activities to be adapted in response to data and analysis developed through such a monitoring programme. This will provide opportunities to identify and address negative impacts of remediation activities, if any arise. It will also assist in identifying successful remediation approaches.

13. Criteria for the evaluation of the remediation programme need to be specified before the monitoring programme is implemented. The planning team needs to consider carefully how data collected by the monitoring programme will be used to evaluate and potentially alter remediation decisions. Where quantitative indicators of ecological conditions are utilized, it is essential to determine in advance the number of samples that need to be collected in order to make meaningful statistical comparisons. It is also advisable to increase the number of monitoring transects devoted to reference sites, based on the observed variability in habitats, the shoreward extent of oil contamination, shoreline slope, sediment type, exposure to winds, tides and waves and the presence of embayments.
GLOSSARY

aquifer: Natural water-bearing geological formation found below the surface of the earth.

berm: Mound or wall of earth.

biomarker fingerprinting: Method for determining the source of oil contaminants based on analysis of petroleum components that remain detectable and relatively unchanged in oil residues even after natural environmental weathering and biodegradation.

boom: Floating barricade used to contain oil spills.

calcigypsids: Sandy or loamy soils forming a great group of the gypsid suborder of the aridisol soil order.

clean closure: Removal or decontamination of all waste residues, contaminated system components and subsoils, including the removal of all wastes, liners, leachate and other contaminated materials that pose a substantial present or potential threat to human health or the environment.

closure in place: Placement of a cover system over a waste disposal area designed to minimize infiltration and erosion of contaminants into soil or groundwater.

coagulation/flocculation: Collection of water flows from various sources in a tank or chamber prior to further processing or treatment. In the coagulation/flocculation phase of water treatment, a chemical (e.g. alum, iron salts or lime) is added to the water to be treated. With stirring, the chemical additive causes small particles of silt and other impurities to form clumps which can be removed by subsequent processes.

flow collection: Collection of water flows from various sources in a tank or chamber prior to further processing or treatment.

freshwater lens: Body of freshwater floating on top of brackish water in an unconfined aquifer.

gatch: Gypsiferous soils containing a hardened layer that limits or prevents root growth.

geomembrane: Impermeable thin sheet of rubber or plastic material used primarily as a liquid or vapour barrier.

granular activated carbon: Substance produced from a variety of carbonaceous materials. It is used to remove dissolved organic material from water.

gravity clarification: Water treatment process in which particles suspended in water sink to the bottom of a container. This process may be used after coagulation/flocculation.

halophytes: Plants which are able to tolerate high salinity in their growth media.

haplocalcids: Sandy or loamy soils forming a great group of the calcid suborder of the aridisol soil order.

high temperature thermal desorption (HTTD): Process using heat to separate contaminants from contaminated material. In the process, water and organic contaminants are volatilized from the material. The volatilized contaminants usually require further treatment.

impounding fencing: Chain link fencing with slats, approximately 2 metres high, placed perpendicular to the prevailing wind direction, for the purpose of preventing the accumulation of mobile sand on revegetated areas.

landfill: Waste disposal facility on land. State-of-the-art landfills have liners and leachate collection and treatment systems to prevent contamination of surface and groundwater.

leachate: Water that has percolated through waste material and leached out some of the constituents of the material.

liner: Relatively impermeable barrier usually made from plastic or dense clay designed to keep contaminants inside a landfill.

oil lakes: Pools of oil from damaged oil wells and oil spills.

oil production brine: Liquid that is separated from oil following pumping of oil wells, drilling or during the normal extraction of oil. Most of this material is usually returned underground through injection wells following separation from the oil. Brines are very salty because they are composed largely of sodium-laden waters that are mixed with the oil underground.
organic amendment: Material containing organic matter such as plant residues, manure, sewage sludge, composts or peat, added to soil to improve its physical, chemical and biotic properties.

ozonation: Treatment process using ozone to disinfect water and eliminate colour, odour and taste problems.

petrocalcids: Sandy or loamy soils containing a strongly cemented layer of carbonate accumulation, which form a great group of the calcid suborder of the aridisol soil order.

petrogypsids: Sandy or loamy soils containing a gatch layer, which form a great group of the gypsid suborder of the aridisol soil order.

reverse osmosis (RO): Water treatment process that removes contaminants from water using pressure, forcing water molecules through a semi-permeable membrane. Reverse osmosis removes ionized salts, colloids, and organic molecules down to a molecular weight of 100. The process is also called hyperfiltration.

sabkha: Arabic term for salt flat, usually located in areas of groundwater discharge exposed only rarely to free-standing sea water. Sabkha soils may have strength in the surface hypersaline crust when dry, but once wetted or disturbed exhibit very low strength and bearing capacity.

shelter belt: Trees, shrubs, or other vegetation, usually planted perpendicular to the principal wind direction, to protect soil and crops against the effects of wind, such as wind erosion and the drifting of soil.

supra-littoral: Spray zone of the shore, located above the highest astronomical tide; seawater penetrates these elevated areas rarely (e.g., during storm surges coincident with the highest tides).

tar mat: Crust of spilled oil and soil which forms a pavement-like surface.

tarcrete: Oil contamination consisting of dry tar and soil forming a thin oil crust with no visible contamination of the underlying soil, resulting from deposition of oil droplets.

torripsamments: Sandy soils forming a great group of the psamment suborder of the entisol soil order.

total dissolved solids (TDS): Measure of salinity. The total weight of solids dissolved in water is determined by filtering a given volume of water, evaporating it at a defined temperature and then weighing the residue.

total petroleum hydrocarbons (TPH): Term used to describe a class of several hundred chemical compounds, comprising mainly hydrogen and carbon, often present in oil.

ultrafiltration: Filter technology that removes some suspended or dissolved solids from water or other liquids. It is especially useful for removing suspended oil, grease, and fine solids from water and is used in a variety of water treatment processes.

vadose zone (also called zone of aeration or unsaturated zone): Area between the land surface and the water table, including the root zone, the intermediate zone and capillary fringe where pore spaces contain water, as well as air and other gases, at less than atmospheric pressure. It may include water-saturated portions.

wadi: Arabic term for streambed or other natural depression that is dry except during the rainy season.

wellhead pit: Excavation in the ground for the purpose of storing sea water used in fighting oil well fires.
International Court of Justice

Pulp Mills on the River Uruguay
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V. The Claims Made by the Parties in Their Final Submissions

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ABBREVIATIONS AND ACRONYMS

AAP “Autorización Ambiental Previa” (initial environmental authorization)
ADCP Acoustic Doppler Current Profiler
AOX Adsorbable Organic Halogens
BAT Best Available Techniques (or Technology)
Botnia “Botnia S.A.” and “Botnia Fray Bentos S.A.” (two companies formed under Uruguayan law by the Finnish company Oy Metsä-Botnia AB)
CARU “Comisión Administradora del Río Uruguay” (Administrative Commission of the River Uruguay)
CIS Cumulative Impact Study (prepared in September 2006 at the request of the International Finance Corporation)
CMB Celulosa M’Bopicuí S.A.” (a company formed under Uruguayan law by the Spanish company ENCE)
CMB (ENCE) Pulp mill planned at Fray Bentos by the Spanish company ENCE, which formed the Uruguayan company CMB for that purpose
DINAMA “Dirección Nacional de Medio Ambiente” (National Directorate for the Environment of the Uruguayan Government)
ECF Elemental Chlorine-Free
EIA Environmental Impact Assessment
ENCE “Empresa Nacional de Celulosas de España” (Spanish company which formed the company CMB under Uruguayan law)
ESAP Environmental and Social Action Plan
GTAN “Grupo Técnico de Alto Nivel” (High-Level Technical Group established in 2005 by Argentina and Uruguay to resolve their dispute over the CMB (ENCE) and Orion (Botnia) mills)
IFC International Finance Corporation
MVOTMA “Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente” (Uruguay’s Ministry of Housing, Land Use Planning and Environmental Affairs)
Orion (Botnia) Pulp mill built at Fray Bentos by the Finnish company Oy Metsä-Botnia AB, which formed the Uruguayan companies Botnia S.A. and Botnia Fray Bentos S.A. for that purpose
OSE “Obras Sanitarias del Estado” (Uruguay’s State Agency for Sanitary Works)
POPs Persistent Organic Pollutants
PROCEL “Plan de Monitoreo de la Calidad Ambiental en el Río Uruguay en áreas de Plantas Celulósicas” (Plan for monitoring water quality in the area of the pulp mills set up under CARU)
INTERNATIONAL COURT OF JUSTICE

YEAR 2010

20 April 2010

CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA v. URUGUAY)

Legal framework and facts of the case.
1961 Treaty of Montevideo — 1975 Statute of the River Uruguay — Establishment of the Administrative Commission of the River Uruguay (CARU) — CMB (ENCE) pulp mill project — Orion (Botnia) pulp mill project — Port terminal at Nueva Palmira — Subject of the dispute.

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On the basis of the evidence submitted, no breach by Uruguay of Article 41 of the 1975 Statute.

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Uruguay’s request for confirmation of its right to continue operating the Orion (Botnia) plant — No practical significance.

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Obligation of the Parties to co-operate with each other, on the terms set out in the 1975 Statute, to ensure the achievement of its object and purpose — Joint action of the Parties through CARU and establishment of a real community of interests and rights in the management of the River Uruguay and in the protection of its environment.
Mr. Juan Carlos Colombo, Ph.D. in Oceanography from the University of Quebec, Professor at the Faculty of Sciences and Museum of the National University of La Plata, Director of the Laboratory of Environmental Chemistry and Biogeochemistry at the National University of La Plata,
Mr. Neil McIntyre, Ph.D. in Environmental Engineering, Senior Lecturer in Hydrology at Imperial College London,
Ms Inés Camilloni, Ph.D. in Atmospheric Sciences, Professor of Atmospheric Sciences in the Faculty of Sciences of the University of Buenos Aires, Senior Researcher at the National Research Council (CONICET),
Mr. Gabriel Raggio, Doctor in Technical Sciences of the Swiss Federal Institute of Technology Zurich (ETHZ) (Switzerland), Independent Consultant,
as Scientific Advisers and Experts;
Mr. Holger Martinsen, Minister at the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship, Mr. Mario Oyarzabal, Embassy Counsellor, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Fernando Marani, Second Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands,
Mr. Gabriel Herrera, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
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Ms Kate Cook, Barrister at Matrix Chambers, London, specializing in environmental law and law relating to development, Ms Maria Tignino, Ph.D. in Law, Researcher at the University of Geneva, Mr. Magnus Jesko Langer, teaching and research assistant, Graduate Institute of International and Development Studies, Geneva,
as Legal Advisers,
and
the Eastern Republic of Uruguay,
represented by
H.E. Mr. Carlos Gianelli, Ambassador of the Eastern Republic of Uruguay to the United States of America,
as Agent;
H.E. Mr. Carlos Mora Medero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,
as Co-Agent;
Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, Member of the English Bar,
Mr. Luigi Condorelli, Professor at the Faculty of Law, University of Florence,
Ms Raquel Piaggio, State Agency for Sanitary Works (OSE), Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Mr. Charles A. Menzie, Ph.D., Principal Scientist and Director of the Eco-Sciences Practice at Exponent, Inc., Alexandria, Virginia,

Mr. Neil McCubbin, Eng., B.Sc. (Eng.), Ist Class Honours, Glasgow, Associate of the Royal College of Science and Technology, Glasgow, as Scientific Advisers and Experts,

The COURT, composed as above, after deliberation,

delivers the following Judgment:

1. On 4 May 2006, the Argentine Republic (hereinafter “Argentina”) filed in the Registry of the Court an Application instituting proceedings against the Eastern Republic of Uruguay (hereinafter “Uruguay”) in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations under the Statute of the River Uruguay (United Nations, Treaty Series (UNTS), Vol. 1295, No. 1-21425, p. 340), a treaty signed by Argentina and Uruguay at the Statute of the River Uruguay (United Nations, Treaty Series (UNTS), Series (UNTS), Eastern Republic of Uruguay (hereinafter “Uruguay”) in respect of a dispute the Registry of the Court an Application instituting proceedings against the United Nations was notified of the filing of the Application. The Registrar communicated the Application forthwith to the Government of Uruguay. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar communicated the Application forthwith to the Government of Uruguay. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar transmitted a certified copy of this request forthwith to the Government of Uruguay.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar communicated the Application forthwith to the Government of Uruguay. In accordance with paragraph 3 of that Article, the Secretary-General of the United Nations was notified of the filing of the Application.

3. On 4 May 2006, immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Government of Uruguay.

4. On 2 June 2006, Uruguay transmitted to the Court a CD-ROM containing the electronic version of two volumes of documents relating to the Argentine request for the indication of provisional measures, entitled “Observations of Uruguay” (of which paper copies were subsequently received); a copy of these documents was immediately sent to Argentina.

5. On 2 June 2006, Argentina transmitted to the Court various documents, including a video recording, and, on 6 June 2006, it transmitted further documents; copies of each series of documents were immediately sent to Uruguay.

6. On 6 and 7 June 2006, various communications were received from the Parties, whereby each Party presented the Court with certain observations on the documents submitted by the other Party. Uruguay objected to the production of the video recording submitted by Argentina. The Court decided not to authorize the production of that recording at the hearings.

7. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case. Argentina chose Mr. Raúl Emilio Vinuesa, and Uruguay chose Mr. Santiago Torres Bernárdez.

8. By an Order of 13 July 2006, the Court, having heard the Parties, found “that the circumstances, as they [then] presented[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures”.

9. By another Order of the same date, the Court, taking account of the views of the Parties, fixed 15 January 2007 and 20 July 2007, respectively, as the time-limits for the filing of a Memorial by Argentina and a Counter-Memorial by Uruguay; those pleadings were duly filed within the time-limits so prescribed.

10. On 29 November 2006, Uruguay, invoking Article 41 of the Statute and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Argentine Government.

11. On 14 December 2006, Uruguay transmitted to the Court a volume of documents concerning the request for the indication of provisional measures. The Court decided not to authorize the production of that recording at the hearings.

12. On 18 December 2006, before the opening of the oral proceedings, Argentina transmitted to the Court a volume of documents concerning Uruguay's request for the indication of provisional measures; the Registrar immediately sent a copy of these documents to the Government of Uruguay.

13. By an Order of 23 January 2007, the Court, having heard the Parties, found “that the circumstances, as they [then] presented[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures”.

14. By an Order of 14 September 2007, the Court, taking account of the agreement of the Parties and of the circumstances of the case, authorized the submission of a Reply by Argentina and a Rejoinder by Uruguay, and fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of those pleadings. The Reply of Argentina and the Rejoinder of Uruguay were duly filed within the time-limits so prescribed.

15. By letters dated 16 June 2009 and 17 June 2009 respectively, the Governments of Uruguay and Argentina notified the Court that they had come to an agreement for the purpose of producing new documents pursuant to Article 56 of the Rules of Court. By letters of 23 June 2009, the Registrar informed the Parties that the Court had decided to authorize them to proceed as they had agreed. The new documents were duly filed within the agreed time-limit.

16. On 15 July 2009, each of the Parties, as provided for in the agreement between them and with the authorization of the Court, submitted comments on the new documents produced by the other Party. Each Party also filed documents in support of these comments.
17. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

18. By letter of 15 September 2009, Uruguay, referring to Article 56, paragraph 4, of the Rules of Court and to Practice Direction IXbis, communicated documents to the Court, forming part of publications readily available, on which it intended to rely during the oral proceedings. Argentina made no objection with regard to these documents.

19. By letter of 25 September 2009, the Argentine Government, referring to Article 56 of the Rules of Court and to Practice Direction IX, paragraph 2, sent new documents to the Registry which it wished to produce. By letter of 28 September 2009, the Government of Uruguay informed the Court that it was opposed to the production of these documents. It further indicated that if, nevertheless, the Court decided to admit the documents in question into the record of the case, it would present comments on them and submit documents in support of those comments. By letters dated 28 September 2009, the Registrar informed the Parties that the Court did not consider the production of the new documents submitted by the Argentine Government to be necessary within the meaning of Article 56, paragraph 2, of the Rules of Court, and that it had not moreover identified any exceptional circumstance (Practice Direction IX, paragraph 3) which justified their production at that stage of the proceedings.

20. Public hearings were held between 14 September 2009 and 2 October 2009, at which the Court heard the oral arguments and replies of:

**For Argentina:**
- H.E. Ms Susana Ruiz Cerutti,
- Mr. Alain Pellet,
- Mr. Philippe Sands,
- Mr. Howard Wheater,
- Ms Laurence Boisson de Chazournes,
- Mr. Marcelo Kohen,
- Mr. Alan Berard,
- Mr. Juan Carlos Colombo,
- Mr. Daniel Müller.

**For Uruguay:**
- H.E. Mr. Carlos Gianelli,
- Mr. Alan Boyle,
- Mr. Paul S. Reichler,
- Mr. Neil McCubbin,
- Mr. Stephen C. McCaffrey,
- Mr. Lawrence H. Martin,
- Mr. Luigi Condorelli.

21. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, one of the Parties submitted written comments on a written reply provided by the other and received after the closure of the oral proceedings.

22. In its Application, the following claims were made by Argentina:

"On the basis of the foregoing statement of facts and law, Argentina, while reserving the right to supplement, amend or modify the present Application in the course of the subsequent procedure, requests the Court to adjudge and declare:

1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:
   (a) the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
   (b) the obligation of prior notification to CARU and to Argentina;
   (c) the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;
   (d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;
   (e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries; and
2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;
3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and
4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.

Argentina reserves the right to amplify or amend these requests at a subsequent stage of the proceedings."

23. In the written proceedings, the following submissions were presented by the Parties:

**On behalf of the Government of Argentina, in the Memorial:**

"For all the reasons described in this Memorial, the Argentine Republic requests the International Court of Justice:

1. to find that by unilaterally authorizing the construction of the CMB and Orion pulp mills and the facilities associated with the latter on the left bank of the River Uruguay, in breach of the obligations resulting from the Statute of 26 February 1975, the Eastern Republic of Uruguay has committed the internationally wrongful acts set out in Chapters IV and V of this Memorial, which entail its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) cease immediately the internationally wrongful acts referred to above;
   (ii) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;"
In the Reply:

\[ \text{(iii) re-establish on the ground and in legal terms the situation that existed before the internationally wrongful acts referred to above were committed;} \]

\[ \text{(iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;} \]

\[ \text{(v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.} \]

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of subsequent developments in the case.\(^1\)

\(^1\) See the Order of the Court of 13 July 2006 on Argentina’s request for the indication of provisional measures, paras. 82.\(\)\n
On behalf of the Government of Uruguay, in the Counter-Memorial:

\[ \text{“On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected.”} \]

In the Rejoinder:

\[ \text{“Based on all the above, it can be concluded that:} \]

\[ \text{(a) Argentina has not demonstrated any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay’s alleged violations of its substantive obligations under the 1975 Statute that would be sufficient to warrant the dismantling of the Botnia plant;} \]

\[ \text{(b) the harm to the Uruguayan economy in terms of lost jobs and revenue would be substantial;} \]

\[ \text{(c) in light of points (a) and (b), the remedy of tearing the plant down would therefore be disproportionately onerous, and should not be granted;} \]

\[ \text{(d) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has violated its procedural obligations to Argentina, it can issue a declaratory judgment to that effect, which would constitute an adequate form of satisfaction;} \]

\[ \text{(e) if the Court finds, notwithstanding all the evidence to the contrary, that the plant is not in complete compliance with Uruguay’s obligations to protect the river or its aquatic environment, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute’s substantive requirements;} \]

\[ \text{(f) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has actually caused damage to the river or to Argentina, it can order Uruguay to pay Argentina monetary compensation under Articles 42 and 43 of the Statute;} \]

\[ \text{(g) the Court should issue a declaration making clear the Parties are obligated to ensure full respect for all the rights in dispute in this case, including Uruguay’s right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.} \]

Submissions

On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay’s right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed.”

24. At the oral proceedings, the following final submissions were presented by the Parties:
I. LEGAL FRAMEWORK

25. The dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay, on the River Uruguay (see sketch-map No. 1 on p. 33 for the general geographical context). After identifying the legal instruments concerning the River Uruguay by which the Parties are bound, the Court will set out the main facts of the case.

A. Legal Framework

26. The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (UNTS, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a “régime for the use of the river” covering various subjects, including the conservation of living resources and the prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

27. The “régime for the use of the river” contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute (see paragraph 1 above). Article 1 of the 1975 Statute states that the parties adopted it “in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties”. After having thus defined its purpose (Article 1) and having also made clear the meaning of certain terms used therein (Article 2), the 1975 Statute lays down rules governing navigation and works on the river (Chapter II, Articles 3 to 13), pilotage (Chapter III, Articles 14 to 16), port facilities, unloading and additional loading (Chapter IV, Articles 17 to 18), the safeguarding of human life (Chapter V, Articles 19 to 23) and the salvaging of property (Chapter VI, Articles 24 to 26), use of the waters of the river (Chapter VII, Articles 27 to 29), resources of the bed and subsoil (Chapter VIII, Articles 30 to 34), the conservation, utilization and development of other natural resources (Chapter IX, Articles 35 to 39), pollution (Chapter X, Articles 40 to 43), scientific research (Chapter XI, Articles 44 to 45), and various powers of the parties over the river and vessels sailing on it (Chapter XII, Articles 46 to 48). The 1975 Statute sets up the Administrative Commission of the River Uruguay (hereinafter “CARU”, from the Spanish acronym for “Comisión Administradora del Río Uruguay”) (Chapter XIII, Articles 49 to 57), and then establishes procedures for conciliation (Chapter XIV, Articles 58 to 59) and judicial settlement of disputes (Chapter XV, Article 60). Lastly, the 1975 Statute contains transitional (Chapter XVI, Articles 61 to 62) and final (Chapter XVII, Article 63) provisions.
28. The first pulp mill at the root of the dispute was planned by "Celuloses de M'Bopicu S.A." (hereinafter "CMB"), a company formed by the Spanish company ENCE (from the Spanish acronym for "Empresa Nacional de Celulosas de España", hereinafter "ENCE"). This mill, hereinafter referred to as the "CMB (ENCE)" mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Rio Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near the "General San Martin" international bridge (see sketch-map No. 2 on p. 35).

29. On 22 July 2002, the promoters of this industrial project approached the Uruguayan authorities and submitted an environmental impact assessment ("EIA" according to the abbreviation used by the Parties) of the plan to Uruguay's National Directorate for the Environment (hereinafter "DINAMA", from the Spanish acronym for "Dirección Nacional de Medio Ambiente"). During the same period, representatives of CMB, which had been specially formed to build the CMB (ENCE) mill, informed the President of CARU of the project. The President of CARU wrote to the Uruguayan Minister of the Environment on 17 October 2002 seeking a copy of the environmental impact assessment of the CMB (ENCE) project submitted by the promoters of this industrial project. This request was reiterated on 21 April 2003. On 14 May 2003, Uruguay submitted to CARU a document entitled "Environmental Impact Study, Celulosas de M'Bopicu. Summary for public release". One month later, the CARU Subcommittee on Water Quality and Pollution Control took notice of the document transmitted by Uruguay and suggested that a copy thereof be sent to its technical advisers for their opinions. Copies were also provided to the Parties' delegations.

30. A public hearing, attended by CARU's Legal Adviser and its technical secretary, was held on 21 July 2003 in the city of Fray Bentos concerning CMB's application for an environmental authorization. On 15 August 2003, CARU asked Uruguay for further information on various points concerning the planned CMB (ENCE) mill. This request was reiterated on 12 September 2003. On 2 October 2003, DINAMA submitted its assessment report to the Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs (hereinafter "MVOTMA", from the Spanish abbreviation for "Ministerio de Vivienda Ordenamiento Territorial y Medio Ambiente"), recommending that CMB be granted an initial environmental authorization ("AAP" according to the Spanish abbreviation for "Autorización Ambiental Previa") subject to certain conditions. On 8 October 2003, CARU was informed by the Uruguayan delegation that DINAMA would very shortly send CARU a report on the CMB (ENCE) project.
31. On 9 October 2003, MVOTMA issued an initial environmental authorization to CMB for the construction of the CMB (ENCE) mill. On the same date the Presidents of Argentina and Uruguay met at Anchorena (Colonia, Uruguay). Argentina maintains that the President of Uruguay, Jorge Battle, then promised his Argentine counterpart, Néstor Kirchner, that no authorization would be issued before Argentina's environmental concerns had been addressed. Uruguay challenges this version of the facts and contends that the Parties agreed at that meeting to deal with the CMB (ENCE) project otherwise than through the procedure under Articles 7 to 12 of the 1975 Statute and that Argentina let it be known that it was not opposed to the project per se. Argentina disputes these assertions.

32. The day after the meeting between the Heads of State of Argentina and Uruguay, CARU declared its willingness to resume the technical analyses of the CMB (ENCE) project as soon as Uruguay transmitted the awaited documents. On 17 October 2003, CARU held an extraordinary plenary meeting at the request of Argentina, at which Argentina complained of Uruguay's granting on 9 October 2003 of the initial environmental authorization. Following the extraordinary meeting CARU suspended work for more than six months, as the Parties could not agree on how to implement the consultation mechanism established by the 1975 Statute.

33. On 27 October 2003, Uruguay transmitted to Argentina copies of the environmental impact assessment submitted by ENCE on 22 July 2002, of DINAMA’s final assessment report dated 2 October 2003 and of the initial environmental authorization of 9 October 2003. Argentina reacted by expressing its view that Article 7 of the 1975 Statute had not been observed and that the transmitted documents did not appear adequate to allow for a technical opinion to be expressed on the environmental impact of the project. On 7 November 2003, further to a request from the Ministry of Foreign Affairs of Argentina, Uruguay provided Argentina with a copy of the Uruguayan Ministry of the Environment’s entire file on the CMB (ENCE) project. On 23 February 2004, Argentina forwarded all of this documentation received from Uruguay to CARU.

34. On 2 March 2004, the Parties' Ministers for Foreign Affairs met in Buenos Aires. On 15 May 2004, CARU resumed its work at an extraordinary plenary meeting during which it took note of the ministerial “understanding” which was reached on 2 March 2004. The Parties are at odds over the content of this “understanding”. The Court will return to this when it considers Argentina's claims as to Uruguay's breach of its procedural obligations under the 1975 Statute (see paragraphs 67 to 158).

35. Following up on CARU's extraordinary meeting of 15 May 2004, the CARU Subcommittee on Water Quality and Pollution Control pre-
pared a plan for monitoring water quality in the area of the pulp mills (hereinafter the “PROCEL” plan from the Spanish acronym for “Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en Areas de Plantas Celulósicas”). CARU approved the plan on 12 November 2004.

36. On 28 November 2005, Uruguay authorized preparatory work to begin for the construction of the CMB (ENCE) mill (ground clearing). On 28 March 2006, the project’s promoters decided to halt the work for 90 days. On 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

C. Orion (Botnia) Mill

37. The second industrial project at the root of the dispute before the Court was undertaken by “Botnia S.A.” and “Botnia Fray Bentos S.A.” (hereinafter “Botnia”), companies formed under Uruguayan law in 2003 especially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called “Orion” (hereinafter the “Orion (Botnia)” mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE) mill, and also near the city of Fray Bentos (see sketch-map No. 2 on p. 35). It has been operational and functioning since 9 November 2007.

38. After informing the Uruguayan authorities of this industrial project in late 2003, the project promoters submitted an application to them for an initial environmental authorization on 31 March 2004 and supplemented it on 7 April 2004. Several weeks later, on 29 and 30 April 2004, CARU members and Botnia representatives met informally. Following that meeting, CARU’s Subcommittee on Water Quality and Pollution Control suggested on 18 June 2004 that Botnia expand on the information provided at the meeting. On 19 October 2004, CARU held another meeting with Botnia representatives and again expressed the need for further information on Botnia’s application to DINAMA for an initial environmental authorization. On 12 November 2004, when approving the water quality monitoring plan put forward by the CARU Subcommittee on Water Quality and Pollution Control (see paragraph 35 above), CARU decided, on the proposal of that subcommittee, to ask Uruguay to provide further information on the application for an initial environmental authorization. CARU transmitted this request for further information to Uruguay by note dated 16 November 2004.

39. On 21 December 2004 DINAMA held a public hearing, attended by a CARU adviser, on the Orion (Botnia) project in Fray Bentos. DINAMA adopted its environmental impact study of the planned Orion (Botnia) mill on 11 February 2005 and recommended that the initial environmental authorization be granted, subject to certain conditions. MVOTMA issued the initial authorization to Botnia on 14 February 2005 for the construction of the Orion (Botnia) mill and an adjacent port terminal. At a CARU meeting on 11 March 2005, Argentina questioned whether the granting of the initial environmental authorization was well-founded in view of the procedural obligations laid down in the 1975 Statute. Argentina reiterated this position at the CARU meeting on 6 May 2005. On 12 April 2005, Uruguay had in the meantime authorized the clearance of the future mill site and the associated groundworks.

40. On 31 May 2005, in pursuance of an agreement made on 5 May 2005 by the Presidents of the two Parties, their Ministers for Foreign Affairs created a High-Level Technical Group (hereinafter the “GTAN”, from the Spanish abbreviation for “Grupo Técnico de Alto Nivel”), which was given responsibility for resolving the disputes over the CMB (ENCE) and Orion (Botnia) mills within 180 days. The GTAN held twelve meetings between 3 August 2005 and 30 January 2006, with the Parties exchanging various documents in the context of this bilateral process. On 31 January 2006, Uruguay determined that the negotiations undertaken within the GTAN had failed; Argentina did likewise on 3 February 2006. The Court will return later to the significance of this process agreed on by the Parties (see paragraphs 132 to 149).

41. On 26 June 2005, Argentina wrote to the President of the International Bank for Reconstruction and Development to express its concern at the possibility of the International Finance Corporation (hereinafter the “IFC”) contributing to the financing of the planned pulp mills. The IFC nevertheless decided to provide financial support for the Orion (Botnia) mill, but did commission EcoMetrix, a consultancy specializing in environmental and industrial matters, to prepare various technical reports on the planned mill and an environmental impact assessment of it. EcoMetrix was also engaged by the IFC to carry out environmental monitoring on the IFC’s behalf of the plant once it had been placed in service.

42. On 5 July 2005, Uruguay authorized Botnia to build a port adjacent to the Orion (Botnia) mill. This authorization was transmitted to CARU on 15 August 2005. On 22 August 2005, Uruguay authorized the construction of a chimney and concrete foundations for the Orion (Botnia) mill. Further authorizations were granted as the construction of this mill proceeded, for example in respect of the waste treatment installations. On 13 October 2005, Uruguay transmitted additional documentation to CARU concerning the port terminal adjacent to the Orion (Botnia) mill.
Argentina repeatedly asked, including at CARU meetings, that the initial work connected with the Orion (Botnia) mill and the CMB (ENCE) mill should be suspended. At a meeting between the Heads of State of the Parties at Santiago de Chile on 11 March 2006, Uruguay's President asked ENCE and Botnia to suspend construction of the mills. ENCE suspended work for 90 days (see paragraph 36 above), Botnia for ten.

43. Argentina referred the present dispute to the Court by Application dated 4 May 2006. On 24 August 2006, Uruguay authorized the commissioning of the port terminal adjacent to the Orion (Botnia) mill and gave CARU notice of this on 4 September 2006. On 12 September 2006, Uruguay authorized Botnia to extract and use water from the river for industrial purposes and formally notified CARU of its authorization on 17 October 2006. At the summit of Heads of State and Government of the Ibero-American countries held in Montevideo in November 2006, the King of Spain was asked to endeavour to reconcile the positions of the Parties; a negotiated resolution of the dispute did not however result. On 8 November 2007, Uruguay authorized the commissioning of the Orion (Botnia) mill and it began operating the next day. In December 2009, Oy Metsä-Botnia AB transferred its interest in the Orion (Botnia) mill to UPM, another Finnish company.

44. In addition, Uruguay authorized Ontur International S.A. to build and operate a port terminal at Nueva Palmira. The terminal was inaugurated in August 2007 and, on 16 November 2007, Uruguay transmitted to CARU a copy of the authorization for its commissioning.

45. In their written pleadings the Parties have debated whether, in light of the procedural obligations laid down in the 1975 Statute, the authorizations for the port terminal were properly issued by Uruguay. The Court deems it unnecessary to review the detailed facts leading up to the construction of the Nueva Palmira terminal, being of the view that these port facilities do not fall within the scope of the subject of the dispute before it. Indeed, nowhere in the claims asserted in its Application or in the submissions in its Memorial or Reply (see paragraphs 22 and 23 above) did Argentina explicitly refer to the port terminal at Nueva Palmira. In its final submissions presented at the hearing on 29 September 2009, Argentina again limited the subject-matter of its claims to the authorization of the construction of the CMB (ENCE) mill and the authorization of the construction and commissioning of "the Botnia mill and its associated facilities on the left bank of the River Uruguay". The Court does not consider the port terminal at Nueva Palmira, which lies some 100 km south of Fray Bentos, downstream of the Orion (Botnia) mill (see sketch-map No. 1 on p. 33), and is used by other economic operators as well, to be a facility "associated" with the mill.

46. The dispute submitted to the Court concerns the interpretation and application of the 1975 Statute, namely, on the one hand whether Uruguay complied with its procedural obligations under the 1975 Statute in issuing authorizations for the construction of the CMB (ENCE) mill as well as for the construction and the commissioning of the Orion (Botnia) mill and its adjacent port; and on the other hand whether Uruguay has complied with its substantive obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007.

47. Having thus related the circumstances surrounding the dispute between the Parties, the Court will consider the basis and scope of its jurisdiction, including questions relating to the law applicable to the present dispute (see paragraphs 48 to 66). It will then examine Argentina's allegations of breaches by Uruguay of procedural obligations (see paragraphs 67 to 158) and substantive obligations (see paragraphs 159 to 266) laid down in the 1975 Statute. Lastly, the Court will respond to the claims presented by the Parties in their final submissions (see paragraphs 267 to 280).

II. SCOPE OF THE COURT'S JURISDICTION

48. The Parties are in agreement that the Court's jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court and Article 60, paragraph 1, of the 1975 Statute. The latter reads: "Any dispute concerning the interpretation or application of the Treaty 1 and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice." The Parties differ as to whether all the claims advanced by Argentina fall within the ambit of the compromissory clause.

49. Uruguay acknowledges that the Court's jurisdiction under the compromissory clause extends to claims concerning any pollution or type of harm caused to the River Uruguay, or to organisms living there, in violation of the 1975 Statute. Uruguay also acknowledges that claims concerning the alleged impact of the operation of the pulp mill on the

quality of the waters of the river fall within the compromissory clause. On the other hand, Uruguay takes the position that Argentina cannot rely on the compromissory clause to submit claims regarding every type of environmental damage. Uruguay further argues that Argentina’s contentions concerning air pollution, noise, visual and general nuisance, as well as the specific impact on the tourism sector, allegedly caused by the Orion (Botnia) mill, do not concern the interpretation or the application of the 1975 Statute, and the Court therefore lacks jurisdiction over them.

Uruguay nevertheless does concede that air pollution which has harmful effects on the quality of the waters of the river or on the aquatic environment would fall within the jurisdiction of the Court.

50. Argentina maintains that Uruguay’s position on the scope of the Court’s jurisdiction is too narrow. It contends that the 1975 Statute was entered into with a view to protect not only the quality of the waters of the river but more generally its “régime” and the areas affected by it. Relying on Article 36 of the 1975 Statute, which lays out the obligation of the parties to co-ordinate measures to avoid any change in the ecological balance and to control harmful factors in the river and the areas affected by it, Argentina asserts that the Court has jurisdiction also with respect to claims concerning air pollution and even noise and “visual” pollution. Moreover, Argentina contends that bad odours caused by the Orion (Botnia) mill negatively affect the use of the river for recreational purposes, particularly in the Gualeguaychú resort on its bank of the river. This claim, according to Argentina, also falls within the Court’s jurisdiction.

51. The Court, when addressing various allegations or claims advanced by Argentina, will have to determine whether they concern “the interpretation or application” of the 1975 Statute, as its jurisdiction under Article 60 thereof covers “[a]ny dispute concerning the interpretation or application of the [1961] Treaty and the [1975] Statute”. Argentina has made no claim to the effect that Uruguay violated obligations under the 1961 Treaty.

52. In order to determine whether Uruguay has breached its obligations under the 1975 Statute, as alleged by Argentina, the Court will have to interpret its provisions and to determine their scope ratione materiae.

Only those claims advanced by Argentina which are based on the provisions of the 1975 Statute fall within the Court’s jurisdiction ratione materiae under the compromissory clause contained in Article 60. Although Argentina, when making claims concerning noise and “visual” pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute, the Court sees no basis in it for such claims. The plain language of Article 36, which provides that “[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it”, leaves no doubt that it does not address the alleged noise and visual pollution as claimed by Argentina. Nor does the Court see any other basis in the 1975 Statute for such claims; therefore, the claims relating to noise and visual pollution are manifestly outside the jurisdiction of the Court conferred upon it under Article 60.

Similarly, no provision of the 1975 Statute addresses the issue of “bad odours” complained of by Argentina. Consequently, for the same reason, the claim regarding the impact of bad odours on tourism in Argentina also falls outside the Court’s jurisdiction. Even if bad odours were to be subsumed under the issue of air pollution, which will be addressed in paragraphs 263 and 264 below, the Court notes that Argentina has submitted no evidence as to any relationship between the alleged bad odours and the aquatic environment of the river.

53. Characterizing the provisions of Articles 1 and 41 of the 1975 Statute as “referral clauses”, Argentina ascribes to them the effect of incorporating into the Statute the obligations of the Parties under general international law and a number of multilateral conventions pertaining to the protection of the environment. Consequently, in the view of Argentina, the Court has jurisdiction to determine whether Uruguay has complied with its obligations under certain international conventions.

54. The Court now therefore turns its attention to the issue whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

55. Argentina asserts that the 1975 Statute constitutes the law applicable to the dispute before the Court, as supplemented so far as its application and interpretation are concerned, by various customary principles and treaties in force between the Parties and referred to in the Statute. Relying on the rule of treaty interpretation set out in Article 31, paragraph 3 (c) of the Vienna Convention on the Law of Treaties, Argentina contends notably that the 1975 Statute must be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment. It asserts that the 1975 Statute must be interpreted so as to take account of all “relevant rules” of international law applicable in the relations between the Parties, so that the Statute’s interpretation remains current and evolves in accordance with changes in environmental standards. In this connection Argentina refers to the principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment. It contends that these rules and principles...
are applicable in giving the 1975 Statute a dynamic interpretation, although they neither replace it nor restrict its scope.

56. Argentina further considers that the Court must require compliance with the Parties' treaty obligations referred to in Articles 1 and 41 (a) of the 1975 Statute. Argentina maintains that the "referral clauses" contained in these articles make it possible to incorporate and apply obligations arising from other treaties and international agreements binding on the Parties. To this end, Argentina refers to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter the "CITES Convention"), the 1971 Ramsar Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"), the 1992 United Nations Convention on Biological Diversity (hereinafter the "Biodiversity Convention"), and the 2001 Stockholm Convention on Persistent Organic Pollutants (hereinafter the "POPs Convention"). It asserts that these conventional obligations are in addition to the obligations arising under the 1975 Statute, and observance of them should be ensured when application of the Statute is being considered. Argentina maintains that it is only where "more specific rules of the [1975] Statute (lex specialis)" derogate from them that the instruments to which the Statute refers should not be applied.

57. Uruguay likewise considers that the 1975 Statute must be interpreted in the light of general international law and it observes that the Parties concur on this point. It maintains however that its interpretation of the 1975 Statute accords with the various general principles of the law of international watercourses and of international environmental law, even if it is not in agreement with the specific interpretation put forward by Argentina. Uruguay emphasizes that the agreement of the Parties on the Statute is reached "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added). In the French translation, this part of Article 1 reads "traitts et autres engagements internationaux en vigueur it l'tgard de l'une ou l'autre des parties" (emphasis added).

58. The Court will first address the issue whether Articles 1 and 41 (a) of the 1975 Statute can be read as incorporating into the 1975 Statute the obligations of the Parties under the various multilateral conventions relied upon by Argentina.

59. Article 1 of the 1975 Statute reads as follows:

"The parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties." (UNTS, Vol. 1295, No. 1-21425, p. 340; footnote omitted.)

Article 1 sets out the purpose of the 1975 Statute. The Parties concluded it in order to establish the joint machinery necessary for the rational and optimum utilization of the River Uruguay. It is true that this article contains a reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties". This reference, however, does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute; rather, the reference to other treaties emphasizes that the agreement of the Parties on the Statute is reached in implementation of the provisions of Article 7 of the 1961 Treaty and "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added). While the conjunction "and" is missing from the English and French translations of the 1975 Statute, as published in the United Nations Treaty Series (ibid., p. 340 and p. 348), it is contained in the Spanish text of the Statute, which is the authentic text and reads as follows:

"Las partes acuerdan el presente Estatuto, en cumplimiento de lo dispuesto en el Artículo 7 del Tratado de Límites en el Río Uruguay, de 7 de Abril de 1961 con el fin de establecer los mecanismos comunes necesarios para el óptimo y racional aprovechamiento del Río Uruguay, y en estricta observancia de los derechos y obligaciones emergentes de los tratados y demás compromisos internacionales vigentes para cualquiera de las partes." (Ibid., p. 332; emphasis added.)

The presence of the conjunction in the Spanish text suggests that the clause "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" is linked to and is to be read with the first part of Article 1, i.e., "[the parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay]."

60. There is one additional element in the language of Article 1 of the 1975 Statute which should be noted. It mentions "treaties and other international agreements in force for each of the parties" (in Spanish original "tratados y demás compromisos internacionales vigentes para cualquiera de las partes"; emphasis added). In the French translation, this part of Article 1 reads "traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties" (emphasis added).

The fact that Article 1 does not require that the "treaties and other
international agreements" should be in force between the two parties thus clearly indicates that the 1975 Statute takes account of the prior commitments of each of the parties which have a bearing on it.

61. Article 41 of the 1975 Statute, paragraph (a) of which Argentina considers as constituting another "referral clause" incorporating the obligations under international agreements into the Statute, reads as follows:

"Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:

(a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;

(b) not to reduce in their respective legal systems:

1) the technical requirements in force for preventing water pollution, and

2) the severity of the penalties established for violations;

(c) to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

62. The Court observes that the words "adopting appropriate" do not appear in the English translation while they appear in the original Spanish text ("dictando las normas y adoptando las medidas apropiadas"). Basing itself on the original Spanish text, it is difficult for the Court to see how this provision could be construed as a "referral clause" having the effect of incorporating the obligations of the parties under international agreements and other norms envisaged within the ambit of the 1975 Statute.

The purpose of the provision in Article 41 (a) is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 (a) distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("con adecuación") with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay. Under Article 41 (b) the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph (c) of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution.

63. The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.

64. The Court next briefly turns to the issue of how the 1975 Statute is to be interpreted. The Parties concur as to the 1975 Statute's origin and historical context, although they differ as to the nature and general tenor of the Statute and the procedural and substantive obligations therein.

The Parties nevertheless are in agreement that the 1975 Statute is to be interpreted in accordance with rules of customary international law on treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties.

65. The Court has had recourse to these rules when it has had to interpret the provisions of treaties and international agreements concluded before the entry into force of the Vienna Convention on the Law of Treaties in 1980 (see, e.g., Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, p. 21, para. 41; Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II), p. 1059, para. 18).

The 1975 Statute is also a treaty which predates the entry into force of the Vienna Convention on the Law of Treaties. In interpreting the terms of the 1975 Statute, the Court will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in the light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties".

66. In the interpretation of the 1975 Statute, taking account of relevant rules of international law applicable in the relations between the Parties, whether these are rules of general international law or contained in multilateral conventions to which the two States are parties, nevertheless has no bearing on the scope of the jurisdiction conferred on the
III. THE ALLEGED BREACH OF PROCEDURAL OBLIGATIONS

67. The Application filed by Argentina on 4 May 2006 concerns the alleged breach by Uruguay of both procedural and substantive obligations laid down in the 1975 Statute. The Court will start by considering the alleged breach of procedural obligations under Articles 7 to 12 of the 1975 Statute, in relation to the (CMB) ENCE and Orion (Botnia) mill projects and the facilities associated with the latter, on the left bank of the River Uruguay near the city of Fray Bentos.

68. Argentina takes the view that the procedural obligations were intrinsically linked to the substantive obligations laid down by the 1975 Statute, and that a breach of the former entailed a breach of the latter.

With regard to the procedural obligations, these are said by Argentina to constitute an integrated and indivisible whole in which CARU, as an organization, plays an essential role.

Consequently, according to Argentina, Uruguay could not invoke other procedural arrangements so as to derogate from the procedural obligations laid down by the 1975 Statute, except by mutual consent.

69. Argentina argues that, at the end of the procedural mechanism provided for by the 1975 Statute, and in the absence of agreement between the Parties, the latter have no choice but to submit the matter to the Court under Article 60 of the Statute, with Uruguay being unable to proceed with the construction of the planned mills until the Court has delivered its Judgment.

70. Following the lines of the argument put forward by the Applicant, the Court will examine in turn the following four points: the links between the procedural obligations and the substantive obligations (A); the procedural obligations and their interrelation with each other (B); whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute (C); and Uruguay’s obligations at the end of the negotiation period (D).

A. The Links between the Procedural Obligations and the Substantive Obligations

71. Argentina maintains that the procedural provisions laid down in Articles 7 to 12 of the 1975 Statute are aimed at ensuring “the optimum and rational utilization of the river” (Article 1), just as are the provisions concerning use of water, the conservation, utilization and development of other natural resources, pollution and research. The aim is also said to be to prevent the Parties from acting unilaterally and without regard for earlier or current uses of the river. According to Argentina, any disregard of this machinery would therefore undermine the object and purpose of the 1975 Statute; indeed the “optimum and rational utilization of the river” would not be ensured, as this could only be achieved in accordance with the procedures laid down under the Statute.

72. It follows, according to Argentina, that a breach of the procedural obligations automatically entails a breach of the substantive obligations, since the two categories of obligations are indivisible. Such a position is said to be supported by the Order of the Court of 13 July 2006, according to which the 1975 Statute created “a comprehensive régime”.

73. Uruguay similarly takes the view that the procedural obligations are intended to facilitate the performance of the substantive obligations, the former being a means rather than an end. It too points out that Article 1 of the 1975 Statute defines its object and purpose.

74. However, Uruguay rejects Argentina’s argument as artificial, since it appears to mix procedural and substantive questions with the aim of creating the belief that the breach of procedural obligations necessarily entails the breach of substantive ones. According to Uruguay, it is for the Court to determine the breach, in itself, of each of these categories of obligations, and to draw the necessary conclusions in each case in terms of responsibility and reparation.

75. The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1, is for the Parties to achieve “the optimum and rational utilization of the River Uruguay” by means of the “joint machinery” for co-operation, which consists of both CARU and the procedural provisions contained in Articles 7 to 12 of the Statute.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of “the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States” (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 90).

76. In the Gabčíková-Nagymaros case, the Court, after recalling that “[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty” (Gabčíková-Nagymaro

77. The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a "comprehensive and progressive régime" (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

78. The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable the parties to fulfill their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfill its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones.

Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied ipso facto with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.

79. The Court considers, as a result of the above, that there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute, but that link does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances.

B. The Procedural Obligations and Their Interrelation

80. The 1975 Statute imposes on a party which is planning certain activities, set out in Article 7, first paragraph, procedural obligations whose content, interrelation and time-limits are specified as follows in Articles 7 to 12:

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

If the Commission finds this to be the case or if a decision cannot be reached in that regard, the party concerned shall notify the other party of the plan through the said Commission.

Such notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters.

Article 8

The notified party shall have a period of 180 days in which to respond in connection with the plan, starting from the date on which its delegation to the Commission receives the notification.

Should the documentation referred to in Article 7 be incomplete, the notified party shall have 30 days in which to so inform, through the Commission, the party which plans to carry out the work.

The period of 180 days mentioned above shall begin on the date on which the delegation of the notified party receives the full documentation.

This period may be extended at the discretion of the Commission if the complexity of the plan so requires.

Article 9

If the notified party raises no objections or does not respond within the period established in Article 8, the other party may carry out or authorize the work planned.

Article 10

The notified party shall have the right to inspect the works being carried out in order to determine whether they conform to the plan submitted.

Article 11

Should the notified party come to the conclusion that the execution of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, it shall so notify the other party, through the Commission, within the period of 180 days established in Article 8.

Such notification shall specify which aspects of the work or the
programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations.

**Article 12**

Should the parties fail to reach agreement within 180 days following the notification referred to in Article 11, the procedure indicated in Chapter XV shall be followed."

81. The original Spanish text of Article 7 of the 1975 Statute reads as follows:

"La parte que proyecte la construcción de nuevos canales, la modificación o alteración significativa de los ya existentes o la realización de cualesquiera otras obras de entidad suficiente para afectar la navegación, el régimen del Río o la calidad de sus aguas, deberá comunicarlo a la Comisión, la cual determinará sumariamente, y en un plazo máximo de treinta días, si el proyecto puede producir perjuicio sensible a la otra parte.

Si así se resuelve o no se llegue a una decisión al respecto, la parte interesada deberá notificar el proyecto a la otra parte a través de la misma Comisión.

En la notificación deberán figurar los aspectos esenciales de la obra y, si fuere el caso, el modo de su operación y los demás datos técnicos que permitan a la parte notificada hacer una evaluación del efecto probable que la obra ocasionará a la navegación, al régimen del Río o a la calidad de sus aguas."

The Court notes that, just as the original Spanish text, the French translation of this Article (see paragraph 80 above) distinguishes between the obligation to inform ("comunicar") CARU of any plan falling within its purview (first paragraph) and the obligation to notify ("notificar") the other party (second paragraph). By contrast, the English translation uses the same verb "notify" in respect of both obligations. In order to conform to the original Spanish text, the Court will use in both linguistic versions of this Judgment the verb "inform" for the obligation set out in Article 7, first paragraph, and the verb "notify" for the obligation set out in the second and third paragraphs.

The Court considers that the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

82. According to Argentina, by failing to comply with the initial obligation (Article 7, first paragraph, of the 1975 Statute) to refer the matter to CARU, Uruguay frustrated all the procedures laid down in Articles 7 to 12 of the Statute. In addition, by failing to notify Argentina of the plans for the CMB (ENCE) and Orion (Botnia) mills, through CARU, with all the necessary documentation, Uruguay is said not to have complied with Article 7, second and third paragraphs. Argentina adds that informal contacts which it or CARU may have had with the companies in question cannot serve as a substitute for Uruguay referring the matter to CARU and notifying Argentina of the projects through the Commission. Argentina concludes that Uruguay has breached all of its procedural obligations under the terms of Articles 7 to 12 of the 1975 Statute.

Uruguay, for its part, considers that referring the matter to CARU does not impose so great a constraint as Argentina contends and that the Parties may agree, by mutual consent, to use different channels by employing other procedural arrangements in order to engage in co-operation. It concludes from this that it has not breached the procedural obligations laid down by the 1975 Statute, even if it has performed them without following to the letter the formal process set out therein.

83. The Court will first examine the nature and role of CARU, and then consider whether Uruguay has complied with its obligations to inform CARU and to notify Argentina of its plans.

1. The nature and role of CARU

84. Uruguay takes the view that CARU, like other river commissions, is not a body with autonomous powers, but rather a mechanism established to facilitate co-operation between the Parties. It adds that the States which have created these river commissions are free to go outside the joint mechanism when it suits their purposes, and that they often do so. According to Uruguay, since CARU is not empowered to act outside the will of the Parties, the latter are free to do directly what they have decided to do through the Commission, and in particular may agree not to inform it in the manner provided for in Article 7 of the 1975 Statute. Uruguay maintains that that is precisely what happened in the present case: the two States agreed to dispense with the preliminary review by CARU and to proceed immediately to direct negotiations.

85. For Argentina, on the other hand, the 1975 Statute is not merely a bilateral treaty imposing reciprocal obligations on the parties; it establishes an institutional framework for close and ongoing co-operation, the core and essence of which is CARU. For Argentina, CARU is the key body for co-ordination between the Parties in virtually all areas covered by the 1975 Statute. By failing to fulfil its obligations in this respect, Uruguay is said to be calling the 1975 Statute fundamentally into question.

86. The Court recalls that it has already described CARU as
“a joint mechanism with regulatory, executive, administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource; ... [a] mechanism which constitutes a very important part of that treaty régime” (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, pp. 133-134, para. 81).

87. The Court notes, first, that CARU, in accordance with Article 50 of the 1975 Statute, was endowed with legal personality “in order to perform its functions” and that the parties to the 1975 Statute undertook to provide it with “the necessary resources and all the information and facilities essential to its operations”. Consequently, far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own; it exercises rights and also bears duties in carrying out the functions attributed to it by the 1975 Statute.

88. While the decisions of the Commission must be adopted by common accord between the riparian States (Article 55), these are prepared and implemented by a secretariat whose staff enjoy privileges and immunities. Moreover, CARU is able to decentralize its various functions by setting up whatever subsidiary bodies it deems necessary (Article 52).

89. The Court observes that, like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to achieve the object and purpose of the latter, namely, “the optimum and rational utilization of the River Uruguay” (Article 1). As the Court has pointed out,

“[I]nternational organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them” (Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I), p. 78, para. 25).

This also applies of course to organizations, which like CARU, only have two member States.

90. Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works contemplated in Article 7, first paragraph, of the 1975 Statute, neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effective-
channel of international law relating to the environment. This Court has recognized that a pertinence of information required by the Court in furtherance of the planned works.

Article 7 of the 1975 Statute is clear on the obligation to inform. The third paragraph of Article 7 states: "The obligation to inform any other party, at a stage when the project or plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the regime of the river or the quality of its waters."

Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, must be sufficient to determine swiftly whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the regime of the river or the quality of its waters. This explains, in the opinion of the Court, the difference between the terms of Article 7, first paragraph, and the third paragraph, concerning the content of the notification to be addressed to the other party at a later stage, enabling it to assess the probable impact of such works on navigation, the regime of the river or the quality of its waters.

98. The Court notes that, in accordance with the terms of Article 7, the information which must be provided to CARU, at this initial stage of the procedure, must be sufficient to determine swiftly whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the regime of the river or the quality of its waters. This explains, in the opinion of the Court, the difference between the terms of Article 7, first paragraph, and the third paragraph, concerning the content of the notification to be addressed to the other party at a later stage, enabling it to assess the probable impact of such works on navigation, the regime of the river or the quality of its waters.

99. The Court considers that the State planning activities referred to in Article 7, first paragraph, are not of determining whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the regime of the river or the quality of its waters.

100. The Court considers that the State planning activities referred to in Article 7, first paragraph, are not of determining whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the regime of the river or the quality of its waters.

101. The Court considers that the State planning activities referred to in Article 7, first paragraph, are not of determining whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the regime of the river or the quality of its waters.
sarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization.

106. The Court observes that, in the present case, Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion (Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions, in particular on 17 October 2002 and 21 April 2003 with regard to the CMB (ENCE) mill, and on 16 November 2004 with regard to the Orion (Botnia) mill. Uruguay merely sent CARU, on 14 May 2003, a summary for public release of the environmental impact assessment for the CMB (ENCE) mill. CARU considered this document to be inadequate and again requested further information from Uruguay on 15 August 2003 and 12 September 2003. Moreover, Uruguay did not transmit any document to CARU regarding the Orion (Botnia) mill. Consequently, Uruguay issued the initial environmental authorizations to CMB on 9 October 2003 and to Botnia on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph. Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU, thereby simply giving effect to Article 7, first paragraph, of Uruguayan Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation, according to which the Ministry of Housing, Land Use Planning and Environmental Affairs may grant the initial environmental authorization provided that the adverse environmental impacts of the project remain within acceptable limits.

107. The Court further notes that on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to construct a port terminal for its exclusive use and to utilize the river bed for industrial purposes, without informing CARU of these projects in advance.

108. With regard to the extraction and use of water from the river, of which CARU should have first been informed, according to Argentina, the Court takes the view that this is an activity which forms an integral part of the commissioning of the Orion (Botnia) mill and therefore did not require a separate referral to CARU.

109. However, Uruguay maintains that CARU was made aware of the plans for the mills by representatives of ENCE on 8 July 2002, and no later than 29 April 2004 by representatives of Botnia, before the initial environmental authorizations were issued. Argentina, for its part, considers that these so-called private dealings, whatever form they may have taken, do not constitute performance of the obligation imposed on the Parties by Article 7, first paragraph.

110. The Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision. Similarly, in the case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), the Court observed that "[i]f the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17 [of the Convention on Mutual Assistance in Criminal Matters between the two countries, providing that "reasons shall be given for any refusal of mutual assistance"]" (Judgment, I.C.J. Reports 2008, p. 231, para. 150).

111. Consequently, the Court concludes from the above that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

3. Uruguay’s obligation to notify the plans to the other party

112. The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the plan might cause significant damage to the other party or if a decision cannot be reached in that regard, “the party concerned shall notify the other party of this plan through the said Commission”.

113. In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan’s impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

114. Article 8 stipulates a period of 180 days, which may be extended by the Commission, for the notified party to respond in connection with...
the plan, subject to it requesting the other party, through the Commission, to supplement as necessary the documentation it has provided.

If the notified party raises no objections, the other party may carry out or authorize the work (Article 9). Otherwise, the former must notify the latter of those aspects of the work which may cause it damage and of the suggested changes (Article 11), thereby opening a further 180-day period of negotiation in which to reach an agreement (Article 12).

115. The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

116. The Parties agree on the need for a full environmental impact assessment in order to assess any significant damage which might be caused by a plan.

117. Uruguay takes the view that such assessments were carried out in accordance with its legislation (Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation), submitted to DINAMA for consideration and transmitted to Argentina on 7 November 2003 in the case of the CMB (ENCE) project and on 19 August 2005 for the Orion (Botnia) project. According to Uruguay, DINAMA asked the companies concerned for all the additional information that was required to supplement the original environmental impact assessments submitted to it, and only when it was satisfied did it propose to the Ministry of the Environment that the initial environmental authorizations requested should be issued, which they were to CMB on 9 October 2003 and to Botnia on 14 February 2005.

Uruguay maintains that it was not required to transmit the environmental impact assessments to Argentina before issuing the initial environmental authorizations to the companies, these authorizations having been adopted on the basis of its legislation on the subject.

118. Argentina, for its part, first points out that the environmental impact assessments transmitted to it by Uruguay were incomplete, particularly in that they made no provision for alternative sites for the mills and failed to include any consultation of the affected populations. The Court will return later in the Judgment to the substantive conditions which must be met by environmental impact assessments (see paragraphs 203 to 219).

Furthermore, in procedural terms, Argentina considers that the initial environmental authorizations should not have been granted to the companies before it had received the complete environmental impact assessments, and that it was unable to exercise its rights in this context under Articles 7 to 11 of the 1975 Statute.

119. The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

120. The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

121. In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question. Thus in the case of CMB (ENCE), the matter was notified to Argentina on 27 October and 7 November 2003, whereas the initial environmental authorization had already been issued on 9 October 2003. In the case of Orion (Botnia), the file was transmitted to Argentina between August 2005 and January 2006, whereas the initial environmental authorization had been granted on 14 February 2005. Uruguay ought not, prior to notification, to have issued the initial environmental authorizations and the authorizations for construction on the basis of the environmental impact assessments submitted to DINAMA. Indeed by doing so, Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute and disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

122. The Court concludes from the above that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

C. Whether the Parties Agreed to Derogate from the Procedural Obligations Set Out in the 1975 Statute

123. Having thus examined the procedural obligations laid down by the 1975 Statute, the Court now turns to the question of whether the Parties agreed, by mutual consent, to derogate from them, as alleged by Uruguay.

124. In this respect the Parties refer to two "agreements" reached on 2 March 2004 and 5 May 2005; however, they hold divergent views regarding their scope and content.
1. The “understanding” of 2 March 2004 between Argentina and Uruguay

125. The Court recalls that, after the issuing of the initial environmental authorization to CMB by Uruguay, without CARU having been able to carry out the functions assigned to it in this context by the 1975 Statute, the Foreign Ministers of the Parties agreed on 2 March 2004 on the procedure to be followed, as described in the minutes of the extraordinary meeting of CARU of 15 May 2004. The relevant extract from those minutes reads as follows in Spanish:

“II) En fecha 2 de marzo de 2004 los Cancilleres de Argentina y Uruguay llegaron a un entendimiento con relación al curso de acción que se dará al tema, esto es, facilitar por parte del gobierno uruguayo, la información relativa a la construcción de la planta y, en relación a la fase operativa, proceder a realizar el monitoreo, por parte de CARU, de la calidad de las aguas conforme a su Estatuto. 

(I) Ambas delegaciones reafirman el compromiso de los Ministros de Relaciones Exteriores de la República Argentina y de la República Oriental del Uruguay de fecha 2 de marzo de 2004 por el cual el Uruguay comunicará la información relativa a la construcción de la planta incluyendo el Plan de Gestión Ambiental. En tal sentido, la CARU recibirá los Planes de Gestión Ambiental para la construcción y operación de la planta que presente la empresa al gobierno uruguayo una vez que le sean remitidos por la delegación uruguaya.” (Emphasis in the original.)

Argentina and Uruguay have provided the Court, respectively, with French and English translations of these minutes. In view of the discrepancies between those two translations, the Court will use the following translation:

“(II) On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on how to proceed in the matter, namely, that the Uruguayan Government would provide information on the construction of the mill and that, in terms of the operational phase, CARU would carry out monitoring of water quality in accordance with its Statute.

(I) Both delegations reaffirmed the arrangement which had been come to by the Foreign Ministers of the Republic of Argentina and the Eastern Republic of Uruguay on 2 March 2004, whereby Uruguay would communicate information on the construction of the mill, including the environmental management plan. As a result, CARU would receive the environmental management plans for the construction and operation of the mill provided by the company to the Uruguayan Government, when these were forwarded to it by the Uruguayan delegation.” (Emphasis in the original.) [Translation by the Court.]

126. Uruguay considers that, under the terms of this “understanding”, the Parties agreed on the approach to be followed in respect of the CMB (ENCE) project, outside CARU, and that there was no reason in law or logic to prevent them derogating from the procedures outlined in the 1975 Statute pursuant to an appropriate bilateral agreement.

The said “understanding”, according to Uruguay, only covered the transmission to CARU of the Environmental Management Plans for the construction and operation of the (CMB) ENCE mill. It supposedly thereby puts an end to any dispute with Argentina regarding the procedure laid down in Article 7 of the 1975 Statute. Lastly, Uruguay maintains that the “understanding” of 2 March 2004 on the (CMB) ENCE project was later extended to include the Orion (Botnia) project, since the PROCEL water quality monitoring plan put in place by CARU’s Subcommittee on Water Quality to implement that “understanding” related to the activity of “both plants”, the CMB (ENCE) and Orion (Botnia) mills, the plural having been used in the title and text of the Subcommittee’s report.

127. Argentina, for its part, maintains that the “understanding” between the two Ministers of 2 March 2004 was intended to ensure compliance with the procedure laid down by the 1975 Statute and thus to reintroduce the CMB (ENCE) project within CARU, ending the dispute on CARU’s jurisdiction to deal with the project. Argentina claims that it reiterated to the organs within CARU that it had not given up its rights under Article 7, although it accepted that the dispute between itself and Uruguay in this respect could have been resolved if the procedure contemplated in the “understanding” of 2 March 2004 had been brought to a conclusion.

According to Argentina, however, Uruguay never transmitted the required information to CARU as it undertook to do in the “understanding” of 2 March 2004. Argentina also denies that the “understanding” of 2 March 2004 was extended to the Orion (Botnia) mill; the reference to both future plants in the PROCEL plan does not in any way signify, in its view, the renunciation of the procedure laid down by the 1975 Statute. 128. The Court first notes that while the existence of the “understanding” of 2 March 2004, as minutd by CARU, has not been contested by the Parties, they differ as to its content and scope. Whatever its specific designation and in whatever instrument it may have been recorded (the CARU minutes), this “understanding” is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement. The Court recalls that the Parties disagree on whether
2. The agreement setting up the High-Level Technical Group (the GTAN)

129. The Court finds that the information which Uruguay agreed to transmit to CARU in the “understanding” of 2 March 2004 was never transmitted. Consequently, the Court cannot accept Uruguay’s contention that the “understanding” put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning implementation of the procedure laid down by Article 7 of the 1975 Statute.

130. Further, the Court observes that, when this “understanding” was reached, only the CMB (ENCE) project was in question, and that it therefore cannot be extended to the Orion (Botnia) project, as Uruguay claims. The reference to both mills is made only as from July 2004, in the context of the PROCEL plan. However, this plan only concerns the measures to monitor and control the environmental quality of the river waters in the areas of the pulp mills, and not the procedures under Article 7 of the 1975 Statute.

131. The Court concludes that the “understanding” of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the “understanding”, only if Uruguay had complied with the terms of the “understanding”. In the view of the Court, it did not do so. Therefore the “understanding” cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.

2. The agreement setting up the High-Level Technical Group (the GTAN)

132. The Court notes that, in furtherance of the agreement reached on 5 May 2005 between the Presidents of Argentina and Uruguay (see paragraph 40 above), the Foreign Ministries of the two States issued a press release on 31 May 2005 announcing the creation of the High-Level Technical Group, referred to by the Parties as the GTAN. According to this communiqué:

“In conformity with what was agreed to by the Presidents of Argentina and Uruguay, the Foreign Ministries of both of our countries constitute, under their supervision, a Group of Technical Experts for complementary studies and analysis, exchange of information and follow-up on the effects that the operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay will have on the ecosystem of the shared Uruguay River.

133. Uruguay regards this press release as an agreement that binds the two States, whereby they decided to make the GTAN the body within which the direct negotiations between the Parties provided for by Article 12 of the 1975 Statute would take place, since its purpose was to analyse the effects on the environment of the “operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay”. Uruguay infers from this that the Parties were agreed on the construction of the mills and that they had limited the extent of the dispute between them to the environmental risks caused by their operation. Uruguay sees proof of this in the referral to the Court on the basis of Article 12 of the 1975 Statute, which allows either Party to apply to the Court in the event of the negotiations failing to produce an agreement within the period of 180 days.

According to Uruguay, therefore, the agreement contained in the press release of 31 May 2005, by paving the way for the direct negotiations provided for in Article 12, covered any possible procedural irregularities in relation to Articles 7 et seq. of the 1975 Statute. Uruguay points out that it communicated all the necessary information to Argentina during the 12 meetings held by the GTAN and that it transmitted the Orion (Botnia) port project to CARU, as agreed by the Parties at the first meeting of the GTAN.

134. Uruguay further notes that the 1975 Statute is silent as to whether the notifying State may or may not implement a project while negotiations are ongoing. It acknowledges that, under international law, the initiating State must refrain from doing so during the period of negotiation, but takes the view that this does not apply to all work and, in particular, that preparatory work is permitted. Uruguay acknowledges that it carried out such work, for example construction of the foundations for the Orion (Botnia) mill, but in its view this did not involve faits accomplis which prevented the negotiations from reaching a conclusion. Uruguay also considers that it had no legal obligation to suspend any and all work on the port.

135. Argentina considers that no acceptance on its part of the construction of the disputed mills can be inferred from the terms of the press release of 31 May 2005. It submits that in creating the GTAN, the Parties did not decide to substitute it for CARU, but regarded it as a means of negotiation that would co-exist with the latter.

Contrary to Uruguay, Argentina takes the view that this matter has been submitted to the Court on the basis of Article 60 of the 1975 Statute and not of Article 12, since Uruguay, by its conduct, has prevented the latter from being used as a basis, having allegedly disregarded the entire procedure laid down in Chapter II of the Statute. Argentina therefore
sees it as for the Court to pronounce on all the breaches of the 1975 Statute, including and not limited to the authorization for the construction of the disputed mills.

136. Argentina submits that Uruguay, by its conduct, frustrated the procedures laid down in Articles 7 to 9 of the 1975 Statute and that, during the period of negotiation within the GTAN, Uruguay continued the construction work on the Orion (Botnia) mill and began building the port terminal. During that same period, Argentina reiterated, within CARU, the need for Uruguay to comply with its procedural obligations under Articles 7 to 12 of the 1975 Statute and to suspend the works.

Lastly, Argentina rejects Uruguay's claim that the work on the foundations of the Orion (Botnia) mill, its chimney and the port was merely preliminary in nature and cannot be regarded as the beginning of construction work as such. For Argentina, such a distinction is groundless and cannot be justified by the nature of the work carried out.

137. The Court first points out that there is no reason to distinguish, as Uruguay and Argentina have both done for the purpose of their respective cases, between referral on the basis of Article 12 and of Article 60 of the 1975 Statute. While it is true that Article 12 provides for recourse to the procedure indicated in Chapter XV, should the negotiations fail to produce an agreement within the 180-day period, it purpose ends there. Article 60 then takes over, in particular its first paragraph, which enables either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. This wording also covers a dispute relating to the interpretation or application of Article 12, like any other provision of the 1975 Statute.

138. The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the shared Uruguay River, with "the group [having] to produce an initial report within a period of 180 days".

139. The Court recognizes that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute, also for a 180-day period, to take place. Under Article 11, these negotiations between the parties with a view to reaching an agreement are to be held once the notified party has sent a communication to the other party, through the Commission, specifying

"which aspects of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality
by authorizing the construction of the mills and the port terminal at the GTAN did not permit Uruguay to derogate from its obligations of work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills (see paragraphs 39 and 42 above).

Indeed, if that were the case, the negotiations between the parties would have no purpose.

The Court notes, moreover, that the 1975 Statute is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States. The Court recalled in the cases concerning Nuclear Tests (Australia v. France) (New Zealand v. France):

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation..." (Judgments, I.C.J. Reports 1974, p. 268, para. 46, and p. 475, para. 49; see also Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 105, para. 94.)

The Court has also had occasion to draw attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned: "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful" (North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 47, para. 85).

In the view of the Court, there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.

In this respect, contrary to what Uruguay claims, the preliminary work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills (see paragraphs 39 and 42 above).

The Court concludes from the above that the agreement to set up the GTAN did not permit Uruguay to derogate from its obligations of information and notification under Article 7 of the 1975 Statute, and that by authorizing the construction of the mills and the port terminal at Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute. Consequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute.

Given that "an obligation to negotiate does not imply an obligation to reach an agreement" (Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42, p. 116), it remains for the Court to examine whether the State initiating the plan is under certain obligations following the end of the negotiation period provided for in Article 12.

D. Uruguay's Obligations Following the End of the Negotiation Period

Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

Chapter XV contains a single article, Article 60, according to which:

"Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.

In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

According to Uruguay, the 1975 Statute does not give one party a "right of veto" over the projects initiated by the other. It does not consider there to be a "no construction obligation" borne by the State initiating the projects until such time as the Court has ruled on the dispute. Uruguay points out that the existence of such an obligation would enable one party to block a project that was essential for the sustainable development of the other, something that would be incompatible with the "optimum and rational utilization of the river". On the contrary, for Uruguay, in the absence of any specific provision in the 1975 Statute, reference should be made to general international law, as reflected in the 2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (Yearbook of the International Law Commission, 2001, Vol. II, Part Two); in particular, draft Article 9, paragraph 3, concerning "Consultations on preventive measures", states that "[i]f the consultations... fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued...".
153. Argentina, on the other hand, maintains that Article 12 of the 1975 Statute makes the Court the final decision-maker where the parties have failed to reach agreement within 180 days following the notification referred to in Article 11. It is said to follow from Article 9 of the Statute, interpreted in the light of Articles 11 and 12 and taking account of its object and purpose, that if the notified party raises an objection, the other party may neither carry out nor authorize the work in question until the procedure laid down in Articles 7 to 12 has been completed and the Court has ruled on the project. Argentina therefore considers that, during the dispute settlement proceedings before the Court, the State which is envisaging carrying out the work cannot confront the other Party with the fait accompli of having carried it out.

Argentina argues that the question of the “veto” raised by Uruguay is inappropriate, since neither of the parties can impose its position in respect of the construction works and it will ultimately be for the Court to settle the dispute, if the parties disagree, by a decision that will have the force of res judicata. It could be said, according to Argentina, that Uruguay has no choice but to come to an agreement with it or to await the settlement of the dispute. Argentina contends that, by pursuing the construction and commissioning of the Orion (Botnia) mill and port, Uruguay has committed a continuing violation of the procedural obligations under Chapter II of the 1975 Statute.

154. The Court observes that the “no construction obligation”, said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

The Court cannot uphold the interpretation of Article 9 according to which any construction is prohibited until the Court has given its ruling pursuant to Articles 12 and 60.

155. Article 12 does not impose an obligation on the parties to submit a matter to the Court, but gives them the possibility of doing so, following the end of the negotiation period. Consequently, Article 12 can do nothing to alter the rights and obligations of the party concerned as long as the Court has not ruled finally on them. The Court considers that

those rights include that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired.

156. In its Order of 13 July 2006, the Court took the view that the “construction [of the mills] at the current site cannot be deemed to create a fait accompli” (Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

157. The Court concludes from the above that Uruguay did not bear any “no construction obligation” after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed (see paragraph 40). Consequently the wrongful conduct of Uruguay (established in paragraph 149 above) could not extend beyond that period.

158. Having established that Uruguay breached its procedural obligations to inform, notify and negotiate to the extent and for the reasons given above, the Court will now turn to the question of the compliance of that State with the substantive obligations laid down by the 1975 Statute.

* * *

IV. SUBSTANTIVE OBLIGATIONS

159. Before taking up the examination of the alleged violations of substantive obligations under the 1975 Statute, the Court will address two preliminary issues, namely, the burden of proof and expert evidence.

A. Burden of Proof and Expert Evidence

160. Argentina contends that the 1975 Statute adopts an approach in terms of precaution whereby “the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment”. It also argues that the burden of proof should not be placed on Argentina alone as the Applicant, because, in its view, the 1975 Statute imposes an equal onus to persuade — for the one that the plant is innocuous and for the other that it is harmful.

161. Uruguay, on the other hand, asserts that the burden of proof is on Argentina, as the Applicant, in accordance with the Court’s longstanding case law, although it considers that, even if the Argentine position about transferring the burden of proof to Uruguay were correct, it would make no difference given the manifest weakness of Argentina’s
case and the extensive independent evidence put before the Court by Uruguay. Uruguay also strongly contests Argentina’s argument that the precautionary approach of the 1975 Statute would imply a reversal of the burden of proof, in the absence of an explicit treaty provision prescribing it as well as Argentina’s proposition that the Statute places the burden of proof equally on both Parties.

162. To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 86, para. 68; Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2005, p. 31, para. 45; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 128, para. 204; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101) applies to the assertions of fact both by the Applicant and the Respondent.

163. It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it. Moreover, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

164. Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

165. The Court now turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared before the Court as counsel for one or the other of the Parties to provide evidence.

166. The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions. In reply to a question put by a judge, Argentina stated that the weight to be given to such documents should be determined by reference not only to the “independence” of the author, who must have no personal interest in the outcome of the dispute and must not be an employee of the government, but also by reference to the characteristics of the report itself, in particular the care with which its analysis was conducted, its completeness, the accuracy of the data used, and the clarity and coherence of the conclusions drawn from such data. In its reply to the same question, Uruguay suggested that reports prepared by retained experts for the purposes of the proceedings and submitted as part of the record should not be regarded as independent and should be treated with caution; while expert statements and evaluations issued by a competent international organization, such as the IFC, or those issued by the consultants engaged by that organization should be regarded as independent and given “special weight”.

167. The Court has given most careful attention to the material submitted to it by the Parties, as will be shown in its consideration of the evidence below with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

168. As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence...
Article 27 of the 1975 Statute allows the parties to use the waters of the river for domestic, sanitary, industrial and agricultural purposes. In this context, the Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

The Court has already addressed in paragraphs 84 to 93 above the role of CARU with respect to the procedural obligations laid down in the 1975 Statute. In addition to its role in that context, the functions of CARU relate to almost all aspects of the implementation of the substantive provisions of the 1975 Statute. Of particular relevance in the present case are its functions relating to rule-making in respect of conservation and preservation of living resources, the prevention of pollution and its monitoring, and the co-ordination of actions of the Parties. These functions will be examined by the Court in its analysis of the positions of the Parties with respect to the interpretation and application of Articles 36 and 41 of the 1975 Statute.

Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development. The Court has already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river.
or the quality of its waters. The Court wishes to add that such utilization
could not be considered to be equitable and reasonable if the interests of
the other riparian State in the shared resource and the environmental
protection of the latter were not taken into account. Consequently, it is
the opinion of the Court that Article 27 embodies this interconnectedness
between equitable and reasonable utilization of a shared resource and the
balance between economic development and environmental protection
that is the essence of sustainable development.

2. The obligation to ensure that the management of the soil and wood-
land does not impair the régime of the river or the quality of its waters
(Article 35)

178. Article 35 of the 1975 Statute provides that the parties:
“undertake to adopt the necessary measures to ensure that the man-
agement of the soil and woodland and the use of groundwater and
the waters of the tributaries of the river do not cause changes which
may significantly impair the régime of the river or the quality of its
waters”.

179. Argentina contends that Uruguay’s decision to carry out major
eucalyptus planting operations to supply the raw material for the Orion
(Botnia) mill has an impact on management of the soil and Uruguayan
woodland, but also on the quality of the waters of the river. For its part,
Uruguay states that Argentina does not make any arguments that are
based on Uruguay’s management of soil or woodland — “nor has it
made any allegations concerning the waters of tributaries”.

180. The Court observes that Argentina has not provided any evidence
to support its contention. Moreover, Article 35 concerns the management
of the soil and woodland as well as the use of groundwater and the water
of tributaries, and there is nothing to suggest, in the evidentiary material
submitted by Argentina, a direct relationship between Uruguay’s man-
agement of the soil and woodland, or its use of groundwater and water
of tributaries and the alleged changes in the quality of the waters of the
River Uruguay which had been attributed by Argentina to the Orion
(Botnia) mill. Indeed, while Argentina made lengthy arguments about the
effects of the pulp mill discharges on the quality of the waters of the river,
no similar arguments have been presented to the Court regarding a del-
eterious relationship between the quality of the waters of the river and the
eucalyptus-planting operations by Uruguay. The Court concludes
that Argentina has not established its contention on this matter.

3. The obligation to co-ordinate measures to avoid changes in the eco-
logical balance (Article 36)

181. Argentina contends that Uruguay has breached Article 36 of the

1975 Statute, which places the Parties under an obligation to co-ordinate
through CARU the necessary measures to avoid changing the ecological
balance of the river. Argentina asserts that the discharges from the Orion
(Botnia) mill altered the ecological balance of the river, and cites as
examples the 4 February 2009 algal bloom, which, according to it, pro-
vides graphic evidence of a change in the ecological balance, as well as
the discharge of toxins, which gave rise, in its view, to the malformed
rotifers whose pictures were shown to the Court.

182. Uruguay considers that any assessment of the Parties’ conduct in
relation to Article 36 of the 1975 Statute must take account of the rules
adopted by CARU, because this Article, creating an obligation of co-op-
eration, refers to such rules and does not by itself prohibit any specific
conduct. Uruguay takes the position that the mill fully meets CARU
requirements concerning the ecological balance of the river, and con-
cludes that it has not acted in breach of Article 36 of the 1975 Statute.

183. It is recalled that Article 36 provides that “[t]he parties shall co-
ordinate, through the Commission, the necessary measures to avoid any
change in the ecological balance and control pests and other harmful
factors in the river and the areas affected by it”.

184. It is the opinion of the Court that compliance with this obligation
cannot be expected to come through the individual action of either Party,
acting on its own. Its implementation requires co-ordination through the
Commission. It reflects the common interest dimension of the 1975 Stat-
ute and expresses one of the purposes for the establishment of the joint
machinery which is to co-ordinate the actions and measures taken by the
Parties for the sustainable management and environmental protection of
the river. The Parties have indeed adopted such measures through the
promulgation of standards by CARU. These standards are to be found in
Sections E3 and E4 of the CARU Digest. One of the purposes of Sec-
tion E3 is “[t]o protect and preserve the water and its ecological balance”.
Similarly, it is stated in Section E4 that the section was developed “in
accordance with . . . Articles 36, 37, 38, and 39”.

185. In the view of the Court, the purpose of Article 36 of the 1975
Statute is to prevent any transboundary pollution liable to change the
ecological balance of the river by co-ordinating, through CARU, the
adoption of the necessary measures. It thus imposes an obligation on
both States to take positive steps to avoid changes in the ecological
balance. These steps consist not only in the adoption of a regulatory
framework, as has been done by the Parties through CARU, but also in
the observance as well as enforcement by both Parties of the
measures adopted. As the Court emphasized in the Gabcikovo-
Nagymaros case:

“In the field of environmental protection, vigilance and prevention
are required on account of the often irreversible character of damage
to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage” (Gabčíkovo-

186. The Parties also disagree with respect to the nature of the obligation laid down in Article 36, and in particular whether it is an obligation of conduct or of result. Argentina submits that, on a plain meaning, both Articles 36 and 41 of the 1975 Statute establish an obligation of result.

187. The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

188. This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

189. In light of the above, the Court is of the view that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

4. The obligation to prevent pollution and preserve the aquatic environment (Article 41)

190. Article 41 provides that:

“Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:

(a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where rele-

vant, with the guidelines and recommendations of international technical bodies;

(b) not to reduce in their respective legal systems:
1. the technical requirements in force for preventing water pollution, and
2. the severity of the penalties established for violations;

(c) to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems.”

191. Argentina claims that by allowing the discharge of additional nutrients into a river that is eutrophic and suffers from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution, as it failed to prescribe appropriate measures in relation to the Orion (Botnia) mill, and failed to meet applicable international environmental agreements, including the Biodiversity Convention and the Ramsar Convention. It maintains that the 1975 Statute prohibits any pollution which is prejudicial to the protection and preservation of the aquatic environment or which alters the ecological balance of the river. Argentina further argues that the obligation to prevent pollution of the river is an obligation of result and extends not only to the aquatic environment proper, but also to any reasonable and legitimate use of the river, including tourism and other recreational uses.

192. Uruguay contends that the obligation laid down in Article 41 (a) of the 1975 Statute to “prevent . . . pollution” does not involve a prohibition on all discharges into the river. It is only those that exceed the standards jointly agreed by the Parties within CARU in accordance with their international obligations, and that therefore have harmful effects, which can be characterized as “pollution” under Article 40 of the 1975 Statute. Uruguay also maintains that Article 41 creates an obligation of conduct, and not of result, but that it actually matters little since Uruguay has complied with its duty to prevent pollution by requiring the plant to meet best available technology (“BAT”) standards.

193. Before turning to the analysis of Article 41, the Court recalls that:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), pp. 241-242, para. 29.)

194. The Court moreover had occasion to stress, in the Gabčíkovo-
Nagymaros Project case, that “the Parties together should look afresh at
the effects on the environment of the operation of the Gabčíkovo power plant” (Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.T.R. Reports 1997, p. 78, para. 140). The Court is mindful of these statements in taking up now the examination of Article 41 of the 1975 Statute.

195. In view of the central role of this provision in the dispute between the Parties in the present case and their profound differences as to its interpretation and application, the Court will make a few remarks of a general character on the normative content of Article 41 before addressing the specific arguments of the Parties. First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to “protect and preserve the aquatic environment and, in particular, to prevent its pollution”. Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs (b) and (c) of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

196. Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the Parties in their respective legal systems which must be “in accordance with applicable international agreements” and “in keeping, where relevant, with the guidelines and recommendations of international technical bodies”.

197. Thirdly, the obligation to “preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures” is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 (a) in the adoption and enforcement of appropriate rules and measures is further reinforced by the requirement that such rules and measures must be “in accordance with applicable international agreements” and “in keeping, where relevant, with the guidelines and recommendations of international technical bodies”. This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards.

198. Finally, the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute. Article 40 provides that: “For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects.” The term “harmful effects” is defined in the CARU Digest as:

“any alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities” (Title I, Chapter 1, Section 2, Article 1 (c) of the Digest (E3)).

199. The Digest expresses the will of the Parties and their interpretation of the provisions of the 1973 Statute. Article 41, not unlike many other provisions of the 1975 Statute, lays down broad obligations agreed to by the Parties to regulate and limit their use of the river and to protect its environment. These broad obligations are given more specific content through the co-ordinated rule-making action of CARU as established under Article 56 of the 1975 Statute or through the regulatory action of each of the parties, or by both means. The two regulatory actions are meant to complement each other. As discussed below (see paragraphs 201 to 202, and 214), CARU standards concern mainly water quality. The CARU Digest sets only general limits on certain discharges or effluents from industrial plants such as: “hydrocarbons”, “sedimentable solids”, and “oils and greases”. As the Digest makes explicit, those matters are left to each party to regulate. The Digest provides that, as regards effluents within its jurisdiction, each party shall take the appropriate “corrective measures” in order to assure compliance with water quality standards (CARU Digest, Sec. E3: Pollution, Title 2, Chapter 5, Section 1, Article 3). Uruguay has taken that action in its Regulation on Water Quality (Decreto No. 253/79) and in relation to the Orion (Botnia) mill in the conditions stipulated in the authorization issued by MVOTMA. In Argentina, the Entre Ríos Province, which borders the river opposite the plant, has regulated industrial discharges in a decree that also recognizes the binding effect of the
200. The Court considers it appropriate to now address the question of the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of “harmful effects” is to be determined. It is the view of the Court that these rules are to be found in the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs (a), (b) and (c) of Article 41 contemplate).

201. The functions of CARU under Article 56 (a) include making rules governing the prevention of pollution and the conservation and preservation of living resources. In the exercise of its rule-making power, the Commission adopted in 1984 the Digest on the uses of the waters of the River Uruguay and has amended it since. In 1990, when Section E3 of the Digest was adopted, the Parties recognized that it was drawn up under Article 7 (f) of the 1961 Treaty and Articles 35, 36, 41 to 45 and 56 (a) (4) of the 1975 Statute. As stated in the Digest, the “basic purposes” of Section E3 of the Digest are to be as follows:

“(a) to protect and preserve the water and its ecological balance;
(b) to ensure any legitimate use of the water considering long term needs and particularly human consumption needs;
(c) to prevent all new forms of pollution and to achieve its reduction in case the standard values adopted for the different legitimate uses of the River’s water are exceeded;
(d) to promote scientific research on pollution.” (Title I, Chapter 2, Section 1, Article 1.)

202. The standards laid down in the Digest are not, however, exhaustive. As pointed out earlier, they are to be complemented by the rules and measures to be adopted by each of the Parties within their domestic laws.

The Court will apply, in addition to the 1975 Statute, these two sets of rules to determine whether the obligations undertaken by the Parties have been breached in terms of the discharge of effluent by the mill as well as in respect of the impact of those discharges on the quality of the waters of the river, on its ecological balance and on its biodiversity.
aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. The Court has observed in the case concerning the Dispute Regarding Navigational and Related Rights,

"there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 242, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 (a) in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

206. The Court has already considered the role of the environmental impact assessment in the context of the procedural obligations of the Parties under the 1975 Statute (paragraphs 119 and 120). It will now deal with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, that is to say, first, whether such an assessment should have, as a matter of method, necessarily considered possible alternative sites, taking into account the receiving capacity of the river in the area where the plant was to be built and, secondly, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of the environmental impact assessment.

(i) The siting of the Orion (Botnia) mill at Fray Bentos

207. According to Argentina, one reason why Uruguay's environmental impact assessment is inadequate is that it contains no analysis of alternatives for the choice of the mill site, whereas the study of alternative sites is required under international law (UNEP Goals and Principles, Espoo Convention, IFC Operational Policy 4.01). Argentina contends that the chosen site is particularly sensitive from an ecological point of view and conducive to the dispersion of pollutants "because of the nature of the waters which will receive the pollution, the propensity of the site to sedimentation and eutrophication, the phenomenon of reverse flow and the proximity of the largest settlement on the River Uruguay".

208. Uruguay counters that the Fray Bentos site was initially chosen because of the particularly large volume of water in the river at that location, which would serve to promote effluent dilution. Uruguay adds that the site is moreover easily accessible for river navigation, which facilitates delivery of raw materials, and local manpower is available there. Uruguay considers that, if there is an obligation to consider alternative sites, the instruments invoked for that purpose by Argentina do not require alternative locations to be considered as part of an environmental impact assessment unless it is necessary in the circumstances to do so. Finally, Uruguay affirms that in any case it did so and that the suitability of the Orion (Botnia) site was comprehensively assessed.

209. The Court will now consider, first, whether Uruguay failed to exercise due diligence in conducting the environmental impact assessment, particularly with respect to the choice of the location of the plant
and, secondly, whether the particular location chosen for the siting of the plant, in this case Fray Bentos, was unsuitable for the construction of a plant discharging industrial effluent of this nature and on this scale, or could have a harmful impact on the river.

210. Regarding the first point, the Court has already indicated that the Espoo Convention is not applicable to the present case (see paragraph 205 above); while with respect to the UNEP Goals and Principles to which Argentina has referred, whose legal character has been described in paragraph 205 above, the Court recalls that Principle 4 (c) simply provides that an environmental impact assessment should include, at a minimum, "[a] description of practical alternatives, as appropriate". It is also to be recalled that Uruguay has repeatedly indicated that the suitability of the Fray Bentos location was comprehensively assessed and that other possible sites were considered. The Court further notes that the IFC's Final Cumulative Impact Study of September 2006 (hereinafter "CIS") shows that in 2003 Botnia evaluated four locations in total at La Paloma, at Paso de los Toros, at Nueva Palmira, and at Fray Bentos, before choosing Fray Bentos. The evaluations concluded that the limited amount of fresh water in La Paloma and its importance as a habitat for birds rendered it unsuitable, while for Nueva Palmira its consideration was discouraged by its proximity to residential, recreational, and culturally important areas, and with respect to Paso de los Toros insufficient flow of water during the dry season and potential conflict with competing water uses, as well as a lack of infrastructure, led to its exclusion. Consequently, the Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

211. Regarding the second point, the Court cannot fail to note that any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.

212. The Court notes, with regard to the receiving capacity of the river at the location of the mill, that the Parties disagree on the geomorphological and hydrodynamic characteristics of the river in the relevant area, particularly as they relate to river flow, and how the flow of the river, including its direction and its velocity, in turn determines the dispersal and dilution of pollutants. The differing views put forward by the Parties with regard to the river flow may be due to the different modelling systems which each has employed to analyse the hydrodynamic features of the River Uruguay at the Fray Bentos location. Argentina implemented a three-dimensional modelling that measured speed and direction at ten different depths of the river and used a sonar — an Acoustic Doppler Current Profiler (hereafter "ADCP") — to record water flow velocities for a range of depths for about a year. The three-dimensional system generated a large number of data later introduced in a numerical hydrodynamic model. On the other hand, Botnia based its environmental impact assessment on a bi-dimensional modelling — the RMA2. The EcoMetrix CIS implemented both three-dimensional and bi-dimensional models. However, it is not mentioned whether an ADCP sonar was used at different depths.

213. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different kinds of modelling, calibration and validation undertaken by the Parties to characterize the rate and direction of flow of the waters of the river in the relevant area. The Court notes however that both Parties agree that reverse flows occur frequently and that phenomena of low flow and stagnation may be observed in the concerned area, but that they disagree on the implications of this for the discharges from the Orion (Botnia) mill into this area of the river.

214. The Court considers that in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos. Consequently, in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute. Moreover, neither of the Parties has argued before the Court that the water quality standards established by CARU have not adequately taken into consideration the geomorphological and hydrological characteristics of the river and the capacity of its waters to disperse and dilute different types of discharges. The Court is of the opinion that, should such inadequacy be detected, particularly with respect to certain areas of the river such as at Fray Bentos, the Parties should initiate a review of the water quality standards set by CARU and ensure that such standards clearly reflect the characteristics of the river and are capable of protecting its waters and its ecosystem.

(ii) Consultation of the affected populations

215. The Parties disagree on the extent to which the populations likely to be affected by the construction of the Orion (Botnia) mill, particularly on the Argentine side of the river, were consulted in the course of the environmental impact assessment. While both Parties agree that consultation of the affected populations should form part of an environmental impact assessment, Argentina asserts that international law imposes specific obligations on States in this regard. In support of this argument, Argentina points to Articles 2.6 and 3.8 of
the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles. Uruguay considers that the provisions invoked by Argentina cannot serve as a legal basis for an obligation to consult the affected populations and adds that in any event the affected populations had indeed been consulted.

216. The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.

217. Regarding the facts, the Court notes that both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river. These activities included meetings on 2 December 2003 in Rio Negro, and on 26 May 2004 in Fray Bentos, with participation of Argentine non-governmental organizations. In addition, on 21 December 2004, a public hearing was convened in Fray Bentos which, according to Uruguay, addressed among other subjects, the

“handling of chemical products in the plant and in the port; the appearance of acid rain, dioxins, furans and other polychlorates of high toxicity that could affect the environment; compliance with the Stockholm Convention; atmospheric emissions of the plant; electromagnetic and electrostatic emissions; [and] liquid discharges into the river”.

Inhabitants of Fray Bentos and nearby regions of Uruguay and Argentina participated in the meeting and submitted 138 documents containing questions or concerns.

218. Further, the Court notes that between June and November 2005 more than 80 interviews were conducted by the Consensus Building Institute, a non-profit organization specializing in facilitated dialogues, mediation, and negotiation, contracted by the IFC. Such interviews were conducted inter alia in Fray Bentos, Gualeguaychú, Montevideo, and Buenos Aires, with interviewees including civil society groups, non-governmental organizations, business associations, public officials, tourism operators, local business owners, fishermen, farmers and plantation owners on both sides of the river. In December 2005, the draft CIS and the report prepared by the Consensus Building Institute were released, and the IFC opened a period of consultation to receive additional feedback from stakeholders in Argentina and Uruguay.

219. In the light of the above, the Court finds that consultation by Uruguay of the affected populations did indeed take place.

220. Argentina maintains that Uruguay has failed to take all measures to prevent pollution by not requiring the mill to employ the “best available techniques”, even though this is required under Article 5 (d) of the POPs Convention, the provisions of which are incorporated by virtue of the “referral clause” in Article 41 (a) of the 1975 Statute. According to Argentina, the experts’ reports it cites establish that the mill does not use best available techniques and that its performance is not up to international standards, in the light of the various techniques available for producing pulp. Uruguay contests these claims. Relying on the CIS, the second Hatfield report and the audit conducted by AMEC at the IFC’s request, Uruguay asserts that the Orion (Botnia) mill is, by virtue of the technology employed there, one of the best pulp mills in the world, applying best available techniques and complying with European Union standards, among others, in the area.

221. Argentina, however, specifically criticizes the absence of any “tertiary treatment of effluent” (i.e., a third round of processing production waste before discharge into the natural environment), which is necessary to reduce the quantity of nutrients, including phosphorus, since the effluent is discharged into a highly sensitive environment. The mill also lacks, according to Argentina, an empty emergency basin, designed to contain effluent spills. Answering a question asked by a judge, Argentina considers that a tertiary treatment would be possible, but that Uruguay failed to conduct an adequate assessment of tertiary treatment options for the Orion (Botnia) mill.

222. Uruguay observes that “the experts did not consider it necessary to equip the mill with a tertiary treatment phase”. Answering the same question, Uruguay argued that, though feasible, the addition of a tertiary treatment facility would not be environmentally advantageous overall, as it would significantly increase the energy consumption of the plant, its carbon emissions, together with sludge generation and chemical use. Uruguay has consistently maintained that the bleaching technology used is acceptable, that the emergency basins in place are adequate, that the mill’s production of synthetic chemical compounds meets technological requirements and that the potential risk from this production was indeed assessed.

223. To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 (a), and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used...
by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment. This is all the more important in view of the fact that Article 41 (a) provides that the regulatory framework to be adopted by the Parties has to be in keeping with the guidelines and recommendations of international technical bodies.

224. The Court notes that the Orion (Botnia) mill uses the bleached Kraft pulping process. According to the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (hereinafter "IPPC-BAT"), which the Parties referred to as the industry standard in this sector, the Kraft process already accounted at that time for about 80 per cent of the world’s pulp production and is therefore the most applied production method of chemical pulping processes. The plant employs an ECF-light (Elemental chlorine-free) bleaching process and a primary and secondary wastewater treatment involving activated sludge treatment.

225. The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the Parties, particularly the IPPC-BAT, there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion (Botnia) mill is not in compliance with the 1975 Statute, the CARU Digest and applicable regulations of the Parties in terms of the concentration of effluents per litre of wastewater discharged from the plant and the absolute amount of effluents that can be discharged in a day.

226. The Court recalls that Uruguay has submitted extensive data regarding the monitoring of effluent from the Orion (Botnia) mill, as contained in the various reports by EcoMetrix and DINAMA (EcoMetrix, Independent Performance Monitoring as required by the IFC Phase 2: Six Month Environmental Performance Review (July 2008); EcoMetrix, Independent Performance Monitoring as required by the IFC, Phase 3: Environmental Performance Review (2008 Monitoring Year) (hereinafter "EcoMetrix Third Monitoring Report"); DINAMA, Performance Report for the First Year of Operation of the Botnia Plant and the Environmental Quality of the Area of Influence, May 2009; DINAMA, Six Month Report on the Botnia Emission Control and Environmental Performance Plan), and that Argentina expressed the view, in this regard, that Uruguay had on this matter, much greater, if not exclusive, access to the factual evidence. However, the Court notes that Argentina has itself generated much factual information and that the materials which Uruguay produced have been available to Argentina at various stages of the proceedings or have been available in the public domain. Therefore the Court does not consider that Argentina has been at a disadvantage with regard to the production of evidence relating to the discharges of effluent of the mill.

227. To determine whether the concentrations of pollutants discharged by the Orion (Botnia) mill are within the regulatory limits, the Court will have to assess them against the effluent discharge limits — both in terms of the concentration of effluents in each litre of wastewater discharged and the absolute amount of effluents that can be discharged in a day — prescribed by the applicable regulatory standards of the Parties, as characterized by the Court in paragraph 200 above, and the permits issued for the plant by the Uruguayan authorities, since the Digest only sets general limits on "hydrocarbons", "sedimentable solids", and "oils and greases", but does not establish specific ones for the substances in contention between the Parties. Argentina did not allege any non-compliance of the Orion (Botnia) mill with CARU's effluent standards (CARU Digest, Sec. E3 (1984, as amended)).

228. Taking into account the data collected after the start-up of the mill as contained in the various reports by DINAMA and EcoMetrix, it does not appear that the discharges from the Orion (Botnia) mill have exceeded the limits set by the effluent standards prescribed by the relevant Uruguayan regulation as characterized by the Court in paragraph 200 above, or the initial environmental authorization issued by MVOTMA (MVOTMA, Initial Environmental Authorization for the Botnia Plant (14 February 2005)), except for a few instances in which the concentrations have exceeded the limits. The only parameters for which a recorded measurement exceeded the standards set by Decree No. 253/79 or the initial environmental authorization by MVOTMA are: nitrogen, nitrates, and AOX (Adsorbable Organic Halogens). In those cases, measurements taken on one day exceeded the threshold. However, the initial environmental authorization of 14 February 2005 specifically allows yearly averaging for the parameters. The most notable of these cases in which the limits were exceeded is that relating to AOX, which is the parameter used internationally to monitor pulp mill effluent, sometimes including persistent organic pollutants (POPs). According to the IPPC-BAT reference document submitted by the Parties, and considered by them as the industry standard in this sector, "the environmental control authorities in many countries have set severe restrictions on the discharges of chlorinated organics measured as AOX into the aquatic environment". Concentrations of AOX reached at one point on 9 January 2008, after the mill began operations, as high as 13 mg/L, whereas the maximum limit used in the environ-

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mental impact assessment and subsequently prescribed by MVOTMA was 6 mg/L. However, in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provisions of the 1975 Statute.

(c) Impact of the discharges on the quality of the waters of the river

230. Regarding the baseline data, the studies and reports submitted by the Parties contained data and analysis relating, inter alia, to water quality. Argentina contends that Uruguay’s baseline data were both inadequate and incomplete in many aspects. Argentina rejects this allegation, and argues that Argentina has actually relied on Uruguay’s baseline data to give its own assessment of water quality. According to Argentina, contrary to Argentina’s assertions, collection of baseline data by Uruguay started in August 2006, when DINAMA started to conduct for a period of 15 months pre-operation water quality monitoring of the plant and the results of measurements of its water and air emissions after the plant started its production activities and, in some cases, until mid-2009.

231. Argentina contends that Uruguay’s baseline data were both inadequate and incomplete in many aspects. Uruguay rejects this allegation, and argues that Argentina has actually relied on Uruguay’s baseline data to give its own assessment of water quality. According to Uruguay, contrary to Argentina’s assertions, collection of baseline data by Uruguay started in August 2006, when DINAMA started to conduct for a period of 15 months pre-operation water quality monitoring prior to the commissioning of the plant in November 2007, which served to complement almost 15 years of more general monitoring that had been carried out within CARU under the PROCON programme (River Uruguay Water Quality and Pollution Control Programme, from the Spanish acronym for “Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay”). Argentina did not challenge counsel for Uruguay’s statement during the oral proceedings that it used Uruguay’s baseline data for the assessment of water quality.

232. The data presented by the Parties on the post-operation monitor-

233. The monitoring sites maintained by Argentina are located on the Argentine side of the river; with the most upstream position located 10 km from the plant and the furthest downstream one at about 16 km from the plant. Nevertheless, three of the sites (U0, U2 and U3) are near the plant; while another three are in Nandubayasal Bay and Inés Lagoon, the data from which, according to Argentina’s counsel, “enabled the scientists to clearly set the bay apart, as it acts as an ecosystem that is relatively detached from the Uruguay river” (Scientific and Technical Report, Chapter 3, appendix: “Background Biogeochemical Studies”, para. 4.1.2; see also ibid., para. 4.3.1.2).

234. The monitoring sites maintained by Uruguay (DINAMA) and by Botnia are located on the Uruguayan side. The OSE monitoring point is located at the drinking water supply intake pipe for Fray Bentos, at or near DINAMA station 11.

235. Argentina’s team gathered data from November 2007 until April 2009 with many of the results being obtained from October 2008. Uruguay, through DINAMA, has been carrying out its monitoring of the site since March 2006. Its most recent data cover the period up to June 2009. The OSE, in terms of its overall responsibility for Uruguayan water quality, has been gathering relevant data which has been used in the periodic reports on the operation of the plant.

236. The Court also has before it interpretations of the data provided by experts appointed by the Parties, and provided by the Parties themselves and their counsel. However, in assessing the probable value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants, in order to determine whether Uruguay breached its obligations under Articles 36 and 41 of the 1975 Statute in authorizing the construction and operation of the Orion (Botnia) mill.

237. The particular parameters and substances that are subject to controversy between the Parties in terms of the impact of the discharges of effluent from the Orion (Botnia) mill on the quality of the waters of the
river are: dissolved oxygen; total phosphorus (and the related matter of eutrophication due to phosphate); phenolic substances; nonylphenols and nonylphenoletheroxylates; and dioxins and furans. The Court now turns to the assessment of the evidence presented to it by the Parties with respect to these parameters and substances.

(i) Dissolved oxygen

238. Argentina raised for the first time during the oral proceedings the alleged negative impact of the Orion (Botnia) mill on dissolved oxygen in the river referring to data contained in the report of the Uruguayan OSE. According to Argentina, since dissolved oxygen is environmentally beneficial and there is a CARU standard which sets a minimum level of dissolved oxygen for the river waters (5.6 mg/L), the introduction by the Orion (Botnia) mill into the aquatic environment of substances or energy which caused the dissolved oxygen level to fall below that minimum constitutes a breach of the obligation to prevent pollution and to preserve the aquatic environment. Uruguay argues that Argentina’s figures taken from the measurements of the OSE were for “oxidabilidad”, which refers to the “demand for oxygen” and not for “oxigeno disuelto” — i.e., dissolved oxygen. Uruguay also claims that a drop in the level of demand for oxygen shows an improvement in the quality of the water, since the level of demand should be kept as low as possible.

239. The Court observes that a post-operational average value of 3.8 mg/L for dissolved oxygen would indeed, if proven, constitute a violation of CARU standards, since it is below the minimum value of 5.6 mg of dissolved oxygen per litre required according to the CARU Digest (E3, Title 2, Chapter 4, Section 2). However, the Court finds that the allegation made by Argentina remains unproven. First, the figures on which Argentina bases itself do not correspond to the ones for dissolved oxygen that appear in the EcoMetrix Third Monitoring Report, where the samples taken between February and October 2008 were all above the CARU minimum standard for dissolved oxygen. Secondly, DINAMA’s Surface Water and Sediment Quality Data Report of July 2009 (Six Month Report: January-June) (hereinafter “DINAMA’s Water Quality Report”) (see p. 7, fig. 4.5: average of 9.4 mg/L) displays concentrations of dissolved oxygen that are well above the minimum level required under the CARU Digest. Thirdly, Argentina’s 30 June 2009 report says in its summary that the records of water quality parameters over the period were “normal for the river with typical seasonal patterns of temperature and associated dissolved oxygen”. The hundreds of measurements presented in the figures in that chapter of the “Colombo Report” support that conclusion even taking account of some slightly lower figures. Fourthly, the figures relating to dissolved oxygen contained in DINAMA’s Water Quality Report have essentially the same characteristics as those gathered by Argentina — they are above the CARU minimum and are the same upstream and downstream. Thus, the Court concludes that there appears to be no significant difference between the sets of data over time and that there is no evidence to support the contention that the reference to “oxidabilidad” in the OSE report referred to by Argentina should be interpreted to mean “dissolved oxygen”.

(ii) Phosphorus

240. There is agreement between the Parties that total phosphorus levels in the River Uruguay are high. According to Uruguay, the total amount of (natural and anthropogenic) phosphorus emitted into the river per year is approximately 19,000 tonnes, of which the Orion (Botnia) mill has a share of some 15 tonnes (in 2008) or even less, as was expected for 2009. These figures have not been disputed by Argentina during the proceedings. Uruguay contends further that no violation of the provisions of the 1975 Statute can be alleged since the high concentration cannot be clearly attributed to the Orion (Botnia) mill as the source, and since no standard is set by CARU for phosphorus. Uruguay maintains also that based on data provided by DINAMA as compared to baseline data also compiled by DENAMA, it can be demonstrated that “[t]otal phosphorus levels were generally lower post-start-up as compared to the 2005-2006 baseline” (EcoMetrix Third Monitoring Report, March 2009).

241. A major disagreement between the Parties relates to the relationship between the higher concentration of phosphorus in the waters of the river and the algal bloom of February 2009. However, the Court finds that there is no standard is set by CARU for phosphorus. Uruguay maintains also that based on data provided by DINAMA as compared to baseline data also compiled by DENAMA, it can be demonstrated that “[t]otal phosphorus levels were generally lower post-start-up as compared to the 2005-2006 baseline” (EcoMetrix Third Monitoring Report, March 2009).

242. The Court notes that CARU has not adopted a water quality standard relating to levels of total phosphorus and phosphates in the river. Similarly, Argentina has no water quality standards for total phosphorus. The Court will therefore have to use the water quality and effluent limits for total phosphorus enacted by Uruguay under its domestic legislation, as characterized by the Court in paragraph 200 above, to assess whether the concentration levels of total phosphorus have exceeded the limits laid down in the regulations of the Parties adopted in accordance with Article 41 (x) of the 1975 Statute. The water quality standard for total phosphorus under the Uruguayan Regulation is 0.025 mg/L for certain purposes such as drinking water, irrigation of crops for human consumption and water used for recreational purposes which involve direct human contact with the water (Decree No. 253/79, Regulation of
The Court finds that based on the evidence before it, the Orion (Botnia) mill has so far complied with the standard for total phosphorus in effluent discharge. In this context, the Court notes that, for 2008 according to the EcoMetrix Third Monitoring Report, the Uruguayan data recorded an average of 0.59 mg/L total phosphorus in effluent discharge from the plant. Moreover, according to the DINAMA 2009 Emissions Report, the effluent figures for November 2008 to May 2009 were between 0.053 mg/L and 0.41 mg/L (e.g., DINAMA, “Six Month Report on the Botnia Emission Control and Environmental Performance Plan November 11, 2008 to May 31, 2009” (22 July 2009) p. 5; see also pp. 25 and 26). Argentina does not contest these figures which clearly show values much below the standard established under the Uruguayan Decree.

The Court observes in this connection that as early as 11 February 2005, DINAMA, in its environmental impact assessment for the Orion (Botnia) mill, noted the heavy load of nutrients (phosphorus and nitrogen) in the river and stated that:

“This situation has generated the frequent proliferation of algae, in some cases with an important degree of toxicity as a result of the proliferation of cyanobacteria. These proliferations, which in recent years have shown an increase in both frequency and intensity, constitute a health risk and result in important economic losses since they interfere with some uses of water, such as recreational activities and the public supply of drinking water. To this already existing situation it must be added that, in the future, the effluent in the plant will emit a total of 200 t/a of N\[nitrogen\] and 20 t/a of P\[phosphorus\], values that are the approximate equivalent of the emission of the untreated sewage of a city of 65,000 people.” (P. 20, para. 6.1.)

The DINAMA Report then continues as follows:

“It is also understood that it is not appropriate to authorize any waste disposal that would increase any of the parameters that present critical values, even in cases in which the increase is considered insignificant by the company. Nevertheless, considering that the parameters in which the quality of water is compromised are not specific to the effluents of this project, but rather would be affected by the waste disposal of any industrial or domestic effluent under consideration, it is understood that the waste disposal proposed in the project may be accepted, as long as there is compensation for any

increase over and above the standard value for any of the critical parameters.” (DINAMA Report, p. 21.)

The Court further notes that the initial environmental authorization, granted on 15 February 2005, required compliance by Botnia with those conditions, with CARU standards and with best available techniques as included in the December 2001 IPPC-BAT of the European Commission. It also required the completion of an implementation plan for mitigation and compensation measures. That plan was completed by the end of 2007 and the authorization to operate was granted on 8 November 2007. On 29 April 2008, Botnia and the OSE concluded an Agreement Regarding Treatment of the Municipal Wastewater of Fray Bentos, aimed at reducing total phosphorus and other contaminants.

The Court considers that the amount of total phosphorus discharge into the river that may be attributed to the Orion (Botnia) mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources. Consequently, the Court concludes that the fact that the level of concentration of total phosphorus in the river exceeds the limits established in Uruguayan legislation in respect of water quality standards cannot be considered as a violation of Article 41 (a) of the 1975 Statute in view of the river’s relatively high total phosphorus content prior to the commissioning of the plant, and taking into account the action being taken by Uruguay by way of compensation.

The Court will now turn to the consideration of the issue of the algal bloom of 4 February 2009. Argentina claims that the algal bloom of 4 February 2009 was caused by the Orion (Botnia) mill’s emissions of nutrients into the river. To substantiate this claim Argentina points to the presence of effluent products in the blue-green algal bloom and to various satellite images showing the concentration of chlorophyll in the water. Such blooms, according to Argentina, are produced during the warm season by the explosive growth of algae, particularly cyanobacteria, responding to nutrient enrichment, mainly phosphate, among other compounds present in detergents and fertilizers.

Uruguay contends that the algal bloom of February 2009, and the high concentration of chlorophyll, was not caused by the Orion (Botnia) mill but could have originated far upstream and may have most likely been caused by the increase of people present in Gualeaguaychú during the yearly carnival held in that town, and the resulting increase in sewage, and not by the mill’s effluents. Uruguay maintains that Argentine data actually prove that the Orion (Botnia) mill has not added to the concentration of phosphorus in the river at any time since it began operating.

The Parties are in agreement on several points regarding the algal bloom of 4 February 2009, including the fact that the concentrations of
nutrients in the River Uruguay have been at high levels both before and after the bloom episode, and the fact that the bloom disappeared shortly after it had begun. The Parties also appear to agree on the interdependence between algae growth, higher temperatures, low and reverse flows, and presence of high levels of nutrients such as nitrogen and phosphorus in the river. It has not, however, been established to the satisfaction of the Court that the algal bloom episode of 4 February 2009 was caused by the nutrient discharges from the Orion (Botnia) mill.

(iii) Phenolic substances

251. With regard to phenolic substances, Argentina contends that the Orion (Botnia) mill’s emission of pollutants have resulted in violations of the CARU standard for phenolic substances once the plant started operating, while, according to Argentina, pre-operational baseline data did not show that standard to have been exceeded. Uruguay on the other hand argues that there have been numerous violations of the standard, throughout the river, long before the plant went into operation. Uruguay substantiates its arguments by pointing to several studies including the EcoMetrix final Cumulative Impact Study, which had concluded that phenolic substances were found to have frequently exceeded the water quality standard of 0.001 mg/L fixed by CARU.

252. The Court also notes that Uruguayan data indicate that the water quality standard was being exceeded from long before the plant began operating. The Cumulative Impact Study prepared in September 2006 by EcoMetrix for the IFC states that phenolics were found frequently to exceed the standard, with the highest values on the Argentine side of the river. The standard is still exceeded in some of the measurements in the most recent report before the Court but most are below it (DINAMA July 2009 Water Quality Report, p. 21, para. 4.1.11.2 and App. 1, showing measurements from 0.0005 to 0.012 mg/L).

253. During the oral proceedings, counsel for Argentina claimed that the standard had not previously been exceeded and that the plant has caused the limit to be exceeded. The concentrations, he said, had increased on average by three times and the highest figure was 20 times higher. Uruguay contends that the data contained in the DINAMA 2009 Report shows that the post-operational levels of phenolic substances were lower than the baseline levels throughout the river including at the OSE water intake.

254. Based on the record, and the data presented by the Parties, the Court concludes that there is insufficient evidence to attribute the alleged increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill.

(iv) Presence of nonylphenols in the river environment

255. Argentina claims that the Orion (Botnia) mill emits, or has emitted, nonylphenols and thus has caused damage to, or at least has substantially put at risk, the river environment. According to Argentina, the most likely source of these emissions are surfactants (detergents), nonylphenolethoxylates used to clean the wood pulp as well as the installations of the plant itself. Argentina also contends that from 46 measurements performed in water samples the highest concentrations, in particular those exceeding the European Union relevant standards, were determined in front-downstream the mill and in the bloom sample collected on 4 February 2009, with lower levels upstream and downstream, indicating that the Orion (Botnia) mill effluent is the most probable source of these residues. In addition, according to Argentina, bottom sediments collected in front-downstream the mill showed a rapid increase of nonylphenols from September 2006 to February 2009, corroborating the increasing trend of these compounds in the River Uruguay. For Argentina, the spatial distribution of sub-lethal effects detected in rotifers (absence of spines), transplanted Asiatic clams (reduction of lipid reserves) and fish (estrogenic effects) coincided with the distribution area of nonylphenols suggesting that these compounds may be a significant stress factor.

256. Uruguay rejects Argentina’s claim relating to nonylphenols and nonylphenolethoxylates, and categorically denies the use of nonylphenols and nonylphenolethoxylates by the Orion (Botnia) mill. In particular, it provides affidavits from Botnia officials to the effect that the mill does not use and has never used nonylphenols or nonylphenolethoxylate derivatives in any of its processes for the production of pulp, including in the pulp washing and cleaning stages, and that no cleaning agents containing nonylphenols are or have been used for cleaning the plant’s equipment (Affidavit of Mr. González, 2 October 2009).

257. The Court recalls that the issue of nonylphenols was included in the record of the case before the Court only by the Report submitted by Argentina on 30 June 2009. Although testing for nonylphenols had been carried out since November 2008, Argentina has not however, in the view of the Court, adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill. Uruguay has also categorically denied before the Court the use of nonylphenolethoxylates for production or cleaning by the Orion (Botnia) mill. The Court therefore concludes that the evidence in
the record does not substantiate the claims made by Argentina on this matter.

(v) Dioxins and furans

258. Argentina has alleged that while the concentration of dioxins and furans in surface sediments is generally very low, data from its studies demonstrated an increasing trend compared to data compiled before the Orion (Botnia) mill commenced operations. Argentina does not claim a violation of standards, but relies on a sample of sábalo fish tested by its monitoring team, which showed that one fish presented elevated levels of dioxins and furans which, according to Argentina, pointed to a rise in the incidence of dioxins and furans in the river after the commissioning of the Orion (Botnia) mill. Uruguay contests this claim, arguing that such elevated levels cannot be linked to the operation of the Orion (Botnia) mill, given the presence of so many other industries operating along the River Uruguay and in neighbouring Nandubaysal Bay, and the highly migratory nature of the sábalo species which was tested. In addition, Uruguay advances that its testing of the effluent coming from the Orion (Botnia) mill demonstrate that no dioxins and furans could have been introduced into the mill effluent, as the levels detected in the effluent were not measurably higher than the baseline levels in the River Uruguay.

259. The Court considers that there is no clear evidence to link the increase in the presence of dioxins and furans in the river to the operation of the Orion (Botnia) mill.

(d) Effects on biodiversity

260. Argentina asserts that Uruguay “has failed to take all measures to protect and preserve the biological diversity of the River Uruguay and the areas affected by it”. According to Argentina, the treaty obligation “to protect and preserve the aquatic environment” comprises an obligation to protect the biological diversity including “habitats as well as species of flora and fauna”. By virtue of the “referral clause” in Article 41 (a), Argentina argues that the 1975 Statute requires Uruguay, in respect of activities undertaken in the river and areas affected by it, to comply with the obligations deriving from the CITES Convention, the Biodiversity Convention and the Ramsar Convention. Argentina maintains that through its monitoring programme abnormal effects were detected in aquatic organisms — such as malformation of rotifers and loss of fat by clams — and the biomagnification of persistent pollutants such as dioxins and furans was detected in detritus feeding fish (such as the sábalo fish). Argentina also contends that the operation of the mill poses a threat, under conditions of reverse flow, to the Esteros de Farrapos site, situated “in the lower section of the River . . . downstream from the Salto Grande dam and on the frontier with Argentina”, a few kilometres upstream from the Orion (Botnia) mill.

261. Uruguay states that Argentina has failed to demonstrate any breach by Uruguay of the Biodiversity Convention, while the Ramsar Convention has no bearing in the present case because Esteros de Farrapos was not included in the list of Ramsar sites whose ecological character is threatened. With regard to the possibility of the effluent plume from the mill reaching Esteros de Farrapos, Uruguay in the oral proceedings acknowledged that under certain conditions that might occur. However, Uruguay added that it would be expected that the dilution of the effluent from the mill of 1:1000 would render the effluent quite harmless and below any concentration capable of constituting pollution. Uruguay contends that Argentina’s claims regarding the harmful effects on fish and rotifers as a result of the effluents from the Orion (Botnia) mill are not credible. It points out that a recent comprehensive report of DINAMA on ichthyofauna concludes that compared to 2008 and 2009 there has been no change in species biodiversity. Uruguay adds that the July 2009 report of DINAMA, with results of its February 2009 monitoring of the sediments in the river where some fish species feed, stated that “the quality of the sediments at the bottom of the Uruguay River has not been altered as a consequence of the industrial activity of the Botnia plant”.

262. The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. The Court has not, however, found sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora. The record rather shows that a clear relationship has not been established between the discharges from the Orion (Botnia) mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance (URES) programme.

(e) Air pollution

263. Argentina claims that the Orion (Botnia) mill has caused air, noise and visual pollution which negatively impact on “the aquatic environment” in violation of Article 41 of the 1975 Statute. Argentina also
argues that the 1975 Statute was concluded not only to protect the quality of the waters, but also, more generally, the "régime" of the river and "the areas affected by it, i.e., all the factors that affect, and are affected by the ecosystem of the river as a whole". Uruguay contends that the Court has no jurisdiction over those matters and that, in any event, the claims are not established on the merits.

264. With respect to noise and visual pollution, the Court has already concluded in paragraph 52 that it has no jurisdiction on such matters under the 1975 Statute. As regards air pollution, the Court is of the view that if emissions from the plant's stacks have deposited into the aquatic environment substances with harmful effects, such indirect pollution of the river would fall under the provisions of the 1975 Statute. Uruguay appears to agree with this conclusion. Nevertheless, in view of the findings of the Court with respect to water quality, it is the opinion of the Court that the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air.

(f) Conclusions on Article 41

265. It follows from the above that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.

(g) Continuing obligations: monitoring

266. The Court is of the opinion that both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment. Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU. The Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment.

* * *
and thereby assume the risk of having to dismantle the mills in the event of an adverse decision by the Court*, as the Court noted in its Order on Argentina's request for the indication of provisional measures in this case (Order of 13 July 2006, I.C.J. Reports 2006, p. 125, para. 47). Argentina adds that whether or not restitution is disproportionate must be determined at the latest as of the filing of the Application instituting proceedings, since as from that time Uruguay, knowing of Argentina's request to have the work halted and the status quo ante re-established, could not have been unaware of the risk it ran in proceeding with construction of the disputed mill. Lastly, Argentina considers Articles 42 and 43 of the 1975 Statute to be inapplicable in the present case, since they establish a régime of responsibility in the absence of any wrongful act.

271. Taking the view that the procedural obligations are distinct from the substantive obligations laid down in the 1975 Statute, and that account must be taken of the purport of the rule breached in determining the form to be taken by the obligation of reparation deriving from its violation, Uruguay maintains that restitution would not be an appropriate form of reparation if Uruguay is found responsible only for breaches of procedural obligations. Uruguay argues that the dismantling of the Orion (Botnia) mill would at any rate involve a "striking disproportion between the gravity of the consequences of the wrongful act of which it is accused and those of the remedy claimed", and that whether or not a disproportionate burden would result from restitution must be determined as of when the Court rules, not, as Argentina claims, as of the date it was seized. Uruguay adds that the 1975 Statute constitutes a lex specialis in relation to the law of international responsibility, as Articles 42 and 43 establish compensation, not restitution, as the appropriate form of reparation for pollution of the river in contravention of the 1975 Statute.

272. The Court, not having before it a claim for reparation based on a régime of responsibility in the absence of any wrongful act, deems it unnecessary to determine whether Articles 42 and 43 of the 1975 Statute establish such a régime. But it cannot be inferred from these Articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation for breaches of procedural obligations under the 1975 Statute.

273. The Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both (see Gabčíkovo-Nagymaros Project (Hungary/Slovakia), 1997).
278. The Court fails to see any special circumstances in the present case requiring the ordering of a measure such as that sought by Argentina. As the Court has recently observed:

"[W]hile the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which is for the Court to assess.

As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 63; Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 272, para. 60; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 477, para. 63; and Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 437, para. 101).

There is thus no reason, except in special circumstances . . . to order [the provision of assurances and guarantees of non-repetition]." (Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 267, para. 150.)

279. Uruguay, for its part, requests the Court to confirm its right "to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute". Argentina contends that this claim should be rejected, in particular because it is a counter-claim first put forward in Uruguay's Rejoinder and, as such, is inadmissible by virtue of Article 80 of the Rules of Court.

280. There is no need for the Court to decide the admissibility of this claim; it is sufficient to observe that Uruguay's claim is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected.

* * *

281. Lastly, the Court points out that the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose. This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill. In that regard the Court notes that the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU. By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment. They have also co-ordinated their actions through the joint mechanism of CARU, in conformity with the provisions of the 1975 Statute, and found appropriate solutions to their differences within its framework without feeling the need to resort to the judicial settlement of disputes provided for in Article 60 of the Statute until the present case was brought before the Court.

* * *

282. For these reasons,

THE COURT,

(1) By thirteen votes to one,

Finds that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;

IN FAVOUR: Vice-President Tomka, Acting President; Judges Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge ad hoc Vinuesa;

AGAINST: Judge ad hoc Torres Bernárdez;

(2) By eleven votes to three,

Finds that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;

IN FAVOUR: Vice-President Tomka, Acting President; Judges Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Judge ad hoc Torres Bernárdez;

AGAINST: Judges A1-Khasawneh, Simma; Judge ad hoc Vinuesa;

(3) Unanimously,

Rejects all other submissions by the Parties.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of April, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Argentine Republic and the Government of the Eastern Republic of Uruguay, respectively.

(Signed) Peter Tomka,
Vice-President.

(Signed) Philippe Couvreur,
Registrar.
Judges Al-Khasawneh and Simma append a joint dissenting opinion to the Judgment of the Court; Judge Keith appends a separate opinion to the Judgment of the Court; Judge Skotnikov appends a declaration to the Judgment of the Court; Judge Cançado Trindade appends a separate opinion to the Judgment of the Court; Judge Yusuf appends a declaration to the Judgment of the Court; Judge Greenwood appends a separate opinion to the Judgment of the Court; Judge ad hoc Torres Bernárdez appends a separate opinion to the Judgment of the Court; Judge ad hoc Vinuesa appends a dissenting opinion to the Judgment of the Court.

(Initialled) P.T.
(Initialled) Ph.C.
African Commission on Human and Peoples’ Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya
Decision of 4 February 2010
SUMMARY OF ALLEGED FACTS

1. The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. These areas were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. The Complainants claim that the Endorois believe that the spirits of all the Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the Lake. The Complainants further claim that the Endorois believe that the Monchongoi forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

2. The Complainants state that the Endorois are a community of approximately 60,000 people who, for centuries, have lived in the Lake Bogoria area. They claim prior to the dispossession of the Endorois created by the Government of Kenya in violation of the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area, the Narok, and Lakipla Kibwezi Administrative Districts, as well as in the Nakuru and Naivasha administrative districts within the Rift Valley Province, in violation of the rights enshrined in the Constitution of Kenya and international law, without proper prior consultations, adequate and effective compensation.

3. The Complainants state that the Endorois are a community of approximately 60,000 people who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of the Endorois through the creation of the Lake Bogoria Game Reserve in 1973, the Endorois had been living in the area for centuries and had been granted the right to continue to occupy and enjoy undisturbed use of the land under the British colonial administration, although the British claimed title to the land in the name of the British Crown.

4. The Complainants state that after several meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide $3,500 for the relocation of the 400 families. The Complainants allege that none of these terms have been implemented and that only 50 out of the 400 families were eventually given some money in 1986.

5. The Complainants state that at independence in 1963, the British Crown's claim to Endorois land was passed on to the respective County Councils. However, under Section 115 of the Kenyan Constitution, the County Councils held this land in trust, on behalf of the Endorois community, who continued to hold, use and enjoy it. The Endorois' customary rights over the land were not challenged until the 1973 gazetting of the land by the Government of Kenya. The Complainants state that the area was central to the present Communication, dispossession of the land is central to the present Communication.

6. The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. These areas were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. The Complainants claim that the Endorois believe that the spirits of all the Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the Lake. The Complainants further claim that the Endorois believe that the Monchongoi forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

7. The Complainants state that despite the lack of understanding of the Endorois community regarding what had been decided by the Government, the KWS informed certain Endorois elders that the KWS would provide 3,500 Kenya Shillings per family. The Complainants allege that none of these terms have been implemented and that only 50 out of the 400 families were eventually given some money in 1986.

8. The Complainants state that after several meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide $3,500 for the relocation of the 400 families. The Complainants allege that none of these terms have been implemented and that only 50 out of the 400 families were eventually given some money in 1986.

9. The Complainants state that after several meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide $3,500 for the relocation of the 400 families. The Complainants allege that none of these terms have been implemented and that only 50 out of the 400 families were eventually given some money in 1986.
9. The Complainants state that to reclaim their ancestral land and to safeguard their pastoralist way of life, the Endorois petitioned to meet with President Daniel Arap Moi, who was their local Member of Parliament. A meeting was held on 28 December 1994 at his Lake Bogoria Hotel.

10. The Complainants state that as a result of this meeting, the President directed the local authority to respect the 1973 agreement on compensation and directed that 25% of annual income towards community projects be given to the Endorois. In November of the following year, upon being notified by the Endorois community that nothing had been implemented, the Complainants state that President Moi again ordered that his directives be followed.

11. The Complainants state that following the non-implementation of the directives of President Moi, the Endorois began legal action against Baringo and Koibatek County Councils. Judgment was given on 19 April 2002 dismissing the application. Although the High Court recognised that Lake Bogoria had been Trust Land for the Endorois, it stated that the Endorois had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and in 1974. It concluded that the money given in 1986 to 170 families for the cost of relocating represented the fulfilment of any duty owed by the authorities towards the Endorois for the loss of their ancestral land.

12. The Complainants state that the High Court also stated clearly that it could not address the issue of a community’s collective right to property, referring throughout to “individuals” affected and stating that “there is no proper identity of the people who were affected by the setting aside of the land … that has been shown to the Court”. The Complainants also claim that the High Court stated that it did not believe Kenyan law should address any special protection to a people’s land based on historical occupation and cultural rights.

13. The Complainants allege that since the Kenyan High Court case in 2000, the Endorois community has become aware that parts of their ancestral land have been demarcated and sold by the Respondent State to third parties.

14. The Complainants further allege that concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery. The Complainants claim that these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use by their livestock. Both mining operations and the demarcation and sale of land have continued despite the request by the African Commission to the President of Kenya to suspend these activities pending the outcome of the present Communication.

15. The Complainants state that following the commencement of legal action on behalf of the community, some improvements were made to the community members’ access to the Lake. For example, they are no longer required to pay Game Reserve entrance fees. The Complainants, nevertheless, allege that this access is subject to the Game Reserve authority’s discretion. They claim that the Endorois still have limited access to Lake Bogoria for grazing their cattle, for religious purposes, and for collecting traditional herbs. They also state that the lack of legal certainty surrounding access rights and rights of usage renders the Endorois completely dependent on the Game Reserve authority’s discretion to grant these rights on an ad hoc basis.

16. The Complainants claim that land for the Endorois is held in very high esteem, since tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life. Land, they claim, belongs to the community and not the individual and is essential to the preservation and survival as a traditional people. The Complainants claim that the Endorois’ health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria.

17. The Complainants claim that at present the Endorois live in a number of locations on the periphery of the Reserve – that the Endorois are not only being forced from fertile lands to semi-arid areas, but have also been divided as a community and displaced from their traditional and ancestral lands. The Complainants claim that for the Endorois, access to the Lake Bogoria region, is a right for the community and the Government of Kenya continues to deny the community effective participation in decisions affecting their own land, in violation of their right to development.

18. The Complainants further allege that the right to legal representation for the Endorois is limited, in that Juma Kipkema, the lawyer and human rights defender who was representing the 20,000 Endorois nomadic pastoralists, was arrested in August 1996 and accused of “belonging to an unlawful society”. They claim that he has also received death threats.

19. The Complainants allege that the Government’s decision to gazette Endorois traditional land as a Game Reserve, which in turn denies the Endorois access to the

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3 Depending on the context, Kenyan Authorities and Respondent State are used in this text interchangeably to mean the Government of Kenya.
area, has jeopardized the community’s pastoral enterprise and imperilled its cultural integrity. The Complainants also claim that 30 years after the evictions began, the Endorois still do not have full and fair compensation for the loss of their land and their rights on to it. They further allege that the process of evicting them from their traditional land not only violates Endorois community property rights, but spiritual, cultural and economic ties to the land are severed.

20. The Complainants allege that the Endorois have no say in the management of their ancestral land. The Endorois Welfare Committee, which is the representative body of the Endorois community, has been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. This failure to register the Endorois Welfare Committee, according to the Complainants, has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent ‘on behalf’ of the community. The Complainants further submit that the denial of domestic legal title to their traditional land, the removal of the community from their ancestral home and the severe restrictions placed on access to the Lake Bogoria region today, together with a lack of adequate compensation, amount to a serious violation of the African Charter. The Complainants state that the Endorois community claims these violations both for themselves as a people and on behalf of all the individuals affected.

21. The Complainants allege that in the creation of the Game Reserve, the Respondent State disregarded national law, Kenyan Constitutional provisions and, most importantly, numerous articles of the African Charter, including the right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life and the right to development.

**ARTICLES ALLEGED TO HAVE BEEN VIOLATED**

22. The Complainants seek a declaration that the Republic of Kenya is in violation of Articles 8, 14, 17, 21 and 22 of the African Charter. The Complainants are also seeking:

- **Restitution** of their land, with legal title and clear demarcation.
- **Compensation** to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture.

**PROCEDURE**

23. On 22 May 2003, the Centre for Minority Rights and Development (CEMIRIDE) forwarded to the Secretariat of the African Commission on Human and Peoples’ Rights (the Secretariat) a formal letter of intent regarding the forthcoming submission of a Communication on behalf of the Endorois community.

24. On 9 June 2003, the Secretariat wrote a letter to the Centre for Minority Rights and Development, acknowledging receipt of the same.

25. On 23 June 2003, the Secretariat wrote a letter to Cynthia Morel of Minority Rights Group International, who is assisting the Centre for Minority Rights Development, acknowledging her Communication and informed her that the complaint would be presented to the upcoming 34th Ordinary Session of the African Commission.

26. A copy of the Complaint, dated 28 August 2003, was sent to the Secretariat on 29 August 2003.

27. At its 34th Ordinary Session held in Banjul, The Gambia, from 6 to 20 November 2003, the African Commission examined the Complaint and decided to be seized thereof.

28. On 10 December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward their written submissions on Admissibility before the 35th Ordinary Session.

29. As the Complainants had already sent their submissions, when the Communication was being sent to the Secretariat, the Secretariat wrote a reminder to the Respondent State to forward its written submissions on Admissibility.

30. By a letter of 14 April 2004, the Complainants requested the African Commission on Human and Peoples’ Rights (the African Commission) to be allowed to present their oral submissions on the matter at the Session.

31. On 29 April 2004, the Secretariat sent a reminder to the Respondent State to forward its written submissions on Admissibility of the Communication.

32. At its 35th Ordinary Session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission examined the Complaint and decided to defer its decision on Admissibility to the next Session. The African Commission also decided to issue an Urgent Appeal to the Government of the Republic of Kenya, requesting it to stay any action or measure by the State in respect of the subject matter of this Communication, pending the decision of the African Commission, which was forwarded on 9 August 2004.

33. At the same Session, a copy of the Complaint was handed over to the delegation of the Respondent State.

34. On 17 June 2004, the Secretariat wrote to both parties informing them of this decision and requesting the Respondent State to forward its submissions on Admissibility before the 36th Ordinary Session.
35. A copy of the same Communication was forwarded to the Respondent State’s High Commission in Addis Ababa, Ethiopia on 22 June 2004.

36. On 24 June 2004, the Kenyan High Commission in Addis Ababa, Ethiopia, informed the Secretariat that it had conveyed the African Commission’s Communication to the Ministry of Foreign Affairs of Kenya.

37. The Secretariat sent a similar reminder to the Respondent State on 7 September 2004, requesting it to forward its written submissions on the Admissibility of the Communication before the 36th Ordinary Session.

38. During the 36th Ordinary Session held in Dakar, Senegal, from 23 November to 7 December 2004, the Secretariat received a hand-written request from the Respondent State for a postponement of the matter to the next Session. At the same Session, the African Commission deferred the case to the next session to allow the Respondent State more time to forward its submissions on Admissibility.

39. On 23 December 2004, the Secretariat wrote to the Respondent State informing it of this decision and requesting it to forward its submissions on Admissibility as soon as possible.

40. Similar reminders were sent out to the Respondent State on 2 February and 4 April 2005.

41. At its 37th Ordinary Session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission considered this Communication and declared it Admissible after the Respondent State had failed to cooperate with the African Commission on the Admissibility procedure despite numerous letters and reminders of its obligations under the Charter.

42. On 7 May 2005, the Secretariat wrote to the parties to inform them of this decision and requested them to forward their arguments on the Merits.

43. On 21 May 2005, the Chairperson of the African Commission addressed an urgent appeal to the President of the Republic of Kenya on reports received alleging the harassment of the Chairperson of the Endorois Assistance Council who is involved in this Communication.

44. On 11 and 19 July 2005, the Secretariat received the Complainants’ submissions on the Merits, which were forwarded to the Respondent State.

45. On 12 September 2005, the Secretariat wrote a reminder to the Respondent State.

46. On 10 November 2005, the Secretariat received an amicus-curiae brief on the case from COHRE.

47. At its 38th Ordinary Session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the Communication and deferred its decision on the Merits to the 39th Ordinary Session.

48. On 30 January 2006, the Secretariat informed the Complainants of this decision.

49. By a Note Verbale of 5 February 2006, which was delivered by hand to the Ministry of Foreign Affairs of the Republic of Kenya through a member of staff of the Secretariat who travelled to the country in March 2006, the Secretariat informed the Respondent State of this decision by the African Commission. Copies of all the submissions by the Complainants since the opening of this file were enclosed thereto.

50. By an email of 4 May 2006, the Senior Principal State Counsel in the Office of the Attorney General of the Respondent State requested the African Commission to defer the consideration of this Communication on the basis that the Respondent State was still preparing a response to the matter which it claimed to be quite protracted and involved many departments.

51. By a Note Verbale of 4 May 2006, which was received by the Secretariat on the same day, the Solicitor General of the Respondent State formally requested the African Commission to defer its consideration of the same to its 40th Ordinary Session noting mainly that due to the wide range of issues contained in the Communication, its response would not be ready for submission before the 39th Ordinary Session.

52. At its 39th Ordinary Session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission deferred its consideration of the same to its 40th Ordinary Session to await the outcome of amicable settlement negotiations underway between the Complainants and the Respondent State.

53. The Secretariat of the African Commission notified the parties of this decision accordingly.

54. On 31 October 2006, the Secretariat of the African Commission received a letter from the Complainants reporting that the parties had had constructive exchanges on the matter and that the matter should be heard on the Merits in November 2006 by the African Commission. The Complainants also applied for leave to have an expert witness heard during the 40th Ordinary Session.

55. At the 40th Ordinary Session, the African Commission deferred its decision on the Merits of the Communication after having heard the expert witness called in by the Complainant. The Respondent State also made presentations. Further documents were submitted at the session and, later on, during the intersession;
more documentation was received from both parties before the 41st Ordinary Session.

56. During the 41st Ordinary Session, the Complainants submitted their final comments on the last submission by the Respondent State.

DECISION ON ADMISSIBILITY
57. The Respondent State has been given ample opportunity to forward its submissions on Admissibility on the matter. Its delegates at the previous two Ordinary Sessions of the African Commission were supplied with hard copies of the Complaint. There was no response from the Respondent State. The African Commission has no option but to proceed with considering the Admissibility of the Communication based on the information at its disposal.

58. The Admissibility of Communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a complainant for a Communication to be Admissible.

59. In the present Communication, the Complaint indicates its authors (Article 56(1)), is compatible with the Organisation of African Unity / African Union Charters and that of the African Charter on Human and Peoples' Rights (Article 56(2)), and it is not written in disparaging language (Article 56(3)). Due to lack of information that the Respondent State should have supplied, if any, the African Commission is not in a position to question whether the Complaint is exclusively based on news disseminated through the mass media (Article 56(4)), has exhausted local remedies (Article 56(5)), and has been settled elsewhere per Article 56(7) of the African Charter. With respect to the requirement of exhaustion of local remedies, in particular, the Complainants approached the High Court in Nakuru, Kenya, in November 1998. The matter was struck out on procedural grounds. A similar claim was made before the same Court in 2000 as a constitutional reference case, in which order was sought as in the previous case. The matter was, however, dismissed on the grounds that it lacked merits and held that the Complainants had been properly consulted and compensated for their loss. The Complainants thus claim that as constitutional reference cases could not be appealed, all possible domestic remedies have been exhausted.

60. The African Commission notes that there was a lack of cooperation from the Respondent State to submit arguments on the Admissibility of the Communication despite numerous reminders. In the absence of such a submission, given the face value of the Complainants' submission, the African Commission holds that the Complaint complies with Article 56 of the African Charter and hence declares the Communication Admissible.

61. In its submission on the Merits, the Respondent State requested the African Commission to review its decision on Admissibility. It argued that even though the African Commission had gone ahead to Admit the Communication, it would nevertheless, proceed to submit arguments why the African Commission should not be precluded from re-examining the Admissibility of the Communication, after the oral testimony of the Respondent State, and dismissing the Communication.

62. In arguing that the African Commission should not be a tribunal of first instance, the Respondent State argues that the remedies sought by the Complainants in the High Court of Kenya could not be the same as those sought from the African Commission.

63. For the benefit of the African Commission, the Respondent State outlined the issues put before the Court in Misc, Civil Case No: 183 of 2002:

(a) A Declaration that the land around Lake Baringo is the property of the Endorois community, held in trust for its benefit by the County Council of Baringo and the County Council of Koibatek, under Sections 114 and 115 of the Constitution of Kenya.

(b) A Declaration that the County Council of Baringo and the County Council of Koibatek are in breach of fiduciary duty of trust to the Endorois community, because of their failure to utilise benefits accruing from the Game Reserve to the benefit of the community contrary to Sections 114 and 115 of the Constitution of Kenya.

(c) A Declaration that the Complainants and the Endorois community are entitled to all the benefits generated through the Game Reserve exclusively and / or in the alternative the land under the Game Reserve should revert to the community under the management of Trustees appointed by the community to receive and invest the benefits in the interest of the community under Section 117 of the Constitution of Kenya.

(d) An award of exemplary damages arising from the breach of the Applicants' Constitutional rights under Section 115 of the Constitution of Kenya.

64. The Respondent State informs the African Commission that the Court held that procedures governing the setting apart of the Game Reserve were followed. The Respondent State further states that it went further to advise the Complainants that they should have exercised their right of appeal under Sections 10, 11 and 12 of the Trust Land Act, Chapter 288, Laws of Kenya, in the event that they felt that the award of compensation was not fairly handled. None of the Applicants had appealed, and the High Court was of the view that it was too late to complain.
The Respondent State also states that the Court opined that the application did not fall under Section 84 (Enforcement of Constitutional Rights) since the application did not plead any violations or likelihood of violations of their rights under Sections 70 – 83 of the Constitution.

It further argues that the Communication irregularly came before the African Commission as the Applicants did not exhaust local remedies regarding the alleged violations. This is because:

(a) The Complainants did not plead that their rights had been contravened or likely to be contravened by the High Court Misc. Civil Case 183 of 2002. It states that the issue of alleged violations of any of the rights claimed under the present Communication has, therefore, not been addressed by the local courts. This means that the African Commission will be acting as a court of first instance. The Respondent State argues that the Applicants should, therefore, be asked to exhaust local remedies before approaching the African Commission.

(b) The Complainants did not pursue other administrative remedies available to them. The Respondent State argues that the allegations that the Kenyan legal system has no adequate remedies to address the case of the Endorois are untrue and unsubstantiated. It argues that in matters of human rights the Kenya High Court has been willing to apply international human rights instruments to protect the rights of the individual.

The Respondent State further says that the Kenyan legal system has a very comprehensive description of property rights, and provides for the protection of all forms of property in the Constitution. It argues that while various international human rights instruments, including the African Charter, recognise the right to property, these instruments have a minimalist approach and do not satisfy the kind of property protected. The Respondent State asserts that the Kenyan legal system goes further than provided for in international human rights instruments.

The Respondent State further states that land as property is recognised under the Kenyan legal system and various methods of ownership are recognised and protected. These include private ownership (for natural and artificial persons), communal ownership either through the Land (Group Representatives) Act for adjudicated land, which is also called the Group Ranches or the Trust Lands managed by the County Council, within whose area of jurisdiction it is situated for the benefit of the persons ordinarily resident on that land. The State avers that the Land Group Act gives effect to such right of ownership, interests or other benefits of the land as may be available, under African customary law.

The Respondent State concludes that Trust Lands are established under the Constitution of Kenya and administered under an Act of Parliament and that the Constitution provides that Trust Land may be alienated through:

- Registration to another person other than the County Council;
- An Act of Parliament providing for the County Council to set apart an area of Trust Land.

Rule 118(2) of the African Commission's Rules of Procedure states that:

If the Commission has declared a Communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.

The African Commission notes the arguments advanced by the Respondent State to reopen its decision on admissibility. However, after careful consideration of the Respondent State’s arguments, the African Commission is not convinced that it should reopen arguments on the Admissibility of the Communication. It therefore declines the Respondent State’s request.

SUBMISSIONS ON MERITS

Complainants’ Submission on the Merits

The arguments below are the submissions of the Complainants, taking also into consideration their oral testimony at the 40th Ordinary Session, all their written submissions, including letters and supporting affidavits.

The Complainants argue that the Endorois have always been the bona fide owners of the land around Lake Bogoria. They argue that the Endorois' concept of land did not conceive the loss of land without conquest. They argue that as a pastoralist community, the Endorois' concept of "ownership" of their land has not been one of ownership by paper. They argue that as a pastoralist community, the Endorois' concept of "ownership" of their land has not been one of ownership by paper. The Complainants state that the Endorois community have always understood the land in question to be "Endorois" land, belonging to the community as a whole and used by it for habitation, cattle, beekeeping, and religious and cultural practices. Other communities would, for instance, ask permission to bring their animals to the area.

Op cit, paras 3, 4 and 5 of this Communication, where the Complainants advance arguments to prove ownership of their land.

Op cit, paras 3, 4 and 5.
73. They also argue that the Endorois have always considered themselves to be a distinct community. They argue that historically the Endorois are a pastoral community, almost solely dependent on livestock. Their practice of pastoralism has consisted of grazing their animals (cattle, goats, sheep) in the lowlands around Lake Bogoria in the rainy season, and turning to the Monchongoi Forest during the dry season. They claim that the Endorois have traditionally relied on beekeeping for honey and that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. They argue that Lake Bogoria is also the centre of the community’s religious and traditional practices: around the Lake are found the community’s historical prayer sites, the places for circumcision rituals, and other cultural ceremonies. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region.

74. The Complainants argue that the Endorois believe that spirits of all former Endorois, no matter where they are buried, live on in the Lake. Annual festivals at the Lake took place with the participation of Endorois from the whole region. They say that Monchongoi forest is considered the birthplace of the Endorois people and the settlement of the first Endorois community. They also state that the Endorois community’s leadership is traditionally based on elders. Though under the British colonial administration, chiefs were appointed, this did not continue after Kenyan independence. They state that more recently, the community formed the Endorois Welfare Committee (EWC) to represent its interests. However, the local authorities have refused to register the EWC despite two separate efforts to do so since its creation in 1996.

75. The Complainants argue that the Endorois are a ‘people’, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Complainants argue that the African Commission has affirmed the rights of ‘peoples’ to bring claims under the African Charter in the case of ‘The Social and Economic Rights Action Centre for Economic and Social Rights v. Nigeria’, (the Ogoni Case) stating: “The African Charter in Articles 20 through 24 clearly provides for peoples’ to retain rights as peoples’, that is, as collectives. The importance of community and collective identity in African culture is recognised throughout the African Charter.” They further argue that the African Commission noted that when there is a large number of individual victims, it may be impractical for each individual Complainant to go before domestic courts. In such situations, as was with the Ogoni case, the African Commission can adjudicate the rights of a people as a collective. They therefore argue that the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

76. The Complainants allege violation to practice their religion. They claim that the Kenyan Authorities’ continual refusal to give the community a right of access to religious sites to worship freely amounts to a violation of Article 8.

77. The Complainants argue that the African Commission has embraced the broad discretion required by international law in defining and protecting religion. In the case of Free Legal Assistance Group and Others v. Zaire, they argue that the African Commission held that the practices of the Jehovah’s Witnesses were protected under Article 8. In the present Communication, the Complainants argue that the Endorois’ religion and beliefs are protected by Article 8 of the African Charter and constitute a religion under international law. The Endorois believe that the Great Ancestor, Doros, came from the Heavens and settled in the Monchongoi Forest. After a period of excess and luxury, the Endorois believe that God became angry and, as punishment, sank the ground one night, forming Lake Bogoria. The Endorois believe themselves to be descendants of the families who survived that event.

78. They state that each season the water of the Lake turns red and the hot springs emit a strong odour. At this time, the community performs traditional ceremonies around the Lake, where the Endorois pray, and as stated above, they claim that Lake Bogoria is considered the centre of the community’s religious and traditional practices.

79. The Complainants argue that the Endorois, as an indigenous group whose religion is intimately tied to the land, require special protection. Lake Bogoria, they argue, is of fundamental religious significance to all Endorois. The religious sites of the Endorois people are situated around the Lake, where the Endorois pray, and religious ceremonies are regularly connected with the Lake. Ancestors are buried near the Lake, and as stated above, they claim that Lake Bogoria is considered the...
spiritual home of all Endorois, living and dead. The Lake, the Complainants argue, is therefore essential to the religious practices and beliefs of the Endorois.

80. The Complainants argue that by evicting the Endorois from their land, and by refusing the Endorois community access to the Lake and other surrounding religious sites, the Kenyan Authorities have interfered with the Endorois’ ability to practice and worship as their faith dictates. In violation of Article 8 of the African Charter, the Complainants argue that religious sites within the Game Reserve have not been properly demarcated and protected. They further argue that since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. Access as of right for religious rituals – such as circumcisions, marital rituals, and initiation rights - has been denied the community. Similarly, the Endorois have not been able to hold or participate in their most significant annual religious ritual, which occurs when the Lake undergoes seasonal changes.

81. Citing the African Commission’s jurisprudence in *Amnesty International v. Sudan*, the Complainants argue that the African Commission recognised the centrality of practice to religious freedom, noting that the State Party violated the authors’ right to practice religion because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion. In addition, they argue, the UN Declaration on the Rights of Indigenous Peoples gives indigenous peoples the right “to maintain, protect and have access in privacy to their religious and cultural sites...” They state that only through unfettered access will the Endorois be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs.

82. Citing the case of *Loren Laraye Riebe Star,* the Complainants argue that the Inter-American Commission on Human Rights (IACmHR) has determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. In the above case, the Complainants argue that the IACmHR held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes. They further state that the IACmHR came to a similar conclusion in *Diana Ortiz v. Guatemala.* This was a case concerning a Catholic nun who fled Guatemala after state actions prevented her from freely exercising her religion. Here, the IACmHR decided that her right to freely practice her religion had been violated, because she was denied access to the lands most significant to her.

83. The Complainants argue that the current management of the Game Reserve has failed both to fully demarcate the sacred sites within the Reserve and to maintain sites that are known to be sacred to the Endorois. They argue that the Kenyan Authorities’ failure to demarcate and protect religious sites within the Game Reserve constitutes a severe and permanent interference with the Endorois’ right to practice their religion. Without proper care, sites that are of immense religious and cultural significance have been damaged, degraded, or destroyed. They cite “The UN Declaration on the Rights of Indigenous Peoples” which state in part that: “States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.”

84. The Complainants also accuse the Kenyan Authorities of interfering with the Endorois’ right to freely practice their religion by evicting them from their land, and then refusing to grant them free access to their sacred sites. This separation from their land, they argue, prevents the Endorois from carrying out sacred practices central to their religion.

85. They argue that even though Article 8 provides that states may interfere with religious practices “subject to law and order”, the Endorois religious practices are not a threat to law and order, and thus there is no justification for the interference. They argue that the limitations placed on the state’s duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. In *Amnesty International v. Zambia*, the Complainants argue that the African Commission noted that it was “of the view that the ‘claw-back’ clauses must not be interpreted against the principles of the Charter... Recourse

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13 Ibid.


to these should not be used as a means of giving credence to violations of the express provisions of the Charter."\(^{16}\)

**Alleged Violation of Article 14 – The Right to Property**

Article 14 of the African Charter states:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

86. The Complainants argue that the Endorois community has a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. They argue that these property rights are derived both from Kenyan law and the African Charter, which recognise indigenous peoples’ property rights over their ancestral land. The Complainants argue that the Endorois’ property rights have been violated by the continuing dispossession of the Lake Bogoria land area. They argue that the impact on the community has been disproportionate to any public need or general community interest.

87. Presenting arguments that Article 14 of the Charter has been violated, the Complainants argue that for centuries the Endorois have constructed homes, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods around the Lake. They argue that in doing so, the Endorois exercised an indigenous form of tenure, holding the land through a collective form of ownership. Such behaviour indicated traditional African land ownership, which was rarely written down as a codification of rights or title, but was, nevertheless, understood through mutual recognition and respect between landholders. ‘Land transactions’ would take place only by way of conquest of land.

88. The Complainants argue that even under colonial rule when the British Crown claimed formal possession of Endorois land, the colonial authorities recognised the Endorois’ right to occupy and use the land and its resources. They argue that in law, the land was recognised as the “Endorois Location” and in practice the Endorois were left largely undisturbed during colonial rule. They aver that the Endorois community continued to hold such traditional rights, interests and benefits in the land surrounding Lake Bogoria even upon the creation of the independent Republic of Kenya in 1963. They state that on 1 May 1963, the Endorois land became ‘Trust Land’ under Section 115(2) of the Kenyan Constitution, which states:

> Each County Council shall hold the Trust Land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.

89. They argue that through centuries of living and working on the land, the Endorois were “ordinarily resident on [the land]”, and their traditional form of collective ownership of the land qualifies as a “right, interest or other benefit... under African customary law” vested in “any tribe, group [or] family” for the purposes of Section 115(2). They, therefore, argue that as a result, under Kenyan law, the Baringo and Koibatek County Councils were – and indeed still are – obliged to give effect to the rights and interests of the Endorois as concerns the land.

**Property Rights and Indigenous Communities**

90. The Complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems, which include the lack of “formal” title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. They state that this situation has led to many cases of displacement from a people’s historic territory, both by the colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities.

91. In pursuing that line of reasoning, the Complainants argue that the African Commission itself has recognised the problems faced by traditional communities in the case of dispossession of their land in a Report of the Working Group on Indigenous Populations/Communities, where it states:

> [...] their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land. Collective tenure is fundamental to most indigenous pastoralist and hunter-gatherer communities and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure.\(^{17}\)


They argue that the jurisprudence of the African Commission notes that Article 14 includes the right to property both individually and collectively.

Quoting the case of *The Mayagna (Sumo) Awas Tingni v Nicaragua,* they argue that indigenous property rights have been legally recognised as being communal property rights, where the Inter-American Court of Human Rights (IACtHR) recognised that the Inter-American Convention protected property rights "in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property."

The Complainants further argue that the courts have addressed violations of indigenous property rights stemming from colonial seizure of land, such as when modern states rely on domestic legal title inherited from colonial authorities. They state that national courts have recognised that right. Such decisions were made by the United Kingdom Privy Council as far back as 1921, the Canadian Supreme Court and the High Court of Australia. Quoting the *Richtersveld* case, they argue that the South African Constitutional Court held that the rights of a particular community survived the annexation of the land by the British Crown and could be held against the current occupiers of their land.

They argue that the protection accorded by Article 14 of the African Charter includes indigenous property rights, particularly to their ancestral lands. The Endorois' right, they argue, to the historic lands around Lake Bogoria are therefore protected by Article 14. They aver that property rights protected go beyond those envisaged under Kenyan law and include a collective right to property.

They argue that as a result of the actions of the Kenyan Authorities, the Endorois' property has been encroached upon, in particular by the expropriation, and in turn, the effective denial of ownership of their land. They also state that the Kenyan justice system has not provided any protection of the Endorois' property rights. Referring to the High Court of Kenya, they argue that it stated that it could not address the issue of a community's right to property.

The Complainants argue that the judgment of the Kenyan High Court also stated in effect that the Endorois had lost any rights under the trust, without the need for compensation beyond the minimal amounts actually granted as costs of resettlement for 170 families. They argue that the judgment also denies that the Endorois have rights under the trust, despite being "ordinarily resident" on the land. The Court, they claimed, stated:

*What is in issue is a national natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.*

They argue that in doing so, the High Court dismissed those arguments based not just on the trust, but also on the Endorois' rights to the land as a 'people' and as a result of their historic occupation of Lake Bogoria.

The Complainants cite a number of encroachments, they claim, that go to the core of the community's identity as a 'people', including:

(a) the failure to provide adequate recognition and protection in domestic law of the community's rights over the land, in particular the failure of Kenyan law to acknowledge collective ownership of land;

(b) the declaration of the Game Reserve in 1973/74, which purported to remove the community's remaining property rights over the land, including its rights as beneficiary of a trust under Kenyan law;

(c) the lack of and full compensation to the Endorois community for the loss of their ability to use and benefit from their property in the years after 1974;

(d) the eviction of the Endorois from their land, both in the physical removal of Endorois families living on the land and the denial of the land to the rest of the Endorois community, and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives;

(e) the significant loss by the Endorois of cattle as a result of the eviction;

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18 *The Awas Tingni Case* (2001), para 140(b) and 151.
19 Ibid at para. 148.
24 Op cit., para 12.
(f) the denial of benefit, use of and interests in their traditional land since eviction, including the denial of any financial benefit from the lands resources, such as that generated by tourism;

(g) the awarding of land to title to private individuals and the awarding of mining concessions on the disputed land.

100. The Complainants argue that an encroachment upon property will constitute a violation of Article 14, unless it is shown that it is in the general or public interest of the community and in accordance with the provisions of appropriate laws. They further argue that the test laid out in Article 14 of the Charter is conjunctive, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community and was carried out in accordance with appropriate laws and must be proportional. Quoting the Commission’s own case law, the Complainants argue that: “The justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.” They argue that both the European Court of Human Rights and the IACHR have held that limitations on rights must be “proportionate and reasonable.”

101. They argue that in the present Communication, in the name of creating a Game Reserve, the Kenyan Authorities have removed the Endorois from their land, and destroyed their possessions, including houses, religious constructions, and beehives. They argue that the upheaval and displacement of an entire community and denial of their property rights over their ancestral lands are disproportionate to any public need served by the Game Reserve. They state that even assuming that the creation of the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need.

102. They further argue that the encroachment on to Endorois property rights must be carried out in accordance with “appropriate laws” in order to avoid a violation of Article 14, and that this provision must, at the minimum mean that both Kenyan law and the relevant provisions of international law were respected. They argue that the violation of the Endorois’ rights failed to respect Kenyan law on at least three levels: (i) there was no power to expel them from the land; (ii) the trust in their favour was never legally extinguished, but simply ignored; and (iii) adequate compensation was never paid.

103. The Complainants state that the traditional land of the Endorois is classified as Trust Land under Section 115 of the Constitution, and that this obliges the County Council to give effect to “such rights, interests or other benefits in respect of the land as may under the African customary law, for the time being in force.” They argue that it created a beneficial right for the Endorois over their ancestral land.

104. They further argue that the Kenyan Authorities created the Lake Hannington Game Reserve, including the Endorois indigenous land, on 9 November 1973, but changed the name to Lake Bogoria Game Reserve in a Second Notice in 1974. The 1974 ‘Notice’ was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA). WAPA, the Complainants inform the African Commission, applied to Trust Land as it did to any other land, and did not require that the land be taken out of the Trust before a Game Reserve could be declared over that land. They argue that the relevant legislation did not give authority for the removal of any individual or group occupying the land in a Game Reserve. Instead, WAPA merely prohibited the hunting, killing or capturing of animals within the Game Reserve. Yet, the Complainants argue, despite a lack of legal justification, the Endorois Community were informed from 1973 onwards that they would have to leave their ancestral lands.

105. Moreover, they argue, the declaration of the Lake Bogoria Game Reserve by way of the 1974 notice did not affect the status of the Endorois’ land as Trust Land. The obligation of Baringo and Koibatek County Councils to give effect to the rights and interests of the Endorois community continued. They state that the only way under Kenyan law in which the Endorois benefits under the Trust could have been dissolved is through the County Council or the President of Kenya having to “set apart” the land. However, the Trust Land Act required that to be legal, such setting apart of the land must be published in the Kenyan Gazette.

26 Handyside v. United Kingdom, No. 5493/72 (1976) Series A.24 (7 December), para. 49.
28 They state that pursuant to Kenyan law, the authorities published Notice 239/1973 in the Kenya Reserve to declare the creation of “Lake Hannington Game Reserve.” Gazette Notice 270/1974 was published to revoke the earlier notice and changed the name of the Game Reserve on 12 October 1974: “the area set forth in the schedule hereto to be a Game Reserve known as Lake Bogoria Game Reserve.”
29 The Complainants state that Section 3(2) of WAPA was subsequently revoked on 13 February 1976 by S.68 of the Wildlife Conservation and Management Act.
30 The Complainants argue that Section 3(20) of WAPA did not allow the Kenyan Minister for Tourism and Wildlife to remove the present occupants.
31 The Complainants argue that the process of such a ‘setting apart’ of Trust Land under S. 117 or S.118 of the Constitution are laid down by the Kenyan Trust Land Act.
106. The Complainants argue that as far as the Community is aware, no such notice was published. Until this is done, they argue, Trust Land encompassing Lake Bogoria cannot have been set apart and the African customary law rights of the Endorois people continue under Kenyan law. They state that the Kenyan High Court failed to protect the Endorois' rights under the Trust to a beneficial property right, and the instruction given to the Endorois to leave their ancestral lands was also not authorised by Kenyan law.

107. They conclude that as a result, the Kenyan Authorities have acted in breach of trust and not in ‘accordance with the provisions of the law’ for the purposes of Article 14 of the Charter.

108. They further argue that even if Endorois land had been set apart, Kenyan law still requires the compensation of residents of lands that are set apart; that the Kenyan Constitution states that where Trust Land is set apart, the Government must ensure:

- [T]he prompt payment of full compensation to any resident of the land set apart who – (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land.

109. Citing Kenyan law, the Complainants argue that the Kenyan Land Acquisition Act outlines factors that should be considered in determining the compensation to be paid, starting with the basic principle that compensation should be based on the market value of the land at the time of the acquisition. Other considerations include: damages to the interested person caused by the removal from the land and other damages including lost earnings, relocation expenses and any diminution of profits of the land. The Land Acquisition Act provides for an additional 15% of the market value to be added to compensate for disturbances. Under Kenyan law if a court finds the amount of compensation to be insufficient, 6% interest per year must be paid on the difference owed to the interested parties.

110. They state that only 170 families of at least 400 families forced to leave Endorois traditional land by the Kenyan Authorities have received some form of monetary assistance. In 1986, 170 families evicted in late 1973 from their homes within the Lake Bogoria Game Reserve, each received around 3,150 Kshs. At the time, this was equivalent to approximately £30.

111. They state that further amounts in compensation for the value of the land lost, together with revenue and employment opportunities from the Game Reserve, were promised by the Kenyan Authorities, but these have never been received by the community.

112. They argue that the Respondent State has itself recognised that the payment of 3,150 Kshs per family amounted only to ‘relocation assistance’, and did not constitute full compensation for loss of land. The Complainants argue that international law also lays down strict requirements for compensation in the case of expropriation of property. They argue that the fact that such payment was made some 13 years after the first eviction, and that it does not represent the market value of the land gazetted as Lake Bogoria Game Reserve, means that the Respondent State would not have paid “prompt, full compensation” as required by the Constitution on the setting apart of the Trust Land. Therefore Kenyan law has not been complied with. Moreover, the Complainants argue, the fact that members of the Endorois community accepted the very limited monetary compensation does not mean that they accepted this as full compensation, or indeed that they accepted the loss of their land. They state that even if the Respondent State had formally set apart the Trust Land by way of Gazette Notice, the test of “in accordance with the provisions of law” required by Article 14 of the Charter would not have been satisfied, due to the payment of inadequate compensation.

113. The Complainants argue that the requirement that any encroachment on property rights be in accordance with the “appropriate laws” must also include

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32 They also argue that recently the area has been referred to as Lake Bogoria National Reserve. Even if there has been a legal change in title, this still would not mean that the Endorois’ trust has been ended under Kenyan law without the “setting aside”.

33 Constitution of the State of Kenya, Section 117(4).

34 Land Acquisition Act, “Principles on which Compensation is to be determined”.

35 See Kenya Land Acquisition Act, Part IV, para 29(3).

36 The Complainants argue that in the European Court of Human Rights, for instance, compensation must be fair compensation, and the amount and timing of payment is material to whether a violation of the right to property is found. They cite the case of Kafkoulidis and Others v. Greece, European Court of Human Rights, Case No. 72/1995/578/664, (1996). The Complainants also cite Article 23(2) of the American Convention on Human Rights which provides that “no-one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”
relevant international laws. They argue that the Respondent State, including the courts, has failed to apply international law on the protection of indigenous land rights, which includes the need to recognise the collective nature of land rights, to recognise historic association, and to prioritise the cultural and spiritual and other links of the people to a particular territory. Instead, Kenyan law gives only limited acknowledgement to African customary law. The Trust Land system in Kenya provides in reality only minimal rights, as a trust (and therefore African customary law rights, such as those of the Endorois) can be extinguished by a simple decision of the executive. They argue that the crucial issue of recognition of the collective ownership of land by the Endorois is not acknowledged at all in Kenyan law, as is clearly shown by the High Court judgment. Encroachment on the Endorois’ property did not therefore comply with the appropriate international laws on indigenous peoples’ rights. They state that the Endorois have also suffered significant property loss as a result of their displacement as detailed above, including the loss of cattle, and that the only “compensation” received was the eventual provision of two cattle dips, which does not compensate for the loss of the salt licks around the Lake or the substantial loss of traditional lands.

114. They conclude that the fact that international standards on indigenous land rights and compensation were not met, as well as that provisions of Kenyan law were ignored, means that the encroachment upon the property of the Endorois community was not in accordance with the “appropriate laws” for the purposes of Article 14 of the Charter.

Alleged Violations of Article 17(2) and (3) – The Right to Culture

Article 17(2) and (3) states that:

(2) Every individual may freely take part in the cultural life of his community.

(3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

115. The Complainants argue that the Endorois community’s cultural rights have been violated as a result of the creation of a Game Reserve. By restricting access to Lake Bogoria, the Kenyan Authorities have denied the community access to a central element of Endorois cultural practice. After defining culture to mean the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other similar groups, they argue that the protection of Article 17 can be invoked by any group that identifies with a particular culture within a state. But they argue that it does more than that. They argue that Article 17 extends to the protection of indigenous cultures and ways of life.

116. They argue that the Endorois have suffered violations of their cultural rights on two counts. In the first instance, the community has faced systematic restrictions on access to sites, such as the banks of Lake Bogoria, which are of central significance for cultural rites and celebrations. The community’s attempts to access their historic land for these purposes was described as “trespassing” and met with intimidation and detention. Secondly, and separately, the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.

117. With mining concessions now underway in proximity to Lake Bogoria, the Complainants argue that further threat is posed to the cultural and spiritual integrity of the ancestral land of the Endorois.

118. They also argue that unlike Articles 8 and 14 of the African Charter, Article 17 does not have an express clause allowing restrictions on the right under certain circumstances. They state that the absence of such a clause is a strong indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people’s right to culture. However, if there is any restriction, the restriction must be proportionate to a legitimate aim and in line with principles of international law on human and peoples’ rights. The Complainants argue that the principle of proportionality requires that limitations be the least restrictive possible to meet the legitimate aim.

119. The Complainants thus argue that even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State’s failure to secure access by right for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim.

Alleged Violation of Article 21 – Rights to Free Disposition of Natural Resources

Article 21 of the Charter states that:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

120. The Complainants argue that the Endorois community are unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve. The medicinal salt licks and fertile soil that kept the community’s cattle healthy are now out of the community’s reach. Mining concessions to Endorois land have been granted without giving the Endorois a share in these resources. Consequently, the Endorois suffer a violation of Article 21: Right to Natural Resources.

121. They argue that in the Ogoni case the right to natural resources contained within their traditional land was vested in the indigenous people and that a people inhabiting a specific region within a state can claim the protection of Article 21. They argue that the right to freely dispose of natural resources is of crucial importance to indigenous peoples and their way of life. They quote from the report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities which states:

Dispossession of land and natural resources is a major human rights problem for indigenous peoples … The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them … This [the loss of fundamental natural resources] is a serious violation of the African Charter (Article 21(1) and 21 (2)), which states clearly that all peoples have the right to natural resources, wealth and property.

122. Citing the African Charter, the Complainants argue that the Charter creates two distinct rights to both property (Article 14) and the free disposal of wealth and natural resources (Article 21). They argue that in the context of traditional land, the two rights are very closely linked and violated in similar ways. They state that Article 21 of the African Charter is, however, wider in its scope than Article 14, and requires respect for a people’s right to use natural resources, even where a people does not have title to the land.

123. The Complainants point out that the World Bank’s Operational Directive 4.10 states that: “Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.”

124. They state that the Endorois as a people enjoy the protection of Article 21 with respect to Lake Bogoria and the wealth and natural resources arising from it. They argue that for the Endorois, the natural resources include traditional medicines made from herbs found around the Lake and the resources, such as salt licks and fertile soil, which provided support for their cattle and therefore their pastoralist way of life. These, the Complainants argue, were natural resources from which the community benefited before their eviction from their traditional land. In addition, Article 21 also protects the right of the community to the potential wealth of their land, including tourism, rubies, and other possible resources. They state that since their eviction from Lake Bogoria, the Endorois, in violation of Article 21, have been denied unhindered access to the land and its natural resources, as they can no longer benefit from the natural resources and potential wealth, including that generated by recent exploitation of the land, such as the revenues and employment created by the Game Reserve and the product of mining operations.

Alleged Violation of Article 22 – The Right to Development

Article 22 of the African Charter states that:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

125. On the issue of the right to development, the Complainants argue that the Endorois’ right to development has been violated as a result of the Respondent State’s failure to adequately involve the Endorois in the development process and the failure to ensure the continued improvement of the Endorois community’s well-being.

126. The Complainants argue that the Endorois have seen the set of choices and capabilities open to them shrink since their eviction from the Game Reserve. They argue that due to the lack of access to the Lake, the salt licks and their usual pasture, the cattle of the Endorois died in large numbers. Consequently, they were not able to pay their taxes and, as a result, the Kenyan Authorities took away more cattle.

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38 The Ogoni Case (2001), paras 56-58.
They stress the point that the Endorois had no choice but to leave the Lake. It is argued that this lack of choice for the community directly contradicts the guarantees of the right to development. They state that if the Kenyan Authorities had been providing the right to development as promised by the African Charter, the development of the Game Reserve would have increased the capabilities of the Endorois.

Citing the Ogoni Case, the Complainants argue that the African Commission has noted the importance of choice to well-being. They state that the African Commission noted that the state must respect rights holders and the "liberty of their action." They argue that the liberty recognised by the Commission is tantamount to the choice embodied in the right to development. By recognising such liberty, they argue, the African Commission has started to embrace the right to development as a choice. Elaborating further on the right to development, they argue that the same 'liberty of action' principle can be applied to the Endorois community in the instant Communication.

They argue that choice and self-determination also include the ability to dispose of natural resources as a community wishes, thereby requiring a measure of control over the land. They further argue that for the Endorois, the ability to use the salt licks, water, and soil of the Lake Bogoria area has been eliminated, undermining this partner (the Endorois community) of self-determination. In that regard, the Complainants argue, it is clear that development should be understood as an increase in peoples' well-being, as measured by capacities and choices available. The realisation of the right to development, they say, requires the improvement and increase in capacities and choices. They argue that the Endorois have suffered a loss of well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them.

Citing the Human Rights Committee (HRC), the Complainants argue that the Committee addressed the effectiveness of consultation procedures in Mazurka v. New Zealand. The Complainants argue that the HRC found that the broad consultation process undertaken by New Zealand had effectively provided for the participation of the Maori people in determining fishing rights. The New Zealand authorities had negotiated with Maori representatives and then allowed the resulting Memorandum of Understanding to be debated extensively by Maoris throughout the country. The Complainants argue that the Committee specifically noted that the consultation procedure addressed the cultural and religious significance of fishing to the Maori people, and that the Maori representatives were able to affect the terms of the final Settlement.

The inadequacy of the consultations undertaken by the Kenyan Authorities, the Complainants argue, is underscored by Endorois actions after the creation of the Game Reserve. The Complainants inform the African Commission that the Endorois believed, and continue to believe even after their eviction, that the Game Reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry into their land. They assert that in failing to understand the reasons for their permanent eviction, many families did not leave the location until 1986.

They argue that the course of action left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. They state that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.

They further say that the requirement of prior, informed consent has also been delineated in the case law of the IACmHR. Referring the African Commission to the case of Mary and Carrie Dan v. USA, they argue that the IACmHR noted that convening meetings with the community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation. They state that to have a process of consent that is fully informed "requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives."
134. The Complainants are also of the view that the Respondent State violated the Endorois’ right to development by engaging in coercive and intimidating activity that has abrogated the community’s right to meaningful participation and freely given consent. They state that such coercion has continued to the present day. The Complainants say that Mr Charles Kamuren, the Chair of the Endorois Welfare Council, had informed the African Commission of details of threats and harassment he and his family and other members of the community have received, especially when they objected to the issue of the granting of mining concessions.

135. The Complainants further argue that the Endorois have been excluded from participating or sharing in the benefits of development. They argue that the Respondent State did not embrace a rights-based approach to economic growth, which insists on development in a manner consistent with, and instrumental to, the realisation of human rights and the right to development through adequate and prior consultation. They assert that the Endorois’ development as a people has suffered economically, socially and culturally. They further conclude that the Endorois community suffered a violation of Article 22 of the Charter.

Respondent State Submissions on Merits
136. In response to the brief submitted by the Complainants on the Merits including the Amicus Curiae Brief by COHRE, the Respondent State, the Republic of Kenya, submitted its reply on the Merits of the Communication to the African Commission.

137. The arguments below are the submissions of the Respondent State, taking into consideration their oral testimony at the 40th Ordinary Session of the African Commission, all their written submissions, including letters, supporting affidavits, video evidence and the ‘Respondents Submissions and Further Clarifications Arising Out of the Questions by the Commissioner During the Merits Hearing of the Communication.’

138. The Respondent State argues that most of the tribes do not reside in their ancestral lands owing to movements made due to a number of factors, including search for pastures for their livestock; search for arable land to carry out agriculture; relocation by Government to facilitate development; creation of irrigation schemes, national parks, game reserves, forests and extraction of natural resources, such as minerals.

139. The Respondent State argues that it has instituted a programme for universal free primary education and an agricultural recovery programme, which aims at increasing the household income of the rural poor, including the Endorois. It states that it has not only initiated programmes for the equitable distribution of budgetary resources, but has also formulated an economic recovery strategy for wealth and employment creation, which seeks to eradicate poverty and secure the economic and social rights of the poor and the marginalised, including the Endorois.

140. The Respondent State argues that the land around the Lake Bogoria area is occupied by the Tugen tribe, which comprises four clans:

141. The Endorois - who have settled around Mangot, Mochongoi and Tangulmbei;

The Lebus – who have settled around Koibatek District;

The Somor – who live around Maringati, Sacho, Tenges and Kakarnet and,

The Alor – living around Kaborchayo, Paratapwa, Kipsalalar and Buluwesa.

142. The Respondent State argues that all the clans co-exist in one geographical area. It states that it is noteworthy that they all share the same language and names, which means that they have a lot in common. The Respondent State disputes that the Endorois are indeed a community / sub-tribe or clan on their own, and it argues that it is incumbent on the Complainants to prove that the Endorois are distinct from the other Tugen sub-tribe or indeed the larger Kalenjin tribe before they can proceed to make a case before the African Commission.

143. The Respondent State maintains that following the Declaration of the Lake Bogoria Game Reserve, the Government embarked on a re-settlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme. It argues that this was over and above the compensation paid to the Endorois after their ancestral land around Lake was gazetted. It further states that there is no such thing as Mochongoi Forest in Kenya and the only forest in the area is Ol Arabel Forest.

Decision on Merits
144. The present Communication alleges that the Respondent State has violated the human rights of the Endorois community, an indigenous people, by forcibly removing them from their ancestral land; the failure to adequately compensate them for the loss of their property, the disruption of the community’s pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people.

145. Before addressing the articles alleged to have been violated, the Respondent State has requested the African Commission to determine whether the Endorois can be recognised as a ‘community’ / sub-tribe or clan on their own. The
Respondent State disputes that the Endorois are a distinct community in need of special protection. The Respondent State argues that the Complainants need to prove this distinction from the Tugen sub-tribe or indeed the larger Kalenjin tribe. The immediate questions that the African Commission needs to address itself to are:

146. Are the Endorois a distinct community? Are they indigenous peoples and thereby needing special protection? If they are a distinct community, what makes them different from the Tugen sub-tribe or indeed the larger Kalenjin tribe?

147. Before responding to the above questions, the African Commission notes that the concepts of “peoples” and “indigenous peoples / communities” are contested terms. As far as “indigenous peoples” are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances. The relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of “peoples.” The African Commission is thus aware of the political connotation that these concepts carry. These controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of “people(s).”

In its Report of the Working Group of Experts on Indigenous Populations/Communities, the African Commission describes its dilemma of defining the concept of “peoples” in the following terms:

Despite its mandate to interpret all provisions of the African Charter as per Article 45(3), the African Commission initially shed away from interpreting the concept of ‘peoples’. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESR do not define ‘peoples.’ It is evident that the drafters of the African Charter intended to distinguish between the traditional individual rights where the sections preceding Article 17 make reference to “every individual.” Article 18 serves as a break by referring to the family. Articles 19 to 24 make specific reference to “all peoples.”

148. The African Commission, nevertheless, notes that while the terms ‘peoples’ and ‘indigenous community’ arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.

149. The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of “peoples.” It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three “generations” of rights: civil and political rights; economic, social, and cultural rights; and group and peoples’ rights. In that regard, the African Commission notes its own observation that the term “indigenous” is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission.

150. The African Commission also notes that the African Charter, in Articles 20 through 24, provides for peoples to retain rights as peoples, that is, as collectives. The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples. These are: the occupation and use of a specific territory; the occupation and use of a specific territory; the occupation and use of a specific territory; the occupation and use of a specific territory;
the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. The Working Group also demarcated some of the shared characteristics of African indigenous groups:

... first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists...

... A key characteristic for most of them is the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.  

151. The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as "peoples", viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy – especially rights enumerated under Articles 19 to 24 of the African Charter – or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.

152. As far as the present matter is concerned, the African Commission is also enjoined under Article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter. It takes note of the working definition proposed by the UN Working Group on Indigenous Populations:

... that indigenous peoples are ... those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.  

153. But this working definition should be read in conjunction with the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, which is the basis of its 'definition' of indigenous populations. Similarly it notes that the International Labour Organisation has proffered a definition of indigenous peoples in Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

154. The African Commission is also aware that though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims. In terms of ILO Convention 169, even though many African countries have not signed and ratified the said Convention, and like the UN Working Groups' conceptualisation of the term, the African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples – that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture. In that regard, the African Commission raises the slightly controversial issue of "first or original occupant" of territory, which is not always relevant to Africa.

56 Ibid.
58 The UN Working Group widens the analysis beyond the African historical experience and also raises the slightly controversial issue of "first or original occupant" of territory, which is not always relevant to Africa.
community have lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973.62

155. In the present Communication the African Commission wishes to emphasise that the Charter recognises the rights of peoples.63 The Complainants argue that the Endorois are a people, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The Respondent State disagrees.64 The African Commission notes that the Constitution of Kenya, though incorporating the principle of non-discrimination and guaranteeing civil and political rights, does not recognise economic, social and cultural rights as such, as well as group rights. It further notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya’s constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.

156. After studying all the submissions of the Complainants and the Respondent State, the African Commission is of the view that Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands - Lake Bogoria and the surrounding area. It agrees that Lake Bogoria and the Monchongoi Forest are central to the Endorois’ way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.

157. In addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples.65 The UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supports self-identification as a key criterion for determining who is indeed indigenous.66 The African Commission is aware that today many indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as ‘peoples’ is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems.67 The African Commission further notes that the Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples’ self-identification is an important ingredient to the concept of peoples’ rights as laid out in the Charter. It agrees that the alleged violations of the African Charter by the Respondent State are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.68

158. Furthermore, in drawing inspiration from international law on human and peoples’ rights, the African Commission notes that the IACHR has dealt with cases of self-identification where Afro-descendent communities were living in a collective manner, and had, for over 2-3 centuries, developed an ancestral link to their land. Moreover, the way of life of these communities depended heavily on the traditional use of their land, as did their cultural and spiritual survival due to the existence of ancestral graves on these lands.69

159. The African Commission notes that while it has already accepted the existence of indigenous peoples in Africa through its WGIP reports, and through the adoption of its Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, it notes the fact that the Inter-American Court has not hesitated in granting the collective rights protection to groups beyond the

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64 The Commission has affirmed the right of peoples to bring claims under the African Charter. See the case of The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria. Here the Commission stated: “The African Charter, in its Articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives.”

65 The Commission has also noted that where there is a large number of victims, it may be impractical for each individual complainant to go before domestic courts. In such situations, as in the Ogoni case, the Commission can adjudicate the rights of a people as a collective. Therefore, the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.


68 See also Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth Session, 1990), UN Doc. A/45/18 at 79 (1991). “The Committee”, in General Recommendation VIII stated that membership in a group, “shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned”.

“narrow/aboriginal/pre-Colombian” understanding of indigenous peoples traditionally adopted in the Americas. In that regard, the African Commission notes two relevant decisions from the IACtHR: Moiwana v Suriname70 and Saramaka v Suriname. The Saramaka case is of particular relevance to the Endorois case, given the views expressed by the Respondent State during the oral hearings on the Merits.71

160. In the Saramaka case, according to the evidence submitted by the Complainants, the Saramaka people are one of six distinct Maroon groups in Suriname whose ancestors were African slaves forcibly taken to Suriname during the European colonisation in the 17th century. The IACtHR considered that the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.

161. Like the State of Suriname, the Respondent State (Kenya) in the instant Communication is arguing that the inclusion of the Endorois in “modern society” has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct group that is very different from the Tugen sub-tribe or indeed the larger Kalenjin tribe. That is, the Respondent State is questioning whether the Endorois can be defined in a way that takes into account the different degrees to which various members of the Endorois community adhere to traditional laws, customs, and economy, particularly those living within the Lake Bogoria area. In the Saramaka case, the IACtHR disagreed with the State of Suriname that the Saramaka people could not be considered a distinct group of people just because a few members do not identify with the larger group. In the instant case, the African Commission, from all the evidence submitted to it, is satisfied that the Endorois can be defined as a distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner from the Tugen sub-tribe or indeed the larger Kalenjin tribe.

162. The IACtHR also noted that the fact that some individual members of the Saramaka community may live outside of the traditional Saramaka territory and in a way that may differ from other Saramakas who live within the traditional territory and in accordance with Saramaka customs does not affect the distinctiveness of this tribal group, nor its communal use and enjoyment of their property. In the case of the Endorois, the African Commission is of the view that the question of whether certain members of the community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves in accordance with their own traditional customs and norms and not by the State. The Endorois cannot be denied a right to juridical personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community.

From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfill the criterion of distinctiveness. The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a “people”, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one’s identity through identification with ancestral lands.

Alleged Violation of Article 8

163. The Complainants allege that Endorois’ right to freely practice their religion has been violated by the Respondent State’s action of evicting the Endorois from their land, and refusing them access to Lake Bogoria and other surrounding religious sites. They further allege that the Respondent State’s has interfered with the Endorois’ ability to practice and worship as their faith dictates; that religious sites within the Game Reserve have not been properly demarcated and protected and since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. They claim that access as of right for religious rituals – such as circumcisions, marital rituals, and initiation rights – has been denied the community. Similarly, they state that the Endorois have not been able to hold or participate in their most significant annual religious ritual, which occurs when the Lake undergoes seasonal changes.

164. The Complainants further argue that the Endorois have neither been able to practice the prayers and ceremonies that are intimately connected to the Lake,
nor have they been able to freely visit the spiritual home of all Endorois, living and dead. They argue that the Endorois' spiritual beliefs and ceremonial practices constitute a religion under international law. They point out that the term "religion" in international human rights instruments covers various religious and spiritual beliefs and should be broadly interpreted. They argue that the HRC states that the right to freedom of religion in the International Covenant on Civil and Political Rights (ICCPR):

"protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions."

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To rebut the allegation of a violation of Article 8 of the African Charter, the Respondent State argues that the Complainants have failed to show that the action of the Government to gazette the Game Reserve for purposes of conserving the environment and wildlife and to a great extent the Complainants' cultural grounds fails the test of the constitution of reasonableness and justifiability. It argues that through the gazetting of various areas as protected areas, National Parks or Game Reserves or falling under the National Museums, it has been possible to conserve some of the areas which are threatened by encroachment due to modernisation. The Respondent State argues that some of these areas include 'Kayas' (forests used as religious ritual grounds by communities from the coast province of Kenya) which has been highly effective with the communities have continued to access these grounds without fear of encroachment.

165. Before deciding whether the Respondent State has indeed violated Article 8 of the Charter, the Commission wishes to establish whether the Endorois' spiritual beliefs and ceremonial practices constitute a religion under the African Charter and international law. In that regard, the African Commission notes the observation of the HRC in paragraph 164 (above). It is of the view that freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb.73 The African Commission notes its own observation in Free Legal Assistance Group v. Zaire, that it has held that the right to freedom of conscience allows for individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief.74

166. This Commission is aware that religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion. The Endorois' cultural and religious practices are centred around Lake Bogoria and are of prime significance to all Endorois. During oral testimony, and indeed in the Complainants' written submission, this Commission's attention was drawn to the fact that religious sites are situated around Lake Bogoria, where the Endorois pray and where religious ceremonies regularly take place. It takes into cognisance that Endorois' ancestors are buried near the Lake, and has already above, Lake Bogoria is considered the spiritual home of all Endorois, living and dead.

167. It further notes that one of the beliefs of the Endorois is that their Great Ancestor, Dorios, came from the Heavens and settled in the Mochongoi Forest.75 It notes the Complainants' arguments, which have not been contested by the Respondent State, that the Endorois believe that each season the water of the Lake turns red and the hot springs emit a strong odour, signalling a time that the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the Lake.

168. From the above analysis, the African Commission is of the view that the Endorois spiritual beliefs and ceremonial practices constitute a religion under the African Charter.

169. The African Commission will now determine whether the Respondent State by its actions or inactions have interfered with the Endorois' right to religious freedom.

170. The Respondent State has not denied that the Endorois' have been removed from their ancestral land they call home. The Respondent State has merely advanced reasons why the Endorois can no longer stay within the Lake Bogoria area. The Complainants argue that the Endorois' inability to practice their religion is a direct result of their expulsion from their land and that since their eviction the Endorois have not been able to freely practice their religion, as access for religious rituals has been denied the community.

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73 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Thirty-sixth session, 1981), U.N. GA Res. 36/55.


75 See paras 73 and 74.
171. It is worth noting that in *Amnesty International v. Sudan*, the African Commission recognised the centrality of practice to religious freedom. The African Commission noted that the State Party violated the authors’ right to practice their religion, because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion. The African Commission also notes the case of Loren Laroye Riebe Star from the IACmHR, which determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. It notes that the Court held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes.

172. The African Commission agrees that in some situations it may be necessary to place some form of limited restrictions on a right protected by the African Charter. But such a restriction must be established by law and must not be applied in a manner that would completely vitiate the right. It notes the recommendation of the HRC that limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. The raison d’être for a particularly harsh limitation on the right to practice religion, such as that experienced by the Endorois, must be based on exceptionally good reasons, and it is for the Respondent State to prove that such interference is not only proportionate to the specific need on which they are predicated, but is also reasonable. In the case of *Amnesty International v. Sudan*, the African Commission stated that a wide-ranging ban on Christian associations was “disproportionate to the measures required by the Government to maintain public order, security, and safety.” The African Commission further went on to state that any restrictions placed on the rights to practice one’s religion should be negligible. In the above mentioned case, the African Commission decided that complete and total expulsion from the land for religious ceremonies is not minimal.

173. The African Commission is of the view that denying the Endorois access to the Lake is a restriction on their freedom to practice their religion, a restriction not necessitated by any significant public security interest or other justification. The African Commission is also not convinced that removing the Endorois from their ancestral land was a lawful action in pursuit of economic development or ecological protection. The African Commission is of the view that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.

The African Commission therefore finds against the Respondent State a violation of Article 8 of the African Charter. The African Commission is of the view that the Endorois’ forced eviction from their ancestral lands by the Respondent State interfered with the Endorois’ right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion.

The African Commission is of the view that the limitations placed on the state’s duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in *Amnesty International v. Zambia*, where it noted that the ‘claw-back’ clauses must not be interpreted against the principles of the Charter … and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter.

**Alleged Violation of Article 14**

174. The Complainants argue that the Endorois community have a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. The Respondent State denies the allegation.

175. The Respondent State further argues that the land in question fell under the definition of Trust Land and was administered by the Baringo County Council for the benefit of all the people who were ordinarily resident in their jurisdiction which comprised mainly the four Tugen tribes. It argues that Trust Land is not only established under the Constitution of Kenya and administered under an Act of Parliament, but that the Constitution of Kenya provides that Trust Land may be alienated through registration to another person other than the County Council; an Act of Parliament providing for the County Council to set apart an area of Trust Land vested in it for use and occupation of public body or authority for public purposes; person or persons or purposes which, in the opinion of the Council, is likely to benefit the persons ordinarily resident in that area; by the President in consultation with the Council. It argues that Trust Land may be set apart as government land for government purposes or private land.

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79 The African Commission is of the view that the limitations placed on the state’s duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in *Amnesty International v. Zambia*, where it noted that the ‘claw-back’ clauses must not be interpreted against the principles of the Charter … and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. See *Amnesty International v. Sudan* (1999), paras. 82 and 80.

176. The Respondent State argues that when Trust Land is set apart for whatever purpose, the interest or other benefits in respect of that land that was previously vested in any tribe, group family or individual under African customary law are extinguished. It, however, states that the Constitution and the Trust Land Act provide for adequate and prompt compensation for all residents. The Respondent State, in both its oral and written submissions, is arguing that the Trust Land Act provides a comprehensive procedure for assessment of compensation where the Endorois should have applied to the District Commissioner and lodged an appeal if they were dissatisfied. The Respondent State further argues that the Endorois have a right of access to the High Court of Kenya by the Constitution to determine whether their rights have been violated.

177. According to the Respondent State, with the creation of more local authorities, the land in question now comprises parts of Baringo and Koibatek County Councils, and through Gazette Notice No 239 of 1973, the land was first set apart as Lake Hannington Game Reserve, which was later revoked by Gazette Notice No 270 of 1974, where the Game Reserve was renamed Lake Baringo Game Reserve, and the boundaries and purpose of setting apart this area specified in the Gazette Notice as required by the Trust Land Act. It argues that the Government offered adequate and prompt compensation to the affected people, "a fact which the Applicants agree with."—81

178. In its oral and written testimonies, the Respondent State argues that the gazettement of a Game Reserve under the Wildlife laws of Kenya is with the objective of ensuring that wildlife is managed and conserved to yield to the nation in general and to individual areas in particular optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation. The Respondent State also argues that National Reserves unlike National Parks, where the Act expressly excludes human interference save for instances where one has got authorisation, are subject to agreements as to restrictions or conditions relating to the provisions of the area covered by the reserve. It also states that communities living around the National Reserves have in some instances been allowed to drive their cattle to the Reserve for the purposes of grazing, so long as they do not cause harm to the environment and the natural habitats of the wild animals. It states that with the establishment of a National Reserve particularly from Trust Land, it is apparent that the community’s right of access is not extinguished, but rather its propriety right as recognised under the law (that is, the right to deal with property as it pleases) is the one which is minimised and hence the requirement to compensate the affected people.

179. Rebutting the claim of the Complainants that the Kenyan Authorities prevented them from occupying their other ancestral land, Muchongoi Forest, the Respondent State argued that the land in question was gazetted as a forest in 1941, by the name of Ol Arabel Forest, which means that the land ceased being communal land by virtue of the gazettement. It states that some excisions have been made from the Ol Arabel Forest to create the Muchongoi Settlement Scheme to settle members of the four Tugen tribes of the Baringo district, one of which is the Endorois.

180. The Respondent State also argues that it has also gone a step further to formulate "Rules", namely the "The Forests (Tugen-Kamasia) Rules" to enable the inhabitants of the Baringo District, including the Endorois to enjoy some privileges through access to the Ol Arabel Forest for some purposes. The Rules, it states, allow the community to collect dead wood for firewood, pick wild berries and fruits, take or collect the bark of dead trees for thatching beehives, cut and remove creepers and lianes for building purposes, take stock, including goats, to such watering places within the Central Forests as may be approved by the District Commissioner in consultation with the Forest Officer, enter the Forest for the purpose of holding customary ceremonies and rites, but no damage shall be done to any tree, graze sheep within the Forest, graze cattle for specified periods during the dry season with the written permission of the District Commissioner or the Forest Officer and to retain or construct huts within the Forest by approved forest cultivators among others.

181. The Respondent State argues further that the above Rules ensure that the livelihoods of the community are not compromised by the gazettement, in the sense that the people could obtain food and building materials, as well as run some economic activities such as beeking and grazing livestock in the Forest. They also say they were at liberty to practice their religion and culture. Further, it states that the due process of law regarding compensation was followed at the time of the said gazettement.

182. Regarding the issue of dispossession of ancestral land in the alleged Muchongoi Forest, the Respondent State did not address it, as it argues that it was not part of the matters addressed by the High Court case, and therefore the African Commission would be acting as a tribunal of first instance if it did so.

183. The Respondent State does not dispute that the Lake Bogoria area of the Baringo and Koibatek Administrative Districts is the Endorois' ancestral land. One of the issues the Respondent State is disputing is whether the Endorois are indeed a distinct Community. That question has already been answered supra. In para 1.1.6 of the Respondent State Merits brief, the State said: "Following the Declaration of the Lake Bogoria Game Reserve, the Government embarked on a resettlement exercise, culminating in the resettlement of the majority of the Endorois in the Muchongoi settlement scheme. This was over and above the compensation paid to the Endorois after their ancestral land around Lake was gazetted."—82

81 See para 3.3.3 of the Respondent’s Merits brief.

82 Italics for emphasis.
It is thus clear that the land surrounding Lake Bogoria is the traditional land of the Endorois people. In para 1 of the Merits brief, submitted by the Complainants, they write: “The Endorois are a community of approximately 60,000 people who, from time immemorial, have lived in the Lake Bogoria area of the Baringo and Koibatek Administrative Districts.” In para 47, the Complainants also state that “For centuries the Endorois have constructed homes on the land, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods.” The Complainants argue that apart from a confrontation with the Masai over the Lake Bogoria region three hundred years ago, the Endorois have been accepted by all neighbouring tribes, including the British Crown, as bona fide owners of their land. The Respondent State does not challenge those statements of the Complainants. The only conclusion that could be reached is that the Endorois community has a right to property with regard to its ancestral land, the possessions attached to it, and their animals.

Two issues that should be disposed of before going into the more substantive questions of whether the Respondent State has violated Article 14 are a determination of what is a ‘property right’ (within the context of indigenous populations) that accords with African and international law, and whether special measures are needed to protect such rights, if they exist and whether Endorois’ land has been encroached upon by the Respondent State. The Complainants argue that “property rights” have an autonomous meaning under international human rights law, which supersedes national legal definitions. They state that both the European Court of Human Rights (ECHR) and IActHR have examined the specific facts of individual situations to determine what should be classified as ‘property rights’, particularly for displaced persons, instead of limiting themselves to formal requirements in national law.

To determine that question, the African Commission will look, first, at its own jurisprudence and then at international case law. In Malawi African Association and Others v. Mauritania, land was considered ‘property’ for the purposes of Article 14 of the Charter.

The African Commission in the Ogoni case also found that the ‘right to property’ includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit. The African Commission also notes that the ECHR have recognised that ‘property rights’ could also include the economic resources and rights over the common land of the applicants.

The Complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems. Common problems faced by indigenous groups include the lack of “formal” title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. This, they argue, has led to many cases of displacement from a people’s historic territory, both by colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities. The African Commission notes that its Working Group on Indigenous Populations/Communities has recognised that some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions and customs. The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute ‘property’ under the Charter and that special measures may have to be taken to secure such ‘property rights’.

The case of Doğan and others v Turkey is instructive in the instant Communication. Although the Applicants were unable to demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that:

“The notion ‘possessions’ in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision.”

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83 Italics for emphasis.
84 See The Mayagna Awas Tingni v. Nicaragua, Inter-American Court of Human Rights, (2001), para. 146 (hereinafter the Awas Tingni Case 2001). The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.
86 The Ogoni Case (2001), para. 54.
87 Communication No. 225/98 v Nigeria, 14th Annual Report, para. 52.
88 See Doğan and Others v. Turkey, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.
90 Doğan and Others v Turkey, European Court of Human Rights, Applications 88/03-88/11/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.
189. Although they did not have registered property, they either had their own houses constructed on the land of their ancestors or lived in the houses owned by their fathers and cultivate the land belonging to the latter. The Court further noted that the Applicants had unchallenged rights over the common land in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling.

190. The African Commission also notes the observation of the IACtHR in the seminal case of *The Mariguana (Sumo) Awas Tingni v Nicaragua*, that the Inter-American Convention protected property rights in a sense which include the rights of members of the indigenous communities within the framework of communal property and argued that possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.

191. In the opinion of the African Commission, the Respondent State has an obligation under Article 14 of the African Charter not only to respect the ‘right to property’, but also to protect that right. In the *Mauritania Case*, the African Commission concluded that the confiscation and pillaging of the property of black Mauritanians and the expropriation or destruction of their land and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in Article 14. Similarly, in *The Ogoni case 2001*, the African Commission addressed factual situations involving removal of people from their homes. The African Commission held that the removal of people from their homes violated Article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14.

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91. Döğan and Others v. Turkey, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), para. 138-139.

92. *The Awas Tingni Case (2001)*, paras. 140(b) and 151.


192. The Saramaka case also sets out how the failure to recognise an indigenous/tribal group becomes a violation of the ‘right to property’. In its analysis of whether the State of Suriname had adopted an appropriate framework to give domestic legal effect to the ‘right to property’, the IACtHR addressed the following issues:

*This controversy over who actually represents the Saramaka people is precisely a natural consequence of the lack of recognition of their juridical personality.*

193. In the Saramaka case, the State of Suriname did not recognise that the Saramaka people can enjoy and exercise property rights as a community. The Court observed that other communities in Suriname have been denied the right to seek judicial protection against alleged violations of their collective property rights precisely because a judge considered they did not have the legal capacity necessary to request such protection. This, the Court opined, placed the Saramaka people in a vulnerable situation where individual ‘property rights’ may trump their rights over communal property, and where the Saramaka people may not seek, as a juridical personality, judicial protection against violations of their ‘property rights’ recognised under Article 21 of the Convention.

194. As is in the instant case before the African Commission, the State of Suriname acknowledged that its domestic legal framework did not recognise the right of the members of the Saramaka people to the use and enjoyment of property in accordance with their system of communal property, but rather a privilege to use land. It also went on to provide reasons, as to why it should not be held accountable for giving effect to the Saramaka claims to a right to property, for example because the land tenure system of the Saramaka people, particularly regarding who owns the land, presents a practical problem for state recognition of their right to communal property. The IACtHR rejected all of the State’s arguments. In the present Communication, the High Court of Kenya similarly dismissed any claims based on historic occupation and cultural rights.

195. The IACtHR went further to say that, in any case, the alleged lack of clarity as to the land tenure system of the Saramakas should not present an insurmountable obstacle for the State, which has the duty to consult with the
members of the Saramaka people and seek clarification of this issue, in order to comply with its obligations under Article 21 of the Convention.

196. In the present Communication, the Respondent State (the Kenyan Government) during the oral hearings argued that legislation or special treatment in favour of the Endorois might be perceived as being discriminatory. The African Commission rejects that view. The African Commission is of the view that the Respondent State cannot abstain from complying with its international obligations under the African Charter merely because it might be perceived to be discriminatory to do so. It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance. The African Commission shares the Respondent State’s concern over the difficulty involved; nevertheless, the State still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law. Besides, it is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. Legislation that recognises said differences is therefore not necessarily discriminatory.

197. Again drawing on the Saramaka v Suriname case, which confirms earlier jurisprudence of the Moiicana v Suriname, Yakye Axa v Paraguay, Sawhoyamaxa v Paraguay and Mayagna Awas Tingni v Nicaragua, the Saramaka case has held that specific measures of protection are owed to members of the tribal community to guarantee the full exercise of their rights. The IACtHR stated that based on Article 1(l) of the Convention, members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regard to their enjoyment of property rights in order to safeguard their physical and cultural survival.

198. Other sources of international law have similarly declared that such special measures are necessary. In the Moiicana case, the IACtHR determined that another Maroon community living in Suriname was also not indigenous to the region, but rather constituted a tribal community that settled in Suriname in the 17th and 18th century, and that this tribal community had “a profound and all-encompassing relationship to their ancestral lands” that was central, not “on the individual, but rather on the community as a whole.” This special relationship to land, as well as their communal concept of ownership, prompted the Court to apply to the tribal Moiicana community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention.

199. The African Commission is of the view that even though the Constitution of Kenya provides that Trust Land may be alienated and that the Trust Land Act provides comprehensive procedure for the assessment of compensation, the Endorois property rights have been encroached upon, in particular by the expropriation and the effective denial of ownership of their land. It agrees with the Complainants that the Endorois were never given the full title to the land they had in practice before the British colonial administration. Their land was instead made subject to a trust, which gave them beneficial title, but denied the actual title. The African Commission further agrees that though for a decade they were able to exercise their traditional rights without restriction, the trust land system has proved inadequate to protect their rights.

200. The African Commission also notes the views expressed by the Committee on Economic, Social and Cultural Rights which has provided a legal test for forced removal from lands which is traditionally claimed by a group of people as their property. In its ‘General Comment No. 4’ it states that “instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.” This view has also been reaffirmed by the United Nations Commission on Human Rights which states that forced evictions are a gross violations of human rights, and in particular the right to adequate housing. The African Commission also notes General Comment No. 7 requiring States Parties, prior to carrying out any evictions, to...
explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force.\textsuperscript{105}

201. The African Commission is also inspired by the European Commission of Human Rights. Article 1 of Protocol 1 to the European Convention states:

Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.\textsuperscript{106}

202. The African Commission also refers to Akdivar and Others v. Turkey. The European Court held that forced evictions constitute a violation of Article 1 of Protocol 1 to the European Convention. Akdivar and Others involved the destruction of housing in the context of the ongoing conflict between the Government of Turkey and Kurdish separatist forces. The petitioners were forcibly evicted from their properties, which were subsequently set on fire and destroyed. It was unclear which party to the conflict was responsible. Nonetheless, the European Court held that the Government of Turkey violated both Article 8 of the European Convention and Article 1 of Protocol 1 to the European Convention because it has a duty to both respect and protect the rights enshrined in the European Convention and its Protocols.

203. In the instant case, the Respondent State sets out the conditions when Trust Land is set apart for whatever purpose.\textsuperscript{107}

204. The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights. The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.\textsuperscript{108}

205. The Inter-American Court jurisprudence also makes it clear that mere access or de facto ownership of land is not compatible with principles of international law. Only de jure ownership can guarantee indigenous peoples' effective protection.\textsuperscript{109}

206. In the Saramaka case, the Court held that the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognised and respected not only in practice but also in law in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighbouring peoples. The situation of the Endorois is not different. The Respondent State simply wants to grant them privileges such as restricted access to ceremonial sites. This, in the opinion of the Commission, falls below internationally recognised norms. The Respondent State must grant title to their territory in order to guarantee its permanent use and enjoyment.

207. The African Commission notes that that Articles 26 and 27 of the UN Declaration on Indigenous Peoples use the term “occupied or otherwise used.” This is to stress that indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds. This was made clear in the judgment of Awas Tingni v Nicaragua. In the current leading international case on this issue, The Mayagna (Sumo) Awas Tingni v Nicaragua,\textsuperscript{110} the IActHR recognised that the Inter-American Convention protected property rights “in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.”\textsuperscript{111} It stated that possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.\textsuperscript{112}

208. The African Commission also notes that in the case of Sawhoyamaxa v Paraguay, the IActHR, acting within the scope of its adjudicatory jurisdiction, decided on indigenous land possession in three different situations, viz: in the Case of the Mayagna (Sumo) Awas Tingni Community, the Court pointed out that


\textsuperscript{107} See para 6.0 of the Respondent State Brief on the Merits. See also para 178 of this judgment where the Respondent State argues that the community’s rights of access is not extinguished.

\textsuperscript{108} See Articles 8(e)(b), 10, 25, 26 and 27 of the UN Declaration on the Rights of Indigenous Peoples.

\textsuperscript{109} See Articles 26 and 27 of the UN Declaration on Indigenous Peoples.

\textsuperscript{110} See Articles 8(2) (b), 10, 25, 26 and 27 of the UN Declaration on Indigenous Peoples.

\textsuperscript{111} See Articles 26 and 27 of the UN Declaration on Indigenous Peoples.

\textsuperscript{112} See Articles 26 and 27 of the UN Declaration on Indigenous Peoples.
possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration. In the *Case of the Moiwana Community*, the Court considered that the members of the N’djuka people were the “legitimate owners of their traditional lands”, although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them, though in this case, the traditional lands were not occupied by third parties. Finally, in the *Case of the Indigenous Community Yakye Axa*, the Court considered that the members of the community were empowered, even under domestic law, to file claims for traditional lands and ordered the State, as measure of reparation, to individualise those lands and transfer them on a no consideration basis.

209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous peoples has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous peoples to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous lands restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.

210. That such encroachment has taken place could be seen by the Endorois’ inability, after being evicted from their ancestral land, to have free access to religious sites and their traditional land to graze their cattle. The African Commission is aware that access roads, gates, game lodges and a hotel have all been built on the ancestral land of the Endorois community around Lake Bogoria and imminent mining operations also threaten to cause irreparable damage to the land. The African Commission has also been notified that the Respondent State is engaged in the demarcation and sale of parts of Endorois historic lands to third parties.

211. The African Commission is aware that encroachment in itself is not a violation of Article 14 of the Charter, as long as it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted ‘in the interest of public need or in the general interest of the community’ and ‘in accordance with appropriate laws’. The African Commission will now assess whether an encroachment ‘in the interest of public need’ is indeed proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands. The African Commission agrees with the Complainants that the test laid out in Article 14 of the Charter is conjunctive, that is, in order for an encroachment not to be in violation of Article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community and was carried out in accordance with appropriate laws.

212. The ‘public interest’ test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was stressed by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who published the following statement:

> Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.

213. Limitations on rights, such as the limitation allowed in Article 14, must be reviewed under the principle of proportionality. The Commission notes its own conclusions that “… the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.” The African Commission also notes the decisive case of *Handyside v. United Kingdom*, where the ECHR stated that any condition or restriction imposed upon a right must be “proportionate to the legitimate aim pursued.”

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113 See case of the Mayaya (Sumo) Awu Telling Community, supra note 184, para. 151.


115 See case of the Indigenous Community Yakye Axa, supra note 1, paras. 124-131.


118 Handyside v. United Kingdom, No. 5493/72, Series A.24 (7 December 1976), para. 49.
The African Commission is of the view that any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present Communication, the African Commission holds the view that in the pursuit of creating a Game Reserve, the Respondent State has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.

It is also of the view that even if the Game Reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. From the evidence submitted both orally and in writing, it is clear that the community was willing to work with the Government in a way that respected their property rights, even if a Game Reserve was being created. In that regard, the African Commission notes its own conclusion in the Constitutional Rights Project Case, where it says that “a limitation may not erode a right such that the right itself becomes illusory.” At the point where such a right becomes illusory, the limitation cannot be considered proportionate – the limitation becomes a violation of the right. The African Commission agrees that the Respondent State has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a Game Reserve and the subsequent eviction of the Endorois community from their own land, the Respondent State has violated the very essence of the right itself, and cannot justify such an interference with reference to “the general interest of the community” or a “public need.”

The African Commission notes that the link to the right to life, in paragraph 219 above, is particularly notable, as it is a non-derogable right under international law. Incorporating the right to life into the threshold of the ‘public interest test’ is further confirmed by jurisprudence of the IActHR. In *Yakye Axa v Paraguay* the Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity.

The IActHR held that one of the obligations that the State must inescapably undertake as guarantor to protect and ensure the right to life is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

The African Commission notes that the link to the right to life, in paragraph 219 above, is particularly notable, as it is a non-derogable right under international law. Incorporating the right to life into the threshold of the ‘public interest test’ is further confirmed by jurisprudence of the IActHR. In *Yakye Axa v Paraguay* the Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity.

With respect to the ‘in accordance with the law’ test, the Respondent State should also be able to show that the removal of the Endorois was not only in the public interest, but their removal satisfied both Kenyan and international law. If it is settled that there was a trust in favour of the Endorois, was it legally extinguished? If it was, how was it satisfied? Was the community adequately compensated? Also, did the relevant legislation creating the Game Reserve expressly require the removal of the Endorois from their land?

The African Commission notes that the Respondent State does not contest the claim that the traditional lands of the Endorois people are classified as Trust Land. In fact S. 115 of the Kenyan Constitution gives effect to that claim. In the opinion of the African Commission it created a beneficial right for the Endorois over their ancestral land. This should have meant that the County Council should give effect to such rights, interest or other benefits in respect of the land.

The Complainants argue that the Respondent State created the Lake Hannington Game Reserve, including the Endorois indigenous lands, on 9 November 1973. The name was changed to Lake Bogoria Game Reserve in a second notice in 1974. The 1974 notice was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA). The Complainants argue that WAPA applied to Trust Land as it did to any other

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119 *The Constitutional Rights Project Case*, para. 42.


121 Pursuant to Kenyan law, the authorities published notice 239/1973 in the Kenya Reserve to declare the creation of “Lake Hannington Game Reserve.” Gazette notice 270/1974 was published to revoke the earlier notice and change the name of the Game Reserve on 12 October 1974: “the area set forth in the schedule hereto to be a Game Reserve known as Lake Bogoria Game Reserve.”

122 See section 3(2) for relevant parts of WAPA. Section 3(2) was subsequently revoked on 13 February 1976 by S.68 of the Wildlife Conservation and Management Act.
land, and did not require that the land be taken out of the Trust before a Game Reserve could be declared over that land.

222. They further argue that the relevant legislation did not give authority for the removal of any individual or group occupying the land in a Game Reserve. Instead, WAPA merely prohibited the hunting, killing or capturing of animals within the Game Reserve.123 The Complainants argue that despite no clear legal order asking them to relocate to another land, the Endorois community was informed from 1973 onwards that they would have to leave their ancestral lands.

223. In rebuttal, the Respondent State argues that the Constitution of Kenya provides that Trust Land may be alienated. It also states that the “Government offered adequate and prompt compensation to the affected people…”124 As regards the Complainants’ claim that the Respondent State prevented the Endorois community from accessing their other ancestral lands, Muchongoi forest, the Respondent State argues that the land in question was gazetted in 1941 by the name of Ol Arabel Forest with the implication that the land ceased being communal by virtue of the gazettement.

224. The African Commission agrees that WAPA merely prohibited the hunting, killing or capturing of animals within the Game Reserve.125 Additionally, the Respondent State has not been able to prove without doubt that the eviction of the Endorois community satisfied both Kenyan and international law. The African Commission is not convinced that the whole process of removing the Endorois from their ancestral land satisfied the very stringent international law provisions. Furthermore, the mere gazetting of Trust Land is not sufficient to legally extinguish the trust. WAPA should have required that the land be taken out of the Trust before a Game Reserve could be declared over that land. This means that the declaration of the Lake Bogoria Game Reserve by way of the 1974 notice did not affect the status of the Endorois land as Trust Land. The obligation of Baringo and Koibatek County Councils to give effect to the rights and interests of the Endorois people continued. That also has to be read in conjunction with the concept of adequate compensation. The African Commission is in agreement with the Complainants that the only way under Kenyan law in which Endorois benefit under the trust could have been dissolved is if the County Council or the President of Kenya had “set apart” the land. However, the Trust Land Act required that to be legal, such setting apart of the land must be published in the Kenyan Gazette.126

225. Two further elements of the ‘in accordance with the law’ test relate to the requirements of consultation and compensation.

226. In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property.

227. In the Saramaka case, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory do not amount to a denial of their survival as a tribal people, the Court stated that the State must abide by the following three safeguards: first, ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory; second, guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; third, ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

228. In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, a prior environment and social impact assessment was not carried out. The absence of these three elements of the ‘test’ is tantamount to a violation of Article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the Game Reserve (or other adequate forms of compensation) also extends to a violation of the right to development.

229. On the issue of compensation, the Respondent State in rebutting the Complainants’ allegations that inadequate compensation was paid, argues that the Complainants do not contest that a form of compensation was done, but that they have only pleaded that about 170 families were compensated. It further argues that, if at all the compensations paid was not adequate, the Trust Land Act provides for a procedure for appeal, for the amount and the people who feel that they are denied compensation over their interest.

230. The Respondent State does not deny the Complainants’ allegations that in 1986, of the 170 families evicted in late 1973, from their homes within the Lake Bogoria Game Reserve, each receiving around 3,150 Kshs (at the time, this was
equivalent to approximately £30). Such payment was made some 13 years after the first eviction. It does not also deny the allegation that £30 did not represent the market value of the land gazetted as Lake Bogoria Game Reserve. It also does not deny that the Kenyan authorities have themselves recognised that the payment of 3,150 Kshs per family amounted only to ‘relocation assistance’, and does not constitute full compensation for loss of land.

231. The African Commission is of the view that the Respondent State did not pay the prompt, full compensation as required by the Constitution. It is of the view that Kenyan law has not been complied with and that though some members of the Endorois community accepted limited monetary compensation that did not mean that they accepted it as full compensation, or indeed that they accepted the loss of their land.

232. The African Commission notes the observations of the United Nations Declaration on the Rights of Indigenous Peoples, which, amongst other provisions for restitutions and compensations, states:

Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

233. In the case of Yakye Axa v Paraguay the Court established that any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations. To this end, Article 63(1) of the American Convention establishes that:

[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

234. The Court said that once it has been proved that land restitution rights are still current, the State must take the necessary actions to return them to the members of the indigenous people claiming them. However, as the Court has pointed out, when a State is unable, on objective and reasonable grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures. This was not the case in respect of the Endorois. The land given them is not of equal quality.

235. The reasons of the Government in the instant Communication are questionable for several reasons including: (a) the contested land is the site of a conservation area, and the Endorois – as the ancestral guardians of that land - are best equipped to maintain its delicate ecosystems; (b) the Endorois are prepared to continue the conservation work begun by the Government; (c) no other community have settled on the land in question, and even if that is the case, the Respondent State is obliged to rectify that situation; (d) the land has not been spoliated and is thus inhabitable; (e) continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois’ way of life, a consequence which clearly tips the proportionality argument on the side of indigenous peoples under international law.

236. It seems also to the African Commission that the amount of £30 as compensation for one’s ancestral home land flies in the face of common sense and fairness.

237. The African Commission notes the detailed recommendations regarding compensation payable to displaced or evicted persons developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. These recommendations, which have been considered and applied by the European Court of Human Rights, set out the following principles for compensation on loss of land: Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the

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129 See case of the Indigenous Community Yakye Axa, para. 149.

130 Indeed, at para 140 of the Sinohoyamau Indigenous Community v. Paraguay case, the Inter-American Court stresses that “Lastly, with regard to the third argument put forth by the State, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the State, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a “public purpose or interest”, which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention, on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.


move and supported during the transition period in the resettlement site; and
(iii) assisted in their efforts to improve upon their former living standards,
income earning capacity and production levels, or at least to restore them. These
recommendations could be followed if the Respondent State is interested in
giving a fair compensation to the Endorois.

238. Taking all the submissions of both parties, the African Commission agrees with the
Complainants that the Property of the Endorois people has been severely encroached upon
and continues to be so encroached upon. The encroachment is not proportionate to any
public need and is not in accordance with national and international law. Accordingly,
the African Commission finds for the Complainants that the Endorois as a distinct people
have suffered a violation of Article 14 of the Charter.

Alleged Violation of Article 17 (2) and (3)
239. The Complainants allege that the Endorois’ cultural rights have been violated on two counts: first, the community has faced systematic restrictions on access to cultural sites and, second, that the cultural rights of the community have been violated by the serious damage caused by the Kenyan Authorities to their pastoralist way of life.

240. The Respondent State denies the allegation claiming that access to the forest areas was always permitted, subject to administrative procedures. The Respondent State also submits that in some instances some communities have allowed political issues to be disguised as cultural practices and in the process they endanger the peaceful coexistence with other communities. The Respondent State does not substantiate who these “communities” or what these “political issues to be disguised as cultural practices” are.

241. The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. Both the Complainants and the Respondent State seem to agree on that. It notes that Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group’s religion, language, and other defining characteristics. 133

242. The African Commission notes that the preamble of the African Charter acknowledges that “civil and political rights cannot be dissociated from economic, social and cultural rights ... social, cultural rights are a guarantee for the enjoyment of civil and political rights”, ideas which influenced the 1976 African Cultural Charter which in its preamble highlights “the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas.” 134 Article 3 of the same Charter states that culture is a source of mutual enrichment for various communities. 135

243. This Commission also notes the views of the Human Rights Committee with regard to the exercise of the cultural rights protected under Article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Committee observes that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.” 136

244. The African Commission notes that a common theme that usually runs through the debate about culture and its violation is the association with one’s ancestral land. It notes that its own Working Group on Indigenous Populations/Communities has observed that dispossession of land and its resources is “a major human rights problem for indigenous peoples.” 137 It further notes that a Report from the Working Group has also emphasised that dispossession “threatens the economic, social and cultural survival of indigenous pastoralist and hunter-gatherer communities.” 138

134 African Cultural Charter (1976), art 6 of the Preamble.
135 Ibid. Article 3.
CCPR/C/21Rev.1/Add5, (1994) Par. 7.
138 Ibid. p.20.
245. In the case of indigenous communities in Kenya, the African Commission notes the critical Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in Kenya that “their livelihoods and cultures have been traditionally discriminated against and their lack of legal recognition and empowerment reflects their social, political and economic marginalization.” He also said that the principal human rights issues they face “relate to the loss and environmental degradation of their land, traditional forests and natural resources, as a result of dispossession in colonial times and in the post-independence period. In recent decades, inappropriate development and conservation policies have aggravated the violation of their economic, social and cultural rights.”

246. The African Commission is of the view that in its interpretation of the African Charter, it has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group. It has thus interpreted Article 17(2) as requiring governments to take measures “aimed at the conservation, development and diffusion of culture,” such as promoting “cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions... promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population.”

247. The African Commission’s WGIP has further highlighted the importance of creating spaces for dominant and indigenous cultures to co-exist. The WGIP notes with concern that:

Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.

248. The African Commission is of the opinion that the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.

249. In its analysis of Article 17 of the African Charter, the African Commission is aware that unlike Articles 8 and 14, Article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people’s right to culture. It further notes that even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community’s cultural rights. Thus, even if the creation of the Game Reserve constitutes a legitimate aim, the Respondent State’s failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Kikuyu and the Masai community pose no harm to the ecosystem of the Game Reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.

250. It is the opinion of the African Commission that the Respondent State has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects. The Respondent State has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the lake.

251. By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois’ right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and (3) of the Charter.

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140 Ibid. Italics added for emphasis.


143 See UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 4(2): States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII, Article 4(e): Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages; International Covenant on Economic, Social and Cultural Rights, Article 15(3).

Alleged Violation of Article 21

252. The Complainants allege that the Endorois community has been unable to access the vital resources in the Lake Bogoria region since their eviction from the Game Reserve.

253. The Respondent State denies the allegation. It argues that it is of the view that the Complainants have immensely benefited from the tourism and mineral prospecting activities, noting, for example:

a) Proceeds from the Game Reserve have been utilised to finance a number of projects in the area, such as schools, health facilities, wells and roads.

b) Since the discovery of ruby minerals in the Weseges area near Lake Bogoria, three companies have been issued with prospecting licences, noting that two out of three companies belong to the community, including the Endorois. In addition, the company which does not consist of the locals, namely Corby Ltd, entered into an agreement with the community, binding itself to deliver some benefits to the latter in terms of supporting community projects. It states that it is evident (from the minutes of a meeting of the community and the company) that the company is ready to undertake a project in the form of an access road to the prospecting site for the community’s and prospecting company’s use.

c) The Respondent State also argues that the mineral prospecting activities are taking place outside the Lake Bogoria Game Reserve, which means that the land is not the subject matter of the Applicants’ complaint.

254. The Respondent State also argues that the community has been holding consultations with Corby Ltd, as evidence by the agreement between them in a clear manifestation of the extent to which the former participants in the decisions touch on the exploitation of the natural resources and the sharing of the benefits emanating therefrom.

255. The African Commission notes that in The Ogoni case the right to natural resources contained within their traditional lands is also vested in the indigenous people, making it clear that a people inhabiting a specific region within a state could also claim under Article 21 of the African Charter. The Respondent State does not give enough evidence to substantiate the claim that the Complainants have immensely benefited from the tourism and mineral prospecting activities.

256. The African Commission notes that proceeds from the Game Reserve have been used to finance a lot of useful projects, ‘a fact’ that the Complainants do not contest. The African Commission, however, refers to cases in the Inter-American Human Rights system to understand this area of the law. The American Convention does not have an equivalent of the African Charter’s Article 21 on the Right to Natural Resources. It therefore reads the right to natural resources into the right to property (Article 21 of the American Convention), and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property. The “test” in both cases makes for a much higher threshold when potential spoliation or development of the land is affecting indigenous land.

257. In the Saramaka case and Inter-American case law, an issue that flows from the IActHR assertion that the members of the Saramaka people have a right to use and enjoy their territory in accordance with their traditions and customs is the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources. In the Saramaka case both the State and the members of the Saramaka people claim a right to these natural resources. The Saramakas claim that their right to use and enjoy all such natural resources is a necessary condition for the enjoyment of their right to property under Article 21 of the Convention. The State argued that all rights to land, particularly its subsoil natural resources, are vested in the State, which it can freely dispose of these resources through concessions to third parties.

258. The IActHR addressed this complex issue in the following order: first, the right of the members of the Saramaka people to use and enjoy the natural resources that lie on and within their traditionally owned territory; second, the State’s grant of concessions for the exploration and extraction of natural resources, including subsoil resources found within Saramaka territory; and finally, the fulfilment of international law guarantees regarding the exploration extraction concessions already issued by the State.

259. First, the IActHR analysed whether and to what extent the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory. The State did not contest that the Saramakas have traditionally used and occupied certain lands for centuries, or that the Saramakas have an “interest” in the territory they have traditionally used in accordance with their customs. The controversy was the nature and scope of the said interest. In accordance with Suriname’s legal and constitutional framework, the Saramakas do not have property rights per se, but rather merely a privilege or permission to use and occupy the land in question. According to Article 41 of the Constitution of Suriname, and Article 2 of its 1986 Mining Decree, ownership rights of all natural resources are vested in the State. For this reason, the State claimed to have an inalienable right to the exploration and exploitation of those resources. On the other hand, the customary laws of the Saramaka people give them a right over all natural resources within its traditional territory.

260. The IActHR held that the cultural and economic survival of indigenous and tribal peoples and their members depends on their access and use of the natural
resources in their territory that are related to their culture and are found therein, and that Article 21 of the Inter-American Convention protects their right to such natural resources. The Court further said that in accordance with their previous jurisprudence as stated in the Yakye Axa and Sawhoyamaxa cases, members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake; hence, the Court opined, the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. It said that the aim and purpose of special measures required on behalf of members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by states.

261. But the Court further said that the natural resources found on and within indigenous and tribal people’s territories that are protected under Article 21 of the American Convention are those natural resources traditionally used and necessary for the very survival, development and continuation of such people’s way of life.147

262. In the Saramaka case, the Court had to determine which natural resources found on and within the Saramaka people’s territory are essential for the survival of their way of life, and are thus protected under Article 21 of the Convention. This has direct relevance to the matter in front of the African Commission, given the ruby mining concessions which were taking place on lands, both ancestral and adjacent to Endorois ancestral land, and which the Complainants allege poisoned the only remaining water source to which the Endorois had access.

263. The African Commission notes the opinion of the IActHR in the Saramaka case as regards the issue of permissible limitations. The State of Suriname had argued that, should the Court recognise a right of the members of the Saramaka people to the natural resources found within traditionally owned lands, this right must be limited to those resources traditionally used for their subsistence, cultural and religious activities. According to the State, the alleged land rights of the Saramakas would not include any interests on forests or minerals beyond what the tribe traditionally possesses and uses for subsistence (agriculture, hunting, fishing etc), and the religious and cultural needs of its people.

264. The Court opined that while it is true that all exploration and extraction activity in the Saramaka territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas, it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within Saramaka territory. The Court observed that this natural resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka community and, consequently, their members. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the Saramakas.

265. Nevertheless, the Court said that protection of the right to property under Article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. The Court also recognised the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival but that these property rights, like many other rights recognised in the Convention, are subject to certain limitations and restrictions. In this sense, Article 21 of the Convention states that the “law may subordinate [the] use and enjoyment [of property] to the interest of society.” But the Court also said that it had previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law as necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society.148

266. The Saramaka case is analogous to the instant case with respect to ruby mining. The IActHR analysed whether gold-mining concessions within traditional Saramaka territory have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka community. According to the evidence submitted before the Court, the Saramaka community, traditionally, did not use gold as part of their cultural identity or economic system. Despite possible individual exceptions, the Saramaka community do not identify themselves with gold nor have they demonstrated a particular relationship with this natural resource, other than claiming a general right to “own everything, from the very top of the trees to the very deepest place that you could go under the ground.” Nevertheless, the Court stated that, because any gold mining activity within Saramaka territory will necessarily affect other natural resources necessary for the survival of the

146 See case of the Indigenous Community Yakye Axa, and the Case of the Indigenous Sawhoyamaxa Community.

147 Ibid.

Saramakas, such as waterways, the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in any possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. The same analysis would apply regarding concessions in the instant case of the Endorois.

267. In the instant case of the Endorois, the Respondent State has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community. The African Commission is aware that the Endorois do not have an attachment to ruby. Nevertheless, it is instructive to note that the African Commission decided in *The Ogoni case* that the right to natural resources contained within their traditional lands vested in the indigenous people. This decision made clear that a people inhabiting a specific region within a state can claim the protection of Article 21. Article 14 of the African Charter indicates that the two-pronged test of 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws' should be satisfied.

268. As far as the African Commission is aware, that has not been done by the Respondent State. The African Commission is of the view the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State. Article 21(2) also concerns the obligations of a State Party to the African Charter in cases of a violation by spoliation, through provision for restitution and compensation. The Endorois have never received adequate compensation or restitution of their land. Accordingly, the Respondent State is found to have violated Article 21 of the Charter.

Alleged Violation of Article 22

269. The Complainants allege that the Endorois’ right to development have been violated as a result of the Respondent State’s creation of a Game Reserve and the Respondent State’s failure to adequately involve the Endorois in the development process.

270. In rebutting the Complainants’ allegations, the Respondent State argues that the task of communities within a participatory democracy is to contribute to the well-being of society at large and not only to care selfishly for one’s own community at the risk of others. It argues that the Baringo and Koibatek Country Councils are not only representing the Endorois, but other clans of the Tugen tribe, of which the Endorois are only a clan. However, to avoid the temptation of one community domineering the other, the Kenyan political system embraces the principle of a participatory model of community through regular competitive election for representatives in those councils. It states that elections are by adult suffrage and are free and fair.

271. The Respondent State also submits it has instituted an ambitious programme for universal free primary education and an agricultural recovery programme, which is aimed at increasing the household incomes of the rural poor, including the Endorois; and initiated programmes for the equitable distribution of budgetary resources through the Constituency Development Fund, Constituency Bursary Funds, Constituency Aids Committees and District Roads Board.

272. It adds that for a long time, tourism in Kenya has been on the decline. This, it argues, has been occasioned primarily by the ethnic disturbance in the Coast and the Rift Valley provinces which are the major tourist circuits in Kenya, of which the complainants land falls and therefore it is expected that the Country Councils of Baringo and Koibatek were affected by the economic down turn.

273. Further rebutting the allegations of the Complainants, the Respondent State argues that the Complainants state in paragraph 239 of their Merits brief that due to lack of access to the salt licks and their usual pasture, their cattle died in large numbers, thereby making them unable to pay their taxes and that, consequently, the government took away more cattle in tax; and that they were also unable to pay for primary and secondary education for their children is utterly erroneous as tax is charged on income. According to the Respondent State it argues that if the Endorois were not able to raise income which amounts to the taxable brackets from their animal husbandry, they were obviously not taxed. The Respondent State adds that this allegation is false and intended to portray the Government in bad light.

274. The Respondent State argues that the Complainants allege that the consultations that took place were not in ‘good faith’ or with the objective of achieving agreement or consent, and furthermore that the Respondent State failed to honour the promises made to the Endorois community with respect to revenue sharing from the Game Reserve, having a certain percentage of jobs, relocation to fertile land and compensation. The Respondent State accuses the Complainants of attempting to mislead the African Commission because the County Council collects all the revenues in the case of Game Reserves and such revenues are ploughed back to the communities within the jurisdictions of the County Council through development projects carried out by the County Council.

275. Responding to the allegation that the Game Reserve made it particularly difficult for the Endorois to access basic herbal medicine necessary for maintaining a healthy life, the Respondent State argues that the prime purpose of gazetting the National Reserve is conservation. Also responding to the claim that the Respondent State has granted several mining and logging concessions to

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149 *The Ogoni Case* (2001), paras 56-58.
third parties, and from which the Endorois have not benefited. The Respondent State asserts that the community has been well informed of those prospecting for minerals in the area. It further states that the community’s mining committee had entered into an agreement with the Kenyan company prospecting for minerals, implying that the Endorois are fully involved in all community decisions.

276. The Respondent State also argues that the community is represented in the Country Council by its elected councillors, therefore presenting the community the opportunity to always be represented in the forum where decisions are made pertaining to development. The Respondent State argues that all the decisions complained about have had to be decided upon by a full council meeting.

277. The African Commission is of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants’ arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.\(^{150}\)

278. In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states “...the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available”. Freedom of choice must be present as a part of the right to development.\(^{151}\)

279. The Endorois believe that they had no choice but to leave the Lake and when some of them tried to reoccupy their former land and houses they were met with violence and forced relocations. The Complainants argue this lack of choice directly contradicts the guarantees of the right to development. The African Commission also notes a Report produced for the UN Working Group on Indigenous Populations requiring that “indigenous peoples are not coerced, pressured or intimidated in their choices of development.”\(^{152}\) Had the Respondent State allowed conditions to facilitate the right to development as in the African Charter, the development of the Game Reserve would have increased the capabilities of the Endorois, as they would have had a possibility to benefit from the Game Reserve. However, the forced evictions eliminated any choice as to where they would live.

280. The African Commission notes the Respondent State’s submissions that the community is well informed of those prospecting for minerals, implying that the Endorois have no say in the management of their ancestral land. The EWC, the representative body of the Endorois community, have been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. The Complainants further allege that the failure to register the EWC has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent ‘on behalf’ of the community.

281. The African Commission notes that its own standards state that a Government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.\(^{153}\) The African Commission agrees with the Complainants that the consultations that the Respondent State did undertake with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfill the African Commission’s standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a fait accompli, and not given an opportunity to shape the policies or their role in the Game Reserve.

282. Furthermore, the community representatives were in an unequal bargaining position, an accusation not denied or argued by the Respondent State, being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the

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\(^{153}\) Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities (Twentieth-Eighth Session, 2003). See also ILO Convention 169 which states: “Consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”
community. It also agrees with the Complainants that the inadequacy of the consultation undertaken by the Respondent State is underscored by Endorois’ actions after the creation of the Game Reserve. The Endorois believed, and continued to believe even after their eviction, that the Game Reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry on to their land. In failing to understand their permanent eviction, many families did not leave the location until 1986.

283. The African Commission wishes to draw the attention of the Respondent State that Article 2(3) of the UN Declaration on Development notes that the right to development includes “active, free and meaningful participation in development.”\(^{154}\) The result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan Authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.

284. The case of the Yakye Axa community is instructive. The Inter-American Court found that the members of the Yakye Axa community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that were the subject matter of proceedings in front of the Court as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim.

285. The IActHR noted that, according to statements from members of the Yakye Axa community during the public hearing, the members of that community might have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

286. The precariousness of the Endorois’ post-dispossession settlement has had similar effects. No collective land of equal value was ever accorded (thus failing the test of ‘in accordance with the law’, as the law requires adequate compensation). The Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area’s medicinal salt licks or traditional water sources. Few Endorois got individual titles in the Mochongoi Forest, though the majority live on the arid land on the outskirts of the Reserve.\(^{155}\)

287. In the case of the Yakye Axa community, the Court established that the State did not guarantee the right of the members of the Yakye Axa community to communal property. The Court deemed that this had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses.

288. In the instant Communication in front of the African Commission, video evidence from the Complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.\(^{156}\) The African Commission is of the view that the Respondent State has done very little to provide necessary assistance in these respects.

289. Closely allied with the right to development is the issue of participation. The IActHR has stated that in ensuring the effective participation of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with the said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.

290. In the instant Communication, even though the Respondent State says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the Respondent State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and commencing their eviction. The Respondent State did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered

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155 See U.N. Doc. E/C.12/1999/5. The right to adequate food (Art. 11), (20th session, 1999), para. 13, and U.N. Doc. HR/GEN/1 Rev.7 at 117. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para. 16. In these documents the arguments is made that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, the Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.

156 See, for example, the affidavit of Richard Yegon, one of the Elders of the Endorois community.
In relation to benefit sharing, the IActHR in the Saramaka case said that after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes – the reason, in fact why they are in front of the African Commission.

291. Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

292. From the oral testimony and even the written brief submitted by the Complainants, the African Commission is informed that the Endorois representatives who represented the community in discussions with the Respondent State were illiterates, impairing their ability to understand the documents produced by the Respondent State. The Respondent State did not contest that statement. The African Commission agrees with the Complainants that the Respondent State did not ensure that the Endorois were accurately informed of the nature and consequences of the process, a minimum requirement set out by the Inter-American Commission in the Dann case.157

293. In this sense, it is important to note that the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People observed that: “[w]herever [large-scale projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. [...] The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.”158 Consequently, the U.N. Special Rapporteur determined that “[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects.”159

In Mary and Carrie Dann v. USA, the IAcDR noted that convening meetings with the Community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation. To have a process of consent that is fully informed “requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.” Mary and Carrie Dann v. USA (2002).

The UNCERD has observed that “[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee’s general recommendation XXII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought”: G. UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty Second Session, 2003), U.N. Doc. CERD/C/ECU/2, 2 June 2003, para. 16.

294. In relation to benefit sharing, the IActHR in the Saramaka case said that benefit sharing is vital both in relation to the right to development and by extension the right to own property. The right to development will be violated when the development in question decreases the well-being of the community. The African Commission similarly notes that the concept of benefit-sharing also serves as an important indicator of compliance for property rights; failure to duly compensate (even if the other criteria of legitimate aim and proportionality are satisfied) result in a violation of the right to property.

295. The African Commission further notes that in the 1990 ‘African Charter on Popular Participation in Development and Transformation’ benefit sharing is key to the development process. In the present context of the Endorois, the right to obtain “just compensation” in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

296. In this sense, the Committee on the Elimination of Racial Discrimination has recommended not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories but also “that the equitable sharing of benefits to be derived from such exploitation be ensured.” In the instant case, the Respondent State should ensure mutually acceptable benefit sharing. In this context, pursuant to the spirit of the African Charter benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community.

297. The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained. It is also convinced that they have faced substantive losses - the actual loss in well-being and the denial of benefits accruing from the Game Reserve.
Furthermore, the Endorois have faced a significant loss in choice since their eviction from the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the Game Reserve.

298. The African Commission is of the view that the Respondent State bears the burden for creating conditions favourable to a people’s development. It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.

Recommendations

1. In view of the above, the African Commission finds that the Respondent State is in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter. The African Commission recommends that the Respondent State:

(a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land.

(b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.

(c) Pay adequate compensation to the community for all the loss suffered.

(d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

(e) Grant registration to the Endorois Welfare Committee.

(f) Engage in dialogue with the Complainants for the effective implementation of these recommendations.

(g) Report on the implementation of these recommendations within three months from the date of notification.

2. The African Commission avails its good offices to assist the parties in the implementation of these recommendations.
Seabed Dispute Chamber of the International Tribunal of the Law of the Sea

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area
Advisory Opinion of 1 February 2011
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ADVISORY OPINION

Present: President TREVES; Judges MAROTTA RANGEL, NELSON, CHANDRASEKHARA RAO, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN; Registrar GAUTIER.

On Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area,

THE SEABED DISPUTES CHAMBER,

composed as above,

gives the following Advisory Opinion:

Introduction

I. The Request

1. The questions on which the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereinafter "the Chamber") has been requested are set forth in decision ISBA/16/C/13 adopted by the Council of the International Seabed Authority (hereinafter "the Council") on 6 May 2010 at its sixteenth session. By letter dated 11 May 2010, transmitted electronically to the Registry of the Tribunal on 14 May 2010, the Secretary-General of the International Seabed Authority (hereinafter "the Secretary-General") officially communicated to the Chamber the decision taken by the Council. The original of that letter was received in the Registry on 17 May 2010. Certified true copies of the English and French versions of the Council's decision were forwarded by the Legal Counsel of the International Seabed Authority (hereinafter "the Legal Counsel") on 8 June 2010 and received in the Registry on the same date. The decision of the Council reads:

The Council of the International Seabed Authority,

Considering the fact that developmental activities in the Area have already commenced,

Decides, in accordance with Article 191 of the United Nations Convention on the Law of the Sea ("the Convention"), to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, pursuant to Article 131 of the Rules of the Tribunal, to render an advisory opinion on the following questions:


2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

2. The Request was entered in the List of cases as No. 17 and the case was named "Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area".

3. In his letter of 11 May 2010, the Secretary-General informed the Chamber of the appointment of the Legal Counsel as the representative of the International Seabed Authority (hereinafter "the Authority") for the proceedings.

II. Events leading to the Request

4. The Chamber considers it necessary to describe the events that led to the request for an advisory opinion:

- On 10 April 2008, the Authority received two applications for approval of a plan of work for exploration in the areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing States pursuant to Annex III, article 8, of the United Nations
Convention on the Law of the Sea (hereinafter “the Convention”). These applications were submitted by Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga);

- These applications were submitted to the Legal and Technical Commission of the Authority. On 5 May 2009, the applicants submitted to the Authority a request that consideration of the applications should be postponed. At the fifteenth session of the Authority, held from 25 May to 5 June 2009, the Legal and Technical Commission decided to defer further consideration of the item;

- On 1 March 2010, the Republic of Nauru transmitted to the Secretary-General a proposal, set out in document ISBA/16/C/6, to seek an advisory opinion from the Chamber on a number of specific questions regarding the responsibility and liability of sponsoring States;

- In support of its proposal, Nauru submitted, inter alia, the following considerations:

In 2008 the Republic of Nauru sponsored an application by Nauru Ocean Resources Inc. for a plan of work to explore for polymetallic nodules in the Area. Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment). Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru’s sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). Unlike terrestrial mining, in which a State generally only risks losing that which it already has (for example, its natural environment), if a developing State can be held liable for activities in the Area, the State may potentially face losing more than it actually has. (ISBA/16/C/6, paragraph 1);

Ultimately, if sponsoring States are exposed to potential significant liabilities, Nauru, as well as other developing States, may be precluded from effectively participating in activities in the Area, which is one of the purposes and principles of Part XI of the Convention, in particular as provided for in article 148; article 150, subparagraph (c); and article 152, paragraph 2. As a result, Nauru considers it crucial that guidance be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability, so that developing States can assess whether it is within their capabilities to effectively mitigate such risks and in turn make an informed decision on whether or not to participate in activities in the Area. (ISBA/16/C/6, paragraph 5);

- Nauru’s proposal was included in the agenda for the sixteenth session of the Council of the Authority, during which intensive discussions on this agenda item were held at the 155th, 160th and 161st meetings;

- The Council decided not to adopt the proposal as formulated by Nauru. In view of the wishes of many participants in the debate, it decided to request an advisory opinion on three more abstract but concise questions;

- These questions were formulated in decision ISBA/16/C/13, adopted by the Council at its 161st meeting on 6 May 2010. As indicated by the Authority in its written statement and at the hearing, the decision adopted by the Council on 6 May 2010 was taken “without a vote” and “without objection” (written statement of the Authority, paragraph 2.4; ITLOS/PV.2010/1/Rev.1, p. 10, lines 16-21).

III. Chronology of the procedure


6. By letter dated 18 May 2010, pursuant to article 4 of the Agreement on Cooperation and Relationship between the United Nations and the International
Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the request for an advisory opinion.

7. By Order dated 18 May 2010, pursuant to article 133, paragraph 2, of the Rules, the President decided that the Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority (hereinafter “the Assembly”) were considered likely to be able to furnish information on the questions submitted to the Chamber for an advisory opinion. Accordingly, the President invited the States Parties, the Authority and the aforementioned intergovernmental organizations to present written statements on those questions. By the same Order, in accordance with article 133, paragraph 3, of the Rules, the President fixed 9 August 2010 as the time-limit within which written statements on those questions might be submitted to the Chamber. In the Order, in accordance with article 133, paragraph 4, of the Rules, the President further decided that oral proceedings would be held and fixed 14 September 2010 as the date for the opening of the hearing. States Parties, the Authority and the aforementioned intergovernmental organizations were invited to participate in the hearing and to indicate to the Registrar, not later than 3 September 2010, their intention to make oral statements.

8. Article 191 of the Convention requires the Chamber to give advisory opinions “as a matter of urgency”. In the present case, the time-limits for the submission of written statements and the date of the opening of the hearing, as set out in the Orders of the President, were fixed with a view to meeting this requirement.

9. By Order dated 28 July 2010, in light of a request submitted to the Chamber, the President extended the time-limit for the submission of written statements to 19 August 2010.

10. By letter dated 30 July 2010, pursuant to article 131 of the Rules, the Legal Counsel transmitted to the Chamber a dossier containing documents in support of the Request. The dossier was posted on the Tribunal’s website.

11. Within the time-limit fixed by the President, written statements were submitted by the following 12 States Parties, which are listed in the order in which their statements were received: the United Kingdom, Nauru, the Republic of Korea, Romania, the Netherlands, the Russian Federation, Mexico, Germany, China, Australia, Chile, and the Philippines. Within the same time-limit, written statements were also submitted by the Authority and two organizations, namely, the Inter-oceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources.

12. Upon receipt of those statements, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies thereof to the States Parties, the Authority and the organizations that had submitted written statements. On 19 August 2010, pursuant to article 134 of the Rules, the written statements submitted to the Chamber were made accessible to the public on the Tribunal’s website.

13. On 17 August 2010, the Registry received a statement submitted jointly by Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature. The statement was accompanied by a petition from these two non-governmental organizations in which they requested permission to participate in the advisory proceedings as amici curiae. At the request of the President, by separate letters dated 27 August 2010, the Registrar informed those organizations that their statement would not be included in the case file since it had not been submitted under article 133 of the Rules; it would, however, be transmitted to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements, which would be informed that the document was not part of the case file and that it would be posted on a separate section of the Tribunal’s website. By communication dated 27 August 2010, the States Parties, the Authority and the intergovernmental organizations in question were so informed.

14. On 10 September 2010, the Chamber, having considered a petition from Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature requesting permission to participate in the advisory proceedings as amici
curiae, decided not to grant that request. The decision was communicated to the two organizations on the same day by a letter from the President.

15. By e-mail dated 26 August 2010, the Legal Counsel transmitted to the Registrar, at the latter’s request, a note containing a summary of potential environmental impacts of seabed mining. This document was posted on the Tribunal’s website.

16. By letter dated 1 September 2010, after the expiry of the time-limit for the submission of written statements, the United Nations Environment Programme submitted a written statement that was received by the Registry on 2 September 2010. The President nevertheless decided that the statement should be included in the case file. Accordingly, on 3 September 2010, the Registrar transmitted an electronic copy of that document to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements. The document was also posted on the Tribunal’s website.

17. Within the time-limit fixed in the Order of the President of 18 May 2010, nine States Parties expressed their intention to participate in the oral proceedings, namely, Argentina, Chile, Fiji, Germany, Mexico, Nauru, the Netherlands, the Russian Federation and the United Kingdom. Within the same time-limit, the Authority and two organizations, namely, the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Union for Conservation of Nature and Natural Resources also expressed their intention to participate in the oral proceedings.

18. Prior to the opening of the oral proceedings, the Chamber held initial deliberations on 10, 13 and 14 September 2010.

19. At four public sittings held on 14, 15 and 16 September 2010, the Chamber heard oral statements, in the following order, by:

For the International Seabed Authority:
- Mr Nii Odunton, Secretary-General,
- Mr Michael Lodge, Legal Counsel,
- Mr Kening Zhang, Senior Legal Officer, and
- Ms Gwenaelle Le Gurun, Legal Officer;

For the Federal Republic of Germany:
- Ms Susanne Wasum-Rainer, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office;

For the Kingdom of the Netherlands:
- Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs;

For the Argentine Republic:
- Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser, Ministry of Foreign Affairs International Trade and Worship;

For the Republic of Chile:
- Mr Roberto Plaza, Minister Counselor, Consul General of Chile in Hamburg;

For the Republic of Fiji:
- Mr Pio Bosco Tikoisuva, High Commissioner of Fiji to the United Kingdom of Great Britain and Northern Ireland;

For the United Mexican States:
- Mr Joel Hernández G., Ambassador, Legal Adviser, Ministry of Foreign Affairs;

For the Republic of Nauru:
- Mr Jacob, First Secretary, Nauru High Commission in Suva (Fiji), and
- Mr Robert Haydon, Advisor;

For the United Kingdom of Great Britain and Northern Ireland:
- Sir Michael Wood KCMG, Member of the English Bar and Member of the International Law Commission;

For the International Seabed Authority:
For the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO):
- Mr Ehrlich Desa, Deputy Executive Secretary;
Ms Cymie R. Payne, Member of the Bar of the State of California, the Commonwealth of Massachusetts, and the Supreme Court of the United States of America, Counsel,

Mr Robert A. Makgill, Barrister and Solicitor of the High Court of New Zealand, Counsel, and

Mr Donald K. Anton, Barrister and Solicitor of the Supreme Court of Victoria, the Supreme Court of New South Wales and the High Court of Australia; Member of the Bar of the State of Missouri, the State of Idaho, and the Supreme Court of the United States; and Senior Lecturer in International Law at the Australian National University College of Law, Counsel.

20. The hearing was broadcast over the internet as a webcast.

21. By letter dated 13 September 2010, pursuant to article 76, paragraph 1, of the Rules, the Registrar transmitted to the Authority, prior to the hearing, a list of the following points that the Chamber wished the Authority to address:

1. With reference to article 153, paragraph 4, of the Convention, how has the Authority been exercising control over activities in the Area for the purpose of securing compliance with the relevant provisions of the Convention and what experience has the Authority accumulated over the years in this regard?

2. In what form has assistance been provided so far to the Authority by sponsoring States, including the case of various States sponsoring one contractor, for the purpose of securing compliance with provisions referred to in article 153, paragraph 4, and what experience has the Authority accumulated over the years in this regard?

3. What are the activities in the Area, including activities associated with exploration and exploitation, which so far have been controlled by the Authority?

4. Would it be possible for the Authority to provide the certificates of sponsorship regarding the contracts it has concluded with contractors, as well as copies of the sponsorship agreements if available?

22. Responses to points 1 to 3 of this list were provided in the oral statements made on behalf of the Authority during the sitting held on 14 September 2010. By letter dated 17 September 2010, the Legal Counsel communicated information on point 4 of the list. This letter was posted on the Tribunal’s website.

23. At the request of the President, by letter dated 13 October 2010, the Registrar asked the Legal Counsel to provide the Chamber with information on the various phases of the process of exploration and exploitation of resources in the Area (collection, transportation to the surface, initial treatment, etc.), as well as information on the technology available. The Legal Counsel provided this information by letter dated 15 November 2010. The information was posted on the Tribunal’s website.

24. As indicated by the President at the opening of the oral proceedings, one Member of the Chamber, Judge Chandrasekha Rao, was prevented by illness from sitting on the bench during the hearing. However, with the approval of the Chamber, he participated in the subsequent deliberations on the advisory opinion.

IV. Role of the Chamber in advisory proceedings

25. The Chamber is a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.

26. The advisory jurisdiction is connected with the activities of the Assembly and the Council, the two principal organs of the Authority. The Authority is the international organization established by the Convention in order to "organize and control activities in the Area" (article 157, paragraph 1, of the Convention and section 1, paragraph 1, of the Annex to the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (hereinafter "the 1994 Agreement"). In order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber
is part of the system in which the Authority’s organs operate, but its task within that system is to act as an independent and impartial body.

27. According to article 159, paragraph 10, and article 191 of the Convention, the advisory function of the Chamber concerns legal questions submitted by the Assembly and by the Council. Advisory opinions requested under article 159, paragraph 10, of the Convention serve to assist the Assembly during its decision-making process. The Chamber’s advisory jurisdiction under article 191 of the Convention concerns “legal questions arising within the scope” of the activities of either the Assembly or the Council.

28. As provided in article 187 of the Convention, the Chamber also has contentious jurisdiction to settle different categories of disputes referred to in that article with respect to activities in the Area.

29. The functions of the Chamber, set out in Part XI of the Convention, are relevant for the good governance of the Area. The Secretary-General made this point at the hearing: “The Chamber has a high responsibility to ensure that the provisions of Part XI of the Convention and the 1994 Agreement are implemented properly and the regime for deep seabed mining as a whole is properly interpreted and applied” (ITLOS/PV.2010/1/Rev.1, p. 5, lines 16-19).

30. The Chamber is mindful of the fact that by answering the questions it will assist the Council in the performance of its activities and contribute to the implementation of the Convention’s regime.

V. Jurisdiction

31. The Chamber will first determine whether it has jurisdiction to give the advisory opinion requested by the Council. The conditions to be met in order to establish the jurisdiction of the Chamber are set out in article 191 of the Convention which reads as follows:

The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

32. As regards the present proceedings, the conditions to be met are: (a) that there is a request from the Council; (b) that the request concerns legal questions; and (c) that these legal questions have arisen within the scope of the Council’s activities.

33. As to the first condition, the Chamber observes that article 191 of the Convention confers on the Assembly and the Council the power to request advisory opinions from the Chamber. In the present case, the decision to request an advisory opinion from the Chamber was adopted by the Council.

34. Rule 56, paragraph 1, of the Rules of Procedure of the Council provides that, as a general rule, decision-making in the Council should be by consensus. Section 3, paragraph 2, of the Annex to the 1994 Agreement states that “[a]s a general rule, decision-making in the organs of the Authority should be by consensus”. According to article 161, paragraph 8 (e), of the Convention and rule 59 of the Rules of Procedure of the Council, “consensus” means the absence of any formal objection.

35. In its written statement, the Authority declared that “[t]he decision of the Council to request the Chamber for an advisory opinion was taken without objection and can thus be regarded as having been taken by consensus”. The information provided by the Authority also shows that the Council’s decision was taken in accordance with the internal rules of procedure of the Authority.

36. The Chamber thus concludes that there is a valid request by the Council.

37. With respect to the second condition, the Chamber must satisfy itself that the advisory opinion requested by the Council concerns “legal questions” within the meaning of article 191 of the Convention.
38. In examining this requirement, the Chamber observes that the three questions before it relate, *inter alia*, to “the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area”; “the extent of liability of a State Party for any failure to comply with the provisions of the Convention ... by an entity whom it has sponsored”; and the “measures that a sponsoring State must take in order to fulfill its responsibility under the Convention”.

39. The questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice (hereinafter “the ICJ”) has stated that “questions ‘framed in terms of law and rais[ing] problems of international law ... are by their very nature susceptible of a reply based on law’” (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, paragraph 25; Western Sahara, Advisory Opinion, ICJ Report 1975*, p. 12, at paragraph 15).

40. For these reasons, the Chamber concludes that the questions raised by the Council are of a legal nature.

41. As to the third condition, article 191 of the Convention also requires that an advisory opinion must concern legal questions “arising within the scope of [the] activities” of the Assembly or the Council. In the present case, it is for the Chamber to determine whether the legal questions submitted to it arose within the scope of the activities of the Council. Therefore, it is pertinent to examine the provisions of the Convention and of the 1994 Agreement that define the Council’s competence.

42. The powers and functions of the Council are set out in Part XI, section 4, of the Convention and, in particular, article 162 thereof, read together with the 1994 Agreement. Article 162, paragraphs 1 and 2 (a), of the Convention reads as follows:

1. The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.

2. In addition, the Council shall:

   (a) supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance.

43. Section 3, paragraph 11 (a), read together with section 1, paragraphs 6 to 11, of the 1994 Agreement, entrusts the Council with the function of approving plans of work in accordance with Annex III, article 6, of the Convention. Article 162, paragraph 2 (f), of the Convention confers on the Council the power to “exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority”.

44. In light of these provisions, the Chamber concludes that the legal questions before it fall within the scope of the activities of the Council, since they relate to the exercise of its powers and functions, including its power to approve plans of work.

45. For the aforementioned reasons, the Chamber finds that it has jurisdiction to entertain the request for an advisory opinion submitted to it by the Council.

VI. Admissibility

46. The Chamber now turns to questions of admissibility.

47. Some of the participants in the proceedings have drawn attention to the wording of article 191 of the Convention, which states that the Chamber “shall give” advisory opinions, and have compared it to article 65, paragraph 1, of the Statute of the ICJ, which states that the Court “may give” an advisory opinion. In light of this difference, they have argued that, contrary to the discretionary powers of the ICJ, the Chamber, once it has established its jurisdiction, has no discretion to decline a request for an advisory opinion.

48. While noting the difference between the wording of article 191 of the Convention and article 65 of the Statute of the ICJ, the Chamber does not consider it
necessary to pronounce on the consequences of that difference with respect to admissibility in the present case.

49. The Chamber deems it appropriate to render the advisory opinion requested by the Council and will proceed accordingly.

VII. Applicable law and procedural rules

50. The Chamber will now proceed to indicate the applicable law.

51. Article 293, paragraph 1, of the Convention and article 38 of the Statute of the Tribunal (hereinafter "the Statute") set out the law to be applied by the Chamber.

52. Article 293, paragraph 1, of the Convention, reads:

A court or tribunal having jurisdiction under this section [section II of Part XV of the Convention] shall apply this Convention and other rules of international law not incompatible with this Convention.

53. Article 38 of the Statute reads:

In addition to the provisions of article 293, the Chamber shall apply:
(a) the rules, regulations and procedures of the Authority adopted in accordance with the Convention; and
(b) the terms of contracts concerning activities in the Area in matters relating to those contracts.

54. It should be noted that, in accordance with article 2, paragraph 1, of the 1994 Agreement, the provisions of that Agreement and Part XI of the Convention "shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail".

55. The procedural rules applicable during advisory proceedings before the Chamber are set out in article 40, paragraph 2, of the Statute and section H ("Advisory proceedings") of the Rules, in particular article 130, paragraph 1, thereof.

56. Article 40, paragraph 2, of the Statute reads:

In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.

Article 130, paragraph 1, of the Rules reads:

In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

VIII. Interpretation

In general

57. Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3 entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"). These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the "Volga" Case (ITLOS Reports 2002, p. 10, at paragraph 77). The ICJ and other international courts and tribunals have stated this view on a number of occasions (see, for example, Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, p. 6; at paragraph 41; Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, ICJ Reports 1996, p. 803, at paragraph 23; Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, ICJ Reports 2004, p. 12, at paragraph 83; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, paragraphs 64-65; Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Arbitral Tribunal, Award of 14 February 1985, UNRIPA...
58. In light of the foregoing, the rules of the Vienna Convention on the interpretation of treaties apply to the interpretation of provisions of the Convention and the 1994 Agreement.

59. The Chamber is also required to interpret instruments that are not treaties and, in particular, the Regulations adopted by the Authority, namely, the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area of 2000 (hereinafter “the Nodules Regulations”), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area of 2010 (hereinafter “the Sulphides Regulations”).

60. The fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation. In the specific case before the Chamber, the analogy is strengthened because of the close connection between these texts and the Convention. The ICJ seems to have adopted a similar approach when it states in its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* that the rules on interpretation of the Vienna Convention “may provide guidance” as regards the interpretation of resolutions of the United Nations Security Council (ICJ, 22 July 2010, paragraph 94).

61. In interpreting the provisions of the Convention, it should be borne in mind that it is a multilingual treaty: the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic (article 320 of the Convention). It should also be noted that these six languages are also official languages of the Council and that the meaning of key terms

62. The relevant provision to be considered in the present context is article 33, paragraph 4, of the Vienna Convention. According to this provision, where no particular text prevails according to the treaty and where “a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.

63. An examination of the relevant provisions of the Convention reveals that the terminology used in the different language versions corresponds to the objective stated by the Drafting Committee of the Third United Nations Conference on the Law of the Sea, namely, “to improve linguistic concordance, to the extent possible, and to achieve juridical concordance in all cases” (Report of the Chairman of the Drafting Committee, 2 March 1981, A/CONF.62/L.67/Rev.1, in Third United Nations Conference on the Law of the Sea, Official Records, vol. XV, p.145, at paragraph 8). There are certain inconsistencies in the terminology used within the same language version and as between language versions. In the view of the Chamber, there is, however, no difference of meaning between the authentic texts of the relevant provisions of the Convention. A comparison between the terms used in these provisions of the Convention is nonetheless useful in clarifying their meaning.

64. The meaning of the term “responsibility” as used in the English text of article 139, paragraphs 1 and 2; article 235, paragraph 1; and Annex III, article 4, paragraph 4, of the Convention (“States Parties shall have the responsibility to ensure”; “States are responsible for the fulfilment”; “States shall ... have the responsibility to ensure”) does not correspond to the meaning of the same term in article 304 of the Convention (“responsibility and liability for damage”) and Annex III, article 22, of the Convention (“responsibility or liability for any damage”).
In article 139, article 235, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention, the term “responsibility” means “obligation”. This emerges not only from the context of the aforementioned articles, but also from a comparison with other linguistic versions. The Spanish text uses the expression “estarán obligados” and the French text uses the more indirect but equally explicit expression “il incombe de”. Similarly, the Arabic text uses the expression “تَكون مَرْهَمة”. The Chinese text uses the term “义务” and the Russian text the term “обязательство”.

In the view of the Chamber, in the provisions cited in the previous paragraph, the term “responsibility” refers to the primary obligation whereas the term “liability” refers to the secondary obligation, namely, the consequences of a breach of the primary obligation. Notwithstanding their apparent similarity to the English term “responsibility”, the French term “responsabilité” and the Spanish term “responsabilidad”, respectively, indicate also the consequences of the breach of the primary obligation. The same applies to the Arabic term “مسؤولية”, the Chinese term “义务” and the Russian term “ответственность”. The fact that the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter “the ILC Articles on State Responsibility”), adopted in 2001, give the term “responsibility” a meaning corresponding to “responsabilité” and “responsabilidad”, “مسؤولية”, “义务” and “ответственность” may create confusion, which can be avoided by comparing the English text of article 139, article 235, and Annex III, article 4, paragraph 4, of the Convention with the other language versions.

It should be further observed that in article 235, paragraph 3, and Annex III, article 22, of the Convention, the English version of which uses the terms “responsibility and liability” together, the term “responsibility” has the same meaning as in the ILC Articles on State Responsibility. This is clear from a comparison of the English version with the French and Spanish versions, which use only the term “responsabilité” and “responsabilidad”. Similarly, the Arabic, Chinese and Russian versions use the term “مسؤولية”, “義務” and “ответственность”, respectively.

This analysis of the terms used in the provisions of the Convention provides a basis for determining their meaning as used in the three Questions.

Thus, in Question 1, the expression “legal responsibilities and obligations” refers to primary obligations, that is, to what sponsoring States are obliged to do under the Convention.

In Question 2, the English term “liability” refers to the consequences of a breach of the sponsoring State’s obligations.

In Question 3, as in Question 1, “responsibility” means “obligation”. The terms “responsabilité” and “responsabilidad”, used, respectively, in the French and Spanish versions of Question 3, are translations of the English term “responsibility” and were apparently introduced for the sake of uniformity. However, in light of the English version and of the terminology used in the French and Spanish versions of article 139 of the Convention, the meaning intended is that of “obligation”. Similarly, the Arabic, Chinese and Russian versions of Question 3 use the term “ trách nhiệm”, “义务” and “ответственность”, respectively.

Question 1

The first question submitted to the Chamber is as follows:


This question concerns the obligations of sponsoring States. Before examining the provisions of the Convention, the 1994 Agreement as well as the Nodules Regulations and the Sulphides Regulations (hereinafter “the Convention...
The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contracts and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary. This is provided for in Annex III, article 4, paragraph 3, of the Convention and confirmed in regulation 11, paragraph 2, of the Nodules Regulations and the Sulphides Regulations.

I. Sponsorship

74. The notion of “sponsorship” is a key element in the system for the exploration and exploitation of the resources of the Area. As required to be carried out by the enterprises and, in association with the Authority, by States Parties or state enterprises, it is a condition for the exploration and exploitation of the resources of the Area that States Parties or state enterprises submit to the Authority documents of sponsorship evidencing that the entities to which they control or are controlled, if they are natural or legal persons, are also sponsors. The Authority’s Regulations that apply to such entities and through the implementation of the obligations set out in Part XI further confirms the requirement of the sponsoring States of their obligations under the Convention and related instruments.

75. As subjects of international law, States Parties engaged in deep seabed mining under the Convention are directly bound by the obligations set out therein. Consequently, there is no reason to apply to them the requirement of sponsorship set out therein. Article 153, paragraph 2(b), of the Nodules Regulations and the Sulphides Regulations confirm that the requirement of sponsorship does not apply to States. This point is further supported by Annex III, article 4, paragraph 5, of the Convention which reads as follows: “The procedures for assessing the qualifications of States Parties which are applicants shall take into account their character as States”.

76. The practice of the Authority, however, indicates that at least two contractor States, when applying for a contract, considered it necessary to submit to the Authority documents of sponsorship.

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79. The notion of “sponsorship” is a key element in the system for the exploration and exploitation of the resources of the Area. As required to be carried out by the enterprises and, in association with the Authority, by States Parties or state enterprises, it is a condition for the exploration and exploitation of the resources of the Area that States Parties or state enterprises submit to the Authority documents of sponsorship evidencing that the entities to which they control or are controlled, if they are natural or legal persons, are also sponsors. The Authority’s Regulations that apply to such entities and through the implementation of the obligations set out in Part XI further confirms the requirement of the sponsoring States of their obligations under the Convention and related instruments.

80. The practice of the Authority, however, indicates that at least two contractor States, when applying for a contract, considered it necessary to submit to the Authority documents of sponsorship.
United Nations Conference on the Law of the Sea, obtained their contracts for exploration through the simplified procedure set out in section 1, paragraph 6(a)(ii) of the Annex to the 1994 Agreement. As “certifying States” under paragraph 1(c) of Resolution II, they stand in the same relationship to a pioneer investor as would a sponsoring State stand to a contractor pursuant to Annex III, article 4, of the Convention.

II. “Activities in the Area”

82. Question 1 concerns the responsibilities and obligations of sponsoring States in respect of “activities in the Area”. This expression is defined in article 1, paragraph 1 (3), of the Convention as “all activities of exploration for, and exploitation of, the resources of the Area”. According to article 133 (a) of the Convention, for the purposes of Part XI, the term “resources” means “all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules”. The two definitions, however, do not indicate what is meant by “exploration” and “exploitation”. It is important to note that according to article 133 (b), “resources, when recovered from the Area, are referred to as ‘minerals’”.

83. Some indication of the meaning of the term “activities in the Area” may be found in Annex IV, article 1, paragraph 1, of the Convention. It reads as follows:

The Enterprise is the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.

84. This provision distinguishes “activities in the Area” which the Enterprise carries out directly pursuant to article 153, paragraph 2(a), of the Convention, from other activities with which the Enterprise is entrusted, namely, the transporting, processing and marketing of minerals recovered from the Area. Consequently, the latter activities are not included in the notion of “activities in the Area” referred to in Annex IV, article 1, paragraph 1, of the Convention.

85. Article 145 of the Convention, which prescribes the taking of “[n]ecessary measures ... with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities”, indicates the activities in respect of which the Authority should adopt rules, regulations and procedures. These activities include: “drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities”. In the view of the Chamber, these activities are included in the notion of “activities in the Area”.

86. Annex III, article 17, paragraph 2(f), of the Convention, which sets out the criteria for the rules, regulations and procedures concerning protection of the marine environment to be drawn up by the Authority gives further useful indications of what is included in the notion of “activities in the Area”. The provision reads as follows:

Rules, regulations and procedures shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.

87. The provisions considered in the preceding paragraphs confirm that processing and transporting as mentioned in Annex IV, article 1, paragraph 1, of the Convention are excluded from the notion of “activities in the Area”. They set out lists of activities whose harmful effects are indicated as directly resulting from such activities. These lists may be seen as an indication of what the Convention considers as included in the notion of “activities in the Area”. These activities include: drilling; dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities.

88. Under Annex III, article 17, paragraph 2(f), of the Convention, “shipboard processing immediately above a mine site of minerals derived from that mine site” is to be considered as included in “activities in the Area”. As the aforementioned list of activities refers without distinction to the harmful effects resulting directly from
"activities in the Area" and from "shipboard processing", the two are to be seen as part of the same kind of activities.

89. The Nodules Regulations and the Sulphides Regulations define "exploration" and "exploitation" in the context of polymetallic nodules and polymetallic sulphides, respectively. According to regulation 1, paragraph 3(b) and (a), of the Nodules Regulations:

"Exploration" means searching for deposits of polymetallic nodules in the Area with exclusive rights, the analysis of such deposits, the testing of collecting systems and equipment, processing facilities and transportation systems, and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in exploitation.

"Exploitation" means the recovery for commercial purposes of polymetallic nodules in the Area and the extraction of minerals therefrom, including the construction and operation of mining, processing and transportation systems for the production and marketing of metals.

90. The same definitions are set out in regulation 1, paragraph 3(b) and (a), of the Sulphides Regulations.

91. These provisions of the Nodules Regulations and the Sulphides Regulations include in the notion of exploration the testing of processing facilities and transportation systems and in that of exploitation the construction and operation of processing and transportation systems.

92. The scope of "exploration" and "exploitation" as defined in the Regulations seems broader than the "activities in the Area" envisaged in Annex IV, article 1, paragraph 1, and in article 145 and Annex III, article 17, paragraph 2(f), of the Convention. Processing and transportation are included in the notion of exploration and exploitation of the Regulations, but not in that of "activities in the Area" in the provision of Annex IV of the Convention, which has just been cited.

93. The difference in scope of "activities in the Area" in the provisions of the Convention and in the Nodules Regulations and the Sulphides Regulations makes it necessary to examine the relevant provisions within the broader framework of the Convention. It would seem preferable to consider that the meaning of "activities in the Area" in articles 139 and Annex III, article 4, paragraph 4, of the Convention is consistent with that of article 145 and Annex III, article 17, paragraph 2(f), and Annex IV, article 1, paragraph 1, rather than with that of "exploration" and "exploitation" in the two Regulations. The aforementioned articles of the Convention and of Annexes III and IV, all belong to the same legal instrument. They were negotiated by the same parties and adopted at the same time. It therefore seems reasonable to assume that the meaning of an expression (or the exclusion of certain activities from the scope of that expression) in one provision also applies to the others. The Regulations are instruments subordinate to the Convention, which, if not in conformity with it, should be interpreted so as to ensure consistency with its provisions. They may, nevertheless, be used to clarify and supplement certain aspects of the relevant provisions of the Convention.

94. In light of the above, the expression "activities in the Area", in the context of both exploration and exploitation, includes, first of all, the recovery of minerals from the seabed and their lifting to the water surface.

95. Activities directly connected with those mentioned in the previous paragraph such as the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at sea, are deemed to be covered by the expression "activities in the Area". "Processing", namely, the process through which metals are extracted from the minerals and which is normally conducted at a plant situated on land, is excluded from the expression "activities in the Area". This is confirmed by the wording of Annex IV, article 1, paragraph 1, of the Convention as well as by information provided by the Authority at the request of the Chamber.

96. Transportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates cannot be included in the notion of "activities in the Area", as it would be incompatible with the exclusion of transportation from "activities in the Area" in Annex IV, article 1, paragraph 1, of the Convention. However, transportation within that part of the high seas, when directly connected with extraction and lifting, should be included in activities in the Area. In
the case of polymetallic nodules, this applies, for instance, to transportation between the ship or installation where the lifting process ends and another ship or installation where the evacuation of water and the preliminary separation and disposal of material to be discarded take place. The inclusion of transportation to points on land could create an unnecessary conflict with provisions of the Convention such as those that concern navigation on the high seas.

97. One consequence of the exclusion of water evacuation and disposal of material from “activities in the Area” would be that the activities conducted by the contractor which are among the most hazardous to the environment would be excluded from those to which the responsibilities of the sponsoring State apply. This would be contrary to the general obligation of States Parties, under article 192 of the Convention, “to protect and preserve the marine environment”.

III. Prospecting

98. “Prospecting”, although mentioned in Annex III, article 2, of the Convention and in the Nodules Regulations and the Sulphides Regulations, is not included in the Convention’s definition of “activities in the Area” because the Convention and the two Regulations distinguish it from “exploration” and from “exploitation”. Moreover, under the Convention and related instruments, prospecting does not require sponsorship. In conformity with the questions submitted to it, which relate to “activities in the Area” and to sponsoring States, the Chamber will not address prospecting activities. However, considering that prospecting is often treated as the preliminary phase of exploration in mining practice and legislation, the Chamber considers it appropriate to observe that some aspects of the present Advisory Opinion may also apply to prospecting.

IV. Responsibilities and obligations

Key provisions

99. The key provisions concerning the obligations of the sponsoring States are: article 139, paragraph 1; article 153, paragraph 4 (especially the last sentence); and Annex III, article 4, paragraph 4, of the Convention (especially the first sentence).

100. These provisions read:

Article 139, paragraph 1
States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

Article 153, paragraph 4
The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.

Annex III, article 4, paragraph 4
The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

101. A perusal of these three provisions reveals that article 139 plays a central role, as it is referred to both in article 153, paragraph 4, and in Annex III, article 4, paragraph 4, of the Convention. While Annex III, article 4, paragraph 4, of the Convention refers to sponsoring States, articles 139, paragraph 1, and 153, paragraph 4, of the Convention do not do so explicitly. However, since the entities which conduct activities in the Area mentioned in article 139, paragraph 1, of the
Convention can do so only when there is a State Party sponsoring them, all three provisions must be read as referring to sponsoring States.

102. It is important to note that the last sentence of article 153, paragraph 4, of the Convention places the obligation of the sponsoring State in relationship with the obligations of the Authority by stating that the former has the obligation to “assist” the latter. As will be seen in the reply to Question 2, the subordinate role of the sponsoring State is reflected in Annex III, article 22, of the Convention, in which the liability of the contractor and of the Authority is mentioned while that of the sponsoring State is not (see paragraph 199).

Obligations of the contractor whose compliance the sponsoring State must ensure

103. The three provisions mentioned in paragraph 100 specify that the obligation (responsibility) of the sponsoring State is “to ensure” that the “activities in the Area” conducted by the sponsored contractor are “in conformity” or in “compliance” with the rules to which they refer.

104. These rules are referred to as “this Part” (Part XI) in article 139 of the Convention, as “the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3” in article 153, paragraph 4, of the Convention, and as “the terms of its contract and its obligations under this Convention” in Annex III, article 4, paragraph 4, of the Convention.

105. The difference between the references contained in articles 139 and 153 of the Convention, cited in the previous paragraphs, is only one of drafting. The reference to Part XI in article 139 of the Convention includes Annexes III and IV. In the view of the Chamber, this reference also includes the rules, regulations and procedures of the Authority and the contracts (or plans of work) for exploration and exploitation, which are based on Part XI and the relevant Annexes thereto.

106. The reference to the contractor’s “obligations under this Convention” in Annex III, article 4, paragraph 4, would seem to be broader than the references in articles 139 and 153 of the Convention. This difference would be relevant if there were obligations of sponsored contractors set out in parts of the Convention other than Part XI and the annexes thereto, the rules, regulations and procedures of the Authority, or the relevant contracts. As this is not the case, it would appear that the scope of the obligations of sponsored contractors, although indicated differently in the three key provisions of the Convention referred to in paragraph 100, is in fact substantially the same.

“Responsibility to ensure”

107. The central issue in relation to Question 1 concerns the meaning of the expression “responsibility to ensure” in article 139, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention.

108. “Responsibility to ensure” points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.

109. As will be seen in greater detail in the reply to Question 2, a violation of this obligation entails “liability”. However, not every violation of an obligation by a sponsored contractor automatically gives rise to the liability of the sponsoring State. Such liability is limited to the State’s failure to meet its obligation to “ensure” compliance by the sponsored contractor.

110. The sponsoring State’s obligation “to ensure” is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation “of conduct” and not “of result”, and as an obligation of “due diligence”. 
111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay*: "An obligation to adopt regulatory or administrative measures … and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).

112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).

113. An example may be found in article 194, paragraph 2, of the Convention which reads: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment …".

114. The nature of the obligation to "ensure" in article 139 of the Convention and in the other provisions mentioned in paragraph 100 appears even more clearly in light of the French and Spanish texts of article 139 of the Convention. They use respectively the expression "il incombe aux États Parties de veiller à …" and "los Estados Partes estarán obligados a velar". "Veiller à" and "velar" point out, even more clearly than "ensure", the idea of exercising diligence. The Arabic text uses the expression "تكون الدول الأطراف ملزمة بضمان" , the Chinese text uses the expression "締约国应有责任确保" and the Russian text uses the expression "Государства-участники обязуются обеспечивать", which point in the same direction.

115. In its Judgment in the *Pulp Mills on the River Uruguay case*, the ICJ illustrates the meaning of a specific treaty obligation that it had qualified as "an obligation to act with due diligence" as follows:

"It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators … (Paragraph 197)"

116. Similar indications are given by the International Law Commission in its Commentary to article 3 of its Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted in 2001. According to article 3, the State of origin of the activities involving a risk of causing transboundary harm "shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". The Commentary states:

"The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required … to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur. (Paragraph 7)"

The content of the "due diligence" obligation to ensure

117. The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. As regards activities in the Area, it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation. Moreover, activities in the Area concerning different kinds of minerals, for example, polymetallic nodules on the one hand and polymetallic sulphides or cobalt rich ferromanganese
crusts on the other, may require different standards of diligence. The standard of due diligence has to be more severe for the riskier activities.

118. Article 153, paragraph 4, last sentence, of the Convention states that the obligation of the sponsoring State in accordance with article 139 of the Convention entails “taking all measures necessary to ensure” compliance by the sponsored contractor. Annex III, article 4, paragraph 4, of the Convention makes it clear that sponsoring States’ “responsibility to ensure” applies “within their legal systems”. With these indications the Convention provides some elements concerning the content of the “due diligence” obligation to ensure. Necessary measures are required and these must be adopted within the legal system of the sponsoring State.

119. Further light on the expression “measures necessary to ensure” is shed by the Convention if one considers article 139, paragraph 2, last sentence, and Annex III, article 4, paragraph 4, last sentence, of the Convention. The main purpose of these provisions is to exempt sponsoring States that have taken certain measures from liability for damage. The description of the measures to be taken by that State may also be used to clarify its “due diligence” obligation. This description remains in general terms in article 139, paragraph 2, of the Convention which mentions “all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4”. The latter provision is more specific as it requires the sponsoring State to adopt “laws and regulations” and to take “administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”.

120. More specific indications concerning the content of these measures, including aspects relating to their enforcement, with respect to the contents of these measures will be provided in the reply to Question 3. As regards Question 1, it has been established that the “due diligence” obligation “to ensure” requires the sponsoring State to take measures within its legal system and that the measures must be “reasonably appropriate”.

V. Direct obligations of sponsoring States

121. The obligations of sponsoring States are not limited to the due diligence “obligation to ensure”. Under the Convention and related instruments, sponsoring States also have obligations with which they have to comply independently of their obligation to ensure a certain behaviour by the sponsored contractor. These obligations may be characterized as “direct obligations”.

122. Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. These obligations will be examined in paragraphs 124-150.

123. It must nevertheless be stated, at the outset, that compliance with these obligations can also be seen as a relevant factor in meeting the due diligence “obligation to ensure” and that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule.

The obligation to assist the Authority

124. Pursuant to the last sentence of article 153, paragraph 4, of the Convention, sponsoring States have the obligation to assist the Authority in its task of controlling activities in the Area for the purpose of ensuring compliance with the relevant provisions of Part XI of the Convention and related instruments. This obligation is to be met “by taking all measures necessary to ensure such compliance in accordance with article 139”. The obligation of the sponsoring States is a direct one, but it is to be met through compliance with the “due diligence obligation” set out in article 139 of the Convention.
Precautionary approach

125. The Nodules Regulations and the Sulphides Regulations contain provisions that establish a direct obligation for sponsoring States. This obligation is relevant for implementing the “responsibility to ensure” that sponsored contractors meet the obligations set out in Part XI of the Convention and related instruments. These are regulation 31, paragraph 2, of the Nodules Regulations and regulation 33, paragraph 2, of the Sulphides Regulations, both of which state that sponsoring States (as well as the Authority) “shall apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration” in order “to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area”.

126. Principle 15 of the 1992 Rio Declaration on Environment and Development (hereinafter “the Rio Declaration”) reads:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

127. The provisions of the aforementioned Regulations transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation. The implementation of the precautionary approach as defined in these Regulations is one of the obligations of sponsoring States.

128. It should be noted that while the first sentence of Principle 15 seems to refer in general terms to the “precautionary approach”, the second sentence limits its scope to threats of “serious or irreversible damage” and to “cost-effective” measures adopted in order to prevent “environmental degradation”.

129. Moreover, by stating that the precautionary approach shall be applied by States “according to their capabilities”, the first sentence of Principle 15 introduces the possibility of differences in application of the precautionary approach in light of the different capabilities of each State (see paragraphs 151-163).

130. The reference to the precautionary approach as set out in the two Regulations applies specifically to the activities envisaged therein, namely, prospecting and exploration for polymetallic nodules and polymetallic sulphides. It is to be expected that the Authority will either repeat or further develop this approach when it regulates exploitation activities and activities concerning other types of minerals.

131. Having established that under the Nodules Regulations and the Sulphides Regulations, both sponsoring States and the Authority are under an obligation to apply the precautionary approach in respect of activities in the Area, it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.

132. The link between an obligation of due diligence and the precautionary approach is implicit in the Tribunal’s Order of 27 August 1999 in the Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan). This emerges from the declaration of the Tribunal that the parties “should in the circumstances act with prudence and caution to ensure that conservation measures are taken…” (ITLOS Reports 1999, p. 274, at paragraph 77), and is confirmed by the further statements that “there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna” (paragraph 79) and that “although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency” (paragraph 80).

133. It should be further noted that the Sulphides Regulations, Annex 4, section 5.1, in setting out a “standard clause” for exploration contracts, provides that:
The Contractor shall take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible applying a precautionary approach and best environmental practices.

Thus, the precautionary approach (called “principle” in the French text of the standard clause just mentioned) is a contractual obligation of the sponsored contractors whose compliance the sponsoring State has the responsibility to ensure.

134. In the parallel provision of the corresponding standard clauses for exploration contracts in the Nodules Regulations, Annex 4, section 5.1, no reference is made to the precautionary approach. However, under the general obligation illustrated in paragraph 131, the sponsoring State has to take measures within the framework of its own legal system in order to oblige sponsored entities to adopt such an approach.

135. The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the “standard clause” contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that “a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute” (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but “any relevant rules of international law applicable in the relations between the parties”.

Best environmental practices

136. Moreover, regulation 33, paragraph 2, of the Sulphides Regulations supplements the sponsoring State’s obligation to apply the precautionary approach with an obligation to apply “best environmental practices”. The same obligation is established as a contractual obligation in section 5.1 of Annex 4 (Standard Clauses for exploration contracts) of the Sulphides Regulations. There is no reference to “best environmental practices” in the Nodules Regulations; their standard contract clause (Annex 4, section 5.1), merely refers to the “best technology” available to the contractor. The adoption of higher standards in the more recent Sulphides Regulations would seem to indicate that, in light of the advancement in scientific knowledge, member States of the Authority have become convinced of the need for sponsoring States to apply “best environmental practices” in general terms so that they may be seen to have become enshrined in the sponsoring States’ obligation of due diligence.

137. In the absence of a specific reason to the contrary, it may be held that the Nodules Regulations should be interpreted in light of the development of the law, as evidenced by the subsequent adoption of the Sulphides Regulations.

Guarantees in the event of an emergency order by the Authority for protection of the marine environment

138. Another obligation which is directly incumbent on the sponsoring State is set out in regulation 32, paragraph 7, of the Nodules Regulations and in regulation 35, paragraph 8, of the Sulphides Regulations. This obligation arises where the contractor has not provided the Council “with a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures”. In such a case, under regulation 32, paragraph 7, of the Nodules Regulations:

the sponsoring State or States shall, in response to a request by the Secretary-General and pursuant to articles 139 and 236 of the Convention, take necessary measures to ensure that the contractor provides such a guarantee or shall take measures to ensure that assistance is provided to the Authority in the discharge of its responsibilities under paragraph 6.

Regulation 35, paragraph 8, of the Sulphides Regulations contains an identical provision.
Availability of recourse for compensation

139. Another direct obligation that gives substance to the sponsoring State’s obligation to adopt laws and regulations within the framework of its legal system is set out in article 235, paragraph 2, of the Convention. This provision reads as follows:

States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

140. This provision applies to the sponsoring State as the State with jurisdiction over the persons that caused the damage. By requiring the sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts, this provision serves the purpose of ensuring that the sponsored contractor meets its obligation under Annex III, article 22, of the Convention to provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area.

VI. Environmental impact assessment

141. The obligation of the contractor to conduct an environmental impact assessment is explicitly set out in section 1, paragraph 7, of the Annex to the 1994 Agreement as follows: “An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities ...”. The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with this obligation.

142. Regulation 31, paragraph 6, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations establish a direct obligation of the sponsoring State concerning environmental impact assessment, which can also be read as a relevant factor for meeting the sponsoring State’s due diligence obligation. This obligation is linked to the direct obligation of assisting the Authority considered at paragraph 124. The abovementioned provisions of the two Regulations read as follows: “[c]ontractors, sponsoring States and other interested States or entities shall cooperate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment”. This provision is designed to clarify and ensure compliance with the sponsoring State’s obligation to cooperate with the Authority in the exercise of the latter’s control over activities in the Area under article 153, paragraph 4, of the Convention, and of its general obligation of due diligence under article 139 thereof. The sponsoring State is obliged not only to cooperate with the Authority in the establishment and implementation of impact assessments, but also to use appropriate means to ensure that the contractor complies with its obligation to conduct an environmental impact assessment.

143. Contractors and sponsoring States must cooperate with the Authority in the establishment of monitoring programmes to evaluate the impact of deep seabed mining on the marine environment, particularly through the creation of “impact reference zones” and “preservation reference zones” (regulation 31, paragraphs 6 and 7, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations). A comparison between environmental conditions in the “impact reference zone” and in the “preservation reference zone” makes it possible to assess the impact of activities in the Area.

144. As clarified in paragraph 10 of the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority’s Legal and Technical Commission in 2002 pursuant to regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev.1 of 13 February 2002), certain activities require “prior environmental impact assessment, as well as an environmental monitoring programme”. These activities are listed in paragraph 10 (a) to (c) of the Recommendations.

145. It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.
As regards the Convention, article 206 states the following:

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205. [Article 205 refers to an obligation to publish reports.]

With respect to customary international law, the ICJ, in its Judgment in *Pulp Mills on the River Uruguay*, speaks of:

a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works. (Paragraph 204)

Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations. The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction."

It must, however, be observed that, in the view of the ICJ, general international law does not "specify the scope and content of an environmental impact assessment" (paragraph 205 of the Judgment in *Pulp Mills on the River Uruguay*). While article 206 of the Convention gives only few indications of this scope and content, the indications in the Regulations, and especially in the Recommendations referred to in paragraph 144, add precision and specificity to the obligation as it applies in the context of activities in the Area.

In light of the above, the Chamber is of the view that the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations.

**VII. Interests and needs of developing States**

With respect to activities in the Area, the fifth preambular paragraph of the Convention states that the achievement of the goals set out in previous preambular paragraphs:

will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

Accordingly, it is necessary to examine whether developing sponsoring States enjoy preferential treatment as compared with that granted to developed sponsoring States under the Convention and related instruments.

Under article 140, paragraph 1, of the Convention:

Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States...

According to article 148 of the Convention:

The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special needs of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.
155. These provisions develop, with respect to activities in the Area, the statement in the fifth preambular paragraph of the Convention.

156. For the purposes of the present Advisory Opinion, and in particular of Question 1, it is important to determine the meaning of article 148 of the Convention. According to this provision, the general purpose of promoting the participation of developing States in activities in the Area taking into account their special interests and needs is to be achieved “as specifically provided for” in Part XI (an expression also found in article 140 of the Convention). This means that there is no general clause for the consideration of such interests and needs beyond what is provided for in specific provisions of Part XI of the Convention. A perusal of Part XI shows immediately that there are several provisions designed to ensure the participation of developing States in activities in the Area and to take into particular consideration their interests and needs.

157. The approach of the Convention to this is particularly evident in the provisions granting a preference to developing States that wish to engage in mining in areas of the deep seabed reserved for the Authority (Annex III, articles 8 and 9, of the Convention); in the obligation of States to promote international cooperation in marine scientific research in the Area in order to ensure that programmes are developed “for the benefit of developing States” (article 143, paragraph 3, of the Convention); and in the obligation of the Authority and of States Parties to promote the transfer of technology to developing States (article 144, paragraph 1, of the Convention and section 5 of the Annex to the 1994 Agreement), and to provide training opportunities for personnel from developing States (article 144, paragraph 2, of the Convention and section 5 of the Annex to the 1994 Agreement); in the permission granted to the Authority in the exercise of its powers and functions to give special consideration to developing States, notwithstanding the rule against discrimination (article 152 of the Convention); and in the obligation of the Council to take “into particular consideration the interests and needs of developing States” in recommending, and approving, respectively, rules, regulations and procedures on the equitable sharing of financial and other benefits derived from activities in the Area (articles 160, paragraph 2(f)(i), and 162, paragraph 2(o)(i), of the Convention).

158. However, none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State “specifically provides” for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed.

159. Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States “of convenience” would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.

160. These observations do not exclude that rules setting out direct obligations of the sponsoring State could provide for different treatment for developed and developing sponsoring States.

161. As pointed out in paragraph 125, the provisions of the Nodules Regulations and the Sulphides Regulations that set out the obligation for the sponsoring State to apply a precautionary approach in ensuring effective protection of the marine environment refer to Principle 15 of the Rio Declaration. As mentioned earlier, Principle 15 provides that the precautionary approach shall be applied by States “according to their capabilities”. It follows that the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the developing sponsoring States. The reference to different capabilities in the Rio Declaration does not, however, apply to the obligation to follow “best environmental practices” set out, as mentioned above, in regulation 33, paragraph 2, of the Sulphides Regulations.
162. Furthermore, the reference to “capabilities” is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields.

163. It should be pointed out that the fifth preambular paragraph of the Convention emphasizes that the achievement of the goals of the Convention will "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked". As noted above, article 148 of the Convention speaks about the promotion of the effective participation of developing States in activities in the Area. What is more important is that Annex III, article 9, paragraph 4, of the Convention specifically refers to the right of a developing State or any natural or juridical person sponsored by it and effectively controlled by it, to inform the Authority that it wishes to submit a plan of work with respect to a reserved area. These provisions have the effect of reserving half of the proposed contract areas in favour of the Authority and developing States. Together with those provisions mentioned in paragraph 157, they require effective implementation with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States. Developing States should receive necessary assistance including training.

Question 2

164. The second question submitted to the Chamber is as follows:

What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?

I. Applicable provisions

165. In replying to this question, the Chamber will proceed from article 139, paragraph 2, of the Convention, read in conjunction with the second sentence of Annex III, article 4, paragraph 4, of the Convention.

166. Article 139, paragraph 2, of the Convention reads:

Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 2(b).

167. Annex III, article 4, paragraph 4, second sentence, of the Convention states:

A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

168. The Chamber will further take into account articles 235 and 304 as well as Annex III, article 22, of the Convention. Lastly, it will consider, as appropriate, the relevant rules on liability set out in the Nodules Regulations and the Sulphides Regulations. In this context, the Chamber notes that the Regulations issued to date by the Authority deal only with prospecting and exploration. Considering that the potential for damage, particularly to the marine environment, may increase during the exploitation phase, it is to be expected that member States of the Authority will further deal with the issue of liability in future regulations on exploitation. The Chamber would like to emphasize that it does not consider itself to be called upon to lay down such future rules on liability. The member States of the Authority may, however, take some guidance from the interpretation in this Advisory Opinion of the pertinent rules on the liability of sponsoring States in the Convention.
Since article 139, paragraph 2, and article 304 of the Convention refer, respectively, to the "rules of international law" and to "the application of existing rules and the development of further rules regarding responsibility and liability under international law", account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility. Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked as such by the Tribunal (The M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, at paragraph 171) as well as by the ICJ (for example, Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), Judgment, ICJ Reports 2005, p. 168, at paragraph 160).

II. Liability in general

At the outset, the Chamber would like to state its understanding of the system of liability in regard to sponsoring States as set out in the Convention and related instruments.

Article 139, paragraph 2, of the Convention and the related provisions referred to above, prescribe or refer to different sources of liability, namely, rules concerning the liability of States Parties (article 139, paragraph 2, first sentence, of the Convention), rules concerning sponsoring State liability (article 139, paragraph 2, second sentence, of the Convention), and rules concerning the liability of the contractor and the Authority (referred to in Annex III, article 22, of the Convention). The "without prejudice" clause in the first sentence of article 139, paragraph 2, of the Convention refers to the rules of international law concerning the liability of States Parties and international organizations. A reference to the international law rules on liability is also contained in article 304 of the Convention. The Chamber considers that these rules supplement the rules concerning the liability of the sponsoring State set out in the Convention.

From the wording of article 139, paragraph 2, of the Convention, it is evident that liability arises from the failure of the sponsoring State to carry out its own responsibilities. The sponsoring State is not, however, liable for the failure of the sponsored contractor to meet its obligations (see paragraph 182).

There is, however, a link between the liability of the sponsoring State and the failure of the sponsored contractor to comply with its obligations, thereby causing damage. An examination of article 139 of the Convention and Annex III, article 4, paragraph 4, second sentence, of the Convention will establish more precisely the link between the damage caused by the contractor and the sponsoring State's liability (see paragraph 181).

Whereas the first sentence of article 139, paragraph 2, of the Convention covers the failure of States Parties, including sponsoring States, to carry out their responsibilities in general, the second sentence deals only with the liability of sponsoring States.

III. Failure to carry out responsibilities

The Chamber will now turn to the interpretation of the elements constituting liability as set out in article 139, paragraph 2, of the Convention, read in conjunction with Annex III, article 4, paragraph 4, of the Convention.

The wording of article 139, paragraph 2, of the Convention clearly establishes two conditions for liability to arise: the failure of the sponsoring State to carry out its responsibilities (see paragraphs 64 to 71 on the meaning of key terms); and the occurrence of damage.

The failure of a sponsoring State to carry out its responsibilities, referred to in article 139, paragraph 2, of the Convention, may consist in an act or an omission that is contrary to that State's responsibilities under the deep seabed mining regime. Whether a sponsoring State has carried out its responsibilities depends primarily on the requirements of the obligation which the sponsoring State is said to have
breached. As stated above in the reply to Question 1 (see paragraph 121), sponsoring States have both direct obligations of their own and obligations in relation to the activities carried out by sponsored contractors. The nature of these obligations also determines the scope of liability. Whereas the liability of the sponsoring State for failure to meet its direct obligations is governed exclusively by the first sentence of article 139, paragraph 2, of the Convention, its liability for failure to meet its obligations in relation to damage caused by a sponsored contractor is covered by both the first and second sentences of the same paragraph.

IV. Damage

178. As stated above, according to the first sentence of article 139, paragraph 2, of the Convention, the failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage. This provision covers neither the situation in which the sponsoring State has failed to carry out its responsibilities but there has been no damage, nor the situation in which there has been damage but the sponsoring State has met its obligations. This constitutes an exception to the customary international law rule on liability since, as stated in the Rainbow Warrior Arbitration (Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, UNRIAA, 1990, vol. XX, p. 215, at paragraph 110), and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.

179. Neither the Convention nor the relevant Regulations (regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations) specifies what constitutes compensable damage, or which subjects may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.

180. No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act “on behalf” of mankind. Each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides:

Any State other than an injured State is entitled to invoke the responsibility of another State...if (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

Causal link between failure and damage

181. Article 139, paragraph 2, first sentence, of the Convention refers to “damage caused”, which clearly indicates the necessity of a causal link between the damage and the failure of the sponsoring State to meet its obligations. The second sentence of article 139, paragraph 2, of the Convention does not mention this causal link. It refers only to a causal link between the activity of the sponsored contractor and the consequent damage. Nevertheless, the Chamber is of the view that, in order for the sponsoring State’s liability to arise, there must be a causal link between the failure of that State and the damage caused by the sponsored contractor.

182. Article 139, paragraph 2, of the Convention establishes that sponsoring States are responsible for ensuring that activities in the Area are carried out in conformity with Part XI of the Convention (see paragraph 108). This means that the sponsoring State’s liability arises not from a failure of a private entity but rather from its own failure to carry out its own responsibilities. In order for the sponsoring State’s liability to arise, it is necessary to establish that there is damage and that the damage was a result of the sponsoring State’s failure to carry out its responsibilities. Such a causal link cannot be presumed and must be proven. The rules on the liability of sponsoring
States set out in article 139, paragraph 2, of the Convention and in the related instruments are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility). As explained in the present paragraph, the liability regime established in Annex III to the Convention and related instruments does not provide for the attribution of activities of sponsored contractors to sponsoring States.

In the event that no causal link pertaining to the failure of the sponsoring States to carry out their responsibilities and the damage caused can be established, the question arises whether they may nevertheless be held liable under the customary international law rules on State responsibility. This issue is dealt with in paragraphs 208 to 211.

For these reasons, the Chamber concludes that the liability of sponsoring States arises from their failure to carry out their own responsibilities and is triggered by the damage caused by sponsored contractors. There must be a causal link between the sponsoring State's failure and the damage, and such a link cannot be presumed.

V. Exemption from liability

The Chamber will now direct its attention to the meaning of the clause "shall not however be liable for damage" in article 139, paragraph 2, second sentence, and in Annex III, article 4, paragraph 4, second sentence, of the Convention.

This clause provides for the exemption of the sponsoring State from liability. Its effect is that, in the event that the sponsored contractor fails to comply with the Convention, the Regulations or its contract, and such failure results in damage, the sponsoring State cannot be held liable. The condition for exemption of the sponsoring State from liability is that, as specified in article 139, paragraph 2, of the Convention, it has taken "all necessary and appropriate measures to secure effective compliance" under article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

It may be pointed out that Annex III, article 4, paragraph 4, of the Convention does not give sponsoring States unlimited discretionary powers concerning the measures to be taken in order to avoid liability. This matter is dealt with in detail in the reply to Question 3.

VI. Scope of liability under the Convention

The Chamber will now deal with the scope of liability under article 139, paragraph 2, second sentence, of the Convention. This requires addressing several issues, namely, the standard of liability, multiple sponsorship, the amount and form of compensation and the relationship between the liability of the contractor and of the sponsoring State.

Standard of liability

With regard to the standard of liability, it was argued in the proceedings that the sponsoring State has strict liability, i.e., liability without fault. The Chamber, however, would like to point out that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence. This rules out the application of strict liability.

Multiple sponsorship

According to Annex III, article 4, paragraph 3, of the Convention, in certain situations, applicants for contracts of exploration or exploitation may require the sponsorship of more than one State Party. This occurs when the applicant holds more than one nationality or where it holds the nationality of one State and is controlled by another State or by nationals of another State.
191. Neither article 139, paragraph 2, nor Annex III, article 4, paragraph 4, of the Convention, indicates how sponsoring States are to share their liability. The Nodules Regulations and the Sulphides Regulations also do not provide guidance in this respect, with an exception as far as the certification of financial viability of the contractor is concerned. Such certification as required under regulation 12, paragraph 5(c), of the Nodules Regulations and under regulation 13, paragraph 4(c), of the Sulphides Regulations must be provided by the State that controls the applicant. Consequently, in this case, a failure of that State to comply with its obligations entails liability.

192. Apart from the exception mentioned in paragraph 191, the provisions of article 139, paragraph 2, of the Convention and related instruments dealing with sponsorship do not differentiate between single and multiple sponsorship. Accordingly, the Chamber takes the position that, in the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority.

Amount and form of compensation

193. As regards the amount of compensation payable, it is pertinent to refer again to Annex III, article 22, of the Convention, which states, with respect to the Authority and the sponsored contractor, that "[i]iability in every case shall be for the actual amount of damage." In this context, note should be taken of regulation 30 of the Nodules Regulations, the identical regulation 32 of the Sulphides Regulations, and the identical section 16.1 of the Standard Clauses for exploration contracts (Annex 4 to the said Regulations).

194. The obligation for a State to provide for a full compensation or restituto in integrum is currently part of customary international law. This conclusion was first reached by the Permanent Court of International Justice in the Factory of Chorzów case (PCIJ Series A, No. 17, p. 47). This obligation was further reiterated by the International Law Commission. According to article 31, paragraph 1, of the ILC Articles on State Responsibility: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". The Chamber notes in this context that treaties on specific topics, such as nuclear energy or oil pollution, provide for limitations on liability together with strict liability.

195. In the light of the foregoing, it is the view of the Chamber that the provisions concerning liability of the contractor for the actual amount of damage, referred to in paragraph 193, are equally valid with regard to the liability of the sponsoring State.

196. As far as the form of the reparation is concerned, the Chamber wishes to refer to article 34 of the ILC Articles on State Responsibility. It reads:

"Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

197. It is the view of the Chamber that the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the status quo ante.

198. It should be noted that, according to regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. In the view of the Chamber, this is equally valid for the liability of the sponsoring State.

Relationship between the liability of the contractor and of the sponsoring State

199. Concerning the relationship between the contractor's liability and that of the sponsoring State, attention may be drawn to Annex III, article 22, of the Convention. This provision reads as follows:

"The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its powers and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage. (Emphasis added)"
200. No reference is made in this provision to the liability of sponsoring States. It may therefore be deduced that the main liability for a wrongful act committed in the conduct of the contractor’s operations or in the exercise of the Authority’s powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State. In the view of the Chamber, this reflects the distribution of responsibilities for deep seabed mining activities between the contractor, the Authority and the sponsoring State.

201. In this context, the question of whether the contractor and the sponsoring State bear joint and several liability was raised in the proceedings. Nothing in the Convention and related instruments indicates that this is the case. Joint and several liability arises where different entities have contributed to the same damage so that full reparation can be claimed from all or any of them. This is not the case under the liability regime established in article 139, paragraph 2, of the Convention. As noted above, the liability of the sponsoring State arises from its own failure to carry out its responsibilities, whereas the contractor’s liability arises from its own non-compliance. Both forms of liability exist in parallel. There is only one point of connection, namely, that the liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor (see paragraph 181). But, in the view of the Chamber, this is merely a trigger mechanism. Such damage is not, however, automatically attributable to the sponsoring State.

202. If the contractor has paid the actual amount of damage, as required under Annex III, article 22, of the Convention, in the view of the Chamber, there is no room for reparation by the sponsoring State.

203. The situation becomes more complex if the contractor has not covered the damage fully. It was pointed out in the proceedings that a gap in liability may occur if, notwithstanding the fact that the sponsoring State has taken all necessary and appropriate measures, the sponsored contractor has caused damage and is unable to meet its liability in full. It was further pointed out that a gap in liability may also occur if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage. In their written and oral statements, States Parties have expressed different views on this issue. Some have argued that the sponsoring State has a residual liability, that is, the liability to cover the damage not covered by the sponsored contractor although the conditions for a liability of the sponsoring State under article 139, paragraph 2, of the Convention are not met. Other States Parties have taken the opposite position.

204. In the view of the Chamber, the liability regime established by article 139 of the Convention and in related instruments leaves no room for residual liability. As outlined in paragraph 201, the liability of the sponsoring State and the liability of the sponsored contractor exist in parallel. The liability of the sponsoring State arises from its own failure to comply with its responsibilities under the Convention and related instruments. The liability of the sponsored contractor arises from its failure to comply with its obligations under its contract and its undertakings thereunder. As has been established, the liability of the sponsoring State depends on the occurrence of damage resulting from the failure of the sponsored contractor. However, as noted in paragraph 182, this does not make the sponsoring State responsible for the damage caused by the sponsored contractor.

205. Taking into account that, as shown above in paragraph 203, situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139, paragraph 2, of the Convention, the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. The Chamber draws attention to article 235, paragraph 3, of the Convention which refers to such possibility.

VII. Liability of sponsoring States for violation of their direct obligations

206. As stated in paragraph 121, the Convention and related instruments provide for direct obligations of sponsoring States. Liability for violation of such obligations is covered by article 139, paragraph 2, first sentence, of the Convention.

207. In the event of failure to comply with direct obligations, it is not possible for the sponsoring State to claim exemption from liability as article 139, paragraph 2, second sentence, of the Convention does not apply.
VIII. “Without prejudice” clause

208. The Chamber will now consider the impact of international law on the deep seabed liability regime. Articles 139, paragraph 2, first sentence, and 304 of the Convention, state that their provisions are “without prejudice” to the rules of international law (see paragraph 169). It remains to be considered whether such statement may be used to fill a gap in the liability regime established in Part XI of the Convention and related instruments.

209. As already indicated, if the sponsoring State has not failed to meet its obligations, there is no room for its liability under article 139, paragraph 2, of the Convention even if activities of the sponsored contractor have resulted in damage. A gap in liability which might occur in such a situation cannot be closed by having recourse to liability of the sponsoring State under customary international law. The Chamber is aware of the efforts made by the International Law Commission to address the issue of damages resulting from acts not prohibited under international law. However, such efforts have not yet resulted in provisions entailing State liability for lawful acts. Here again (see paragraph 205) the Chamber draws the attention of the Authority to the option of establishing a trust fund to cover such damages not covered otherwise.

210. The failure by a sponsoring State to meet its obligations not resulting in material damage is covered by customary international law which does not make damage a requirement for the liability of States. As already stated in paragraph 178, this is confirmed by the ILC Articles on State Responsibility.

211. Lastly, the Chamber would like to point out that article 304 of the Convention refers not only to existing international law rules on responsibility and liability, but also to the development of further rules. The regime of international law on responsibility and liability is not considered to be static. Article 304 of the Convention thus opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.

Question 3

212. The third question submitted to the Chamber is as follows:

What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

I. General aspects

213. The focus of Question 3, as of Questions 1 and 2, is on sponsoring States. The Question seeks to find out the “necessary and appropriate measures” that the sponsoring State “must” take in order to fulfil its responsibility under the Convention, in particular article 139 and Annex III, and the 1994 Agreement. The starting point for this inquiry is article 153 of the Convention, since it introduces for the first time the concept of the sponsoring State and the measures that it must take. Article 153 does not specify the measures to be taken by the sponsoring State. It makes a cross-reference to article 139 of the Convention for guidance in the matter.

214. Article 139, paragraph 2, of the Convention provides that the sponsoring State shall not be liable for damage caused by any failure to comply with Part XI of the Convention by an entity sponsored by it under article 153, paragraph 2(b), of the Convention, “if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4”.

215. Article 139, paragraph 2, of the Convention does not specify the measures that are “necessary and appropriate”. It simply draws attention to article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention. The relevant part of Annex III, article 4, paragraph 4, reads as follows:

A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if
that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

217. Under these provisions, in the system of the responsibilities and liability of the sponsoring State, the ‘necessary’ and appropriate measures are represented by the words ‘are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction’.

218. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to adopt laws and regulations and take administrative measures. Thus, there is here a stipulation that the adoption of laws and regulations and the taking of administrative measures are necessary. The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State. The adoption of laws and regulations is prescribed because not all the obligations of a contractor may be enforced through administrative measures or contractual arrangements alone, as specified in paragraphs 223 to 226.

219. Since the sponsoring State is responsible for ensuring that the contractor acts in accordance with the terms of the contract and with its obligations under the Convention, that State’s laws, regulations and administrative measures are in force. While the existence of such laws, regulations and administrative measures is not a condition precedent for concluding a contract with the Authority, it is a necessary requirement for compliance with the obligation of due diligence of the sponsoring State and for its exemption from liability.

220. It may be observed in this regard that the Nodules Regulations were approved after the pioneer investors had been registered. In view of this, certifying States are required, if necessary, to bring their laws, regulations and administrative measures in keeping with the provisions of the Regulations.

II. Laws and regulations and administrative measures

221. The national measures to be taken by the sponsoring State should also cover the obligations of the contractor even after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulfides Regulations.

222. As already indicated, the national measures, once adopted, may not be kept under review so as to ensure that they meet current standards and that the contractor meets its obligations effectively without detriment to the common heritage of mankind.
III. Compliance by means of a contract?

223. It is the requirement in Annex III, article 4, paragraph 4, of the Convention, that the measures to be taken by the sponsoring State should be in the form of laws and regulations and administrative measures. This means that a sponsoring State could not be considered as complying with its obligations only by entering into a contractual arrangement, such as a sponsoring agreement, with the contractor. Not only would this be incompatible with the provision referred to above but also with the Convention in general and Part XI thereof in particular.

224. Mere contractual obligations between the sponsoring State and the sponsored contractor may not serve as an effective substitute for the laws and regulations and administrative measures referred to in Annex III, article 4, paragraph 4, of the Convention. Nor would they establish legal obligations that could be invoked against the sponsoring State by entities other than the sponsored contractor.

225. The “contractual” approach would, moreover, lack transparency. It will be difficult to verify, through publicly available measures, that the sponsoring State had met its obligations. A sponsorship agreement may not be publicly available and, in fact, may not be required at all. Annex III of the Convention, and the Nodules Regulations and the Sulphides Regulations contain no requirement that a sponsorship agreement, if any, between the sponsoring States and the contractor should be submitted to the Authority or made publicly available. The only requirement is the submission of a certificate of sponsorship issued by the sponsoring State (regulation 11, paragraph 3(f), of the Nodules Regulations and of the Sulphides Regulations), in which the sponsoring State declares that it “assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention”.

226. As stated above, the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind by assisting the Authority and by acting on its own with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining. Contractual arrangements alone cannot satisfy the obligation undertaken by the sponsoring State. The sponsoring State could not claim to be assisting the Authority under article 153, paragraph 4, of the Convention by the mere fact that it had concluded a contract under its domestic law.

IV. Content of the measures

227. The Convention leaves it to the sponsoring State to determine what measures will enable it to discharge its responsibilities. Policy choices on such matters must be made by the sponsoring State. In view of this, the Chamber considers that it is not called upon to render specific advice as to the necessary and appropriate measures that the sponsoring State must take in order to fulfil its responsibilities under the Convention. Judicial bodies may not perform functions that are not in keeping with their judicial character. Nevertheless, without encroaching on the policy choices a sponsoring State may make, the Chamber deems it appropriate to indicate some general considerations that a sponsoring State may find useful in its choice of measures under articles 139, paragraph 2, 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

228. What is expected with regard to the responsibility of the sponsoring State in terms of Annex III, article 4, paragraph 4, of the Convention is made clear in the second sentence of the same paragraph. It requires the sponsoring State to adopt laws and regulations and to take administrative measures which are, within the framework of its legal system, “reasonably appropriate” for securing compliance by persons under its jurisdiction. The standard for determining what is appropriate is not open-ended. The measures taken must be “reasonably appropriate”. The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary.

229. The measures to be taken by the sponsoring State must be determined by that State itself within the framework of its legal system. This determination is, therefore, left to the discretion of the sponsoring State. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to put in place laws and regulations and to take administrative measures that are “reasonably appropriate” so
that it may be absolved from liability for damage caused by any failure of a contractor
sponsored by it, or to ships flying its flag, environmental or other laws and
regulations more stringent than those in the rules, regulations and procedures of the
Authority adopted pursuant to Annex III, article 17, paragraph 20, of the Convention
dealing with protection of the marine environment.

233. While dealing with the obligation of the sponsoring State contained in
Annex III, article 21, paragraph 21, of the Convention, account has to be taken of the
obligation of the contractor under the legal regime for deep seabed mining and the
area of the sponsoring State. The relevant provisions of Annex III, article 4, of
the Convention, paragraph 24, provide the contractor shall carry out its activities in
conformity with the terms of its contract with the Authority and its obligations
under the Convention. The same provision states that it is the responsibility of the
sponsoring State to ensure that the contractor carries out this obligation (see
paragraph 75).

234. The sponsoring State may find it necessary, depending upon its legal system,
to include in its domestic law provisions that are necessary for implementing its
obligations under the Convention. These provisions may concern, inter alia, financial
viability and technical capability of sponsored contractors, conditions for issuing
a certificate of sponsorship and penalties for non-compliance by such contractors.

235. Additionally, the Convention itself specifies in various provisions the issues
that should be covered by the sponsoring State’s laws and regulations. In particular,
article 39 of the Statute dealing with enforcement decisions of the Chamber
provides:

No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to
contractors sponsored by it, or to ships flying its flag, of environmental or
other laws and regulations more stringent than those in the rules,
regulations and procedures of the Authority, shall not be deemed inconsistent with
Part XI of the Convention, not to impose on a contractor conditions that are inconsistent with Part XI of the
Convention. At the same time, however, it establishes an exception thereto. The
national jurisdictions, these provisions may require specific legislation for implementation.

236. Other indications may be found in the provisions that establish direct obligations of the sponsoring States (see paragraph 121). These include: the obligations to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. It is important to stress that these obligations are mentioned only as examples.

237. In this context, the Chamber takes note of the Deep Seabed Mining Law adopted by Germany and of similar legislation adopted by the Czech Republic.

238. While the applicable contract is a contract between the Authority and the contractor only and as such does not bind the sponsoring State, the sponsoring State is nevertheless under an obligation to ensure that the contractor complies with its contract. This means that the sponsoring State must adopt laws and regulations and take administrative measures which do not hinder the contractor in the effective fulfilment of its contractual obligations but rather assist the contractor in that respect.

239. It is inherent in the “due diligence” obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

240. Under Annex III, article 21, paragraph 3, of the Convention, the rules, regulations and procedures concerning environmental protection adopted by the Authority are used as a minimum standard of stringency for the environmental or other laws and regulations that the sponsoring State may apply to the sponsored contractor. It is implicit in this provision that sponsoring States may apply to the contractors they sponsor more stringent standards as far as the protection of the marine environment is concerned.

241. Article 209, paragraph 2, of the Convention is based on the same approach. According to this provision, the requirements contained in the laws and regulations that States adopt concerning pollution of the marine environment from activities in the Area “undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority … shall be no less effective than the international rules, regulations, and procedures” established under Part XI, which consist primarily of the international rules, regulations and procedures adopted by the Authority.

242. For these reasons,

THE CHAMBER,

1. Unanimously,

Decides that it has jurisdiction to give the advisory opinion requested.

2. Unanimously,

Decides to respond to the request for an advisory opinion.

3. Unanimously,

Replies to Question 1 submitted by the Council as follows:

Sponsoring States have two kinds of obligations under the Convention and related instruments:

A. The obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the Convention and related instruments.

This is an obligation of “due diligence”. The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors.
The standard of due diligence may vary over time and depends on the level of risk and on the activities involved.

This “due diligence” obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be “reasonably appropriate”.

B. Direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors.

Compliance with these obligations may also be seen as a relevant factor in meeting the “due diligence” obligation of the sponsoring State.

The most important direct obligations of the sponsoring State are:
(a) the obligation to assist the Authority set out in article 153, paragraph 4, of the Convention;
(b) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the “due diligence” obligation of the sponsoring State and applicable beyond the scope of the two Regulations;
(c) the obligation to apply the “best environmental practices” set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations;
(d) the obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and
(e) the obligation to provide recourse for compensation.

The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment set out in section 1, paragraph 7, of the Annex to the 1994 Agreement. The obligation to conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the Convention and as an aspect of the sponsoring State’s obligation to assist the Authority under article 153, paragraph 4, of the Convention.

Obligations of both kinds apply equally to developed and developing States, unless specifically provided otherwise in the applicable provisions, such as Principle 15 of the Rio Declaration, referred to in the Nodules Regulations and the Sulphides Regulations, according to which States shall apply the precautionary approach “according to their capabilities”.

The provisions of the Convention which take into consideration the special interests and needs of developing States should be effectively implemented with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States.

4. Unanimously,

Replies to Question 2 submitted by the Council as follows:

The liability of the sponsoring State arises from its failure to fulfil its obligations under the Convention and related instruments. Failure of the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring State.

The conditions for the liability of the sponsoring State to arise are:

(a) failure to carry out its responsibilities under the Convention; and
(b) occurrence of damage.

The liability of the sponsoring State for failure to comply with its due diligence obligations requires that a causal link be established between such failure and
damage. Such liability is triggered by a damage caused by a failure of the sponsored contractor to comply with its obligations.

The existence of a causal link between the sponsoring State’s failure and the damage is required and cannot be presumed.

The sponsoring State is absolved from liability if it has taken “all necessary and appropriate measures to secure effective compliance” by the sponsored contractor with its obligations. This exemption from liability does not apply to the failure of the sponsoring State to carry out its direct obligations.

The liability of the sponsoring State and that of the sponsored contractor exist in parallel and are not joint and several. The sponsoring State has no residual liability.

Multiple sponsors incur joint and several liability, unless otherwise provided in the Regulations of the Authority.

The liability of the sponsoring State shall be for the actual amount of the damage.

Under the Nodules Regulations and the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. This is equally valid for the liability of the sponsoring State.

The rules on liability set out in the Convention and related instruments are without prejudice to the rules of international law. Where the sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State’s liability. If the sponsoring State has failed to fulfil its obligation but no damage has occurred, the consequences of such wrongful act are determined by customary international law.

The establishment of a trust fund to cover the damage not covered under the Convention could be considered.

5. Unanimously,

Replies to Question 3 submitted by the Council as follows:

The Convention requires the sponsoring State to adopt, within its legal system, laws and regulations and to take administrative measures that have two distinct functions, namely, to ensure compliance by the contractor with its obligations and to exempt the sponsoring State from liability.

The scope and extent of these laws and regulations and administrative measures depends on the legal system of the sponsoring State.

Such laws and regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor and for co-ordination between the activities of the sponsoring State and those of the Authority.

Laws and regulations and administrative measures should be in force at all times that a contract with the Authority is in force. The existence of such laws and regulations, and administrative measures is not a condition for concluding the contract with the Authority; it is, however, a necessary requirement for carrying out the obligation of due diligence of the sponsoring State and for seeking exemption from liability.

These national measures should also cover the obligations of the contractor after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.
In light of the requirement that measures by the sponsoring States must consist of laws and regulations and administrative measures, the sponsoring State cannot be considered as complying with its obligations only by entering into a contractual arrangement with the contractor.

The sponsoring State does not have absolute discretion with respect to the adoption of laws and regulations and the taking of administrative measures. It must act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.

As regards the protection of the marine environment, the laws and regulations and administrative measures of the sponsoring State cannot be less stringent than those adopted by the Authority, or less effective than international rules, regulations and procedures.

The provisions that the sponsoring State may find necessary to include in its national laws may concern, inter alia, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

It is inherent in the “due diligence” obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

Specific indications as to the contents of the domestic measures to be taken by the sponsoring State are given in various provisions of the Convention and related instruments. This applies, in particular, to the provision in article 39 of the Statute prescribing that decisions of the Chamber shall be enforceable in the territories of the States Parties, in the same manner as judgments and orders of the highest court of the State Party in whose territory the enforcement is sought.

Done in English and French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this first day of February, two thousand and eleven, in three copies, one of which will be placed in the archives of the Tribunal and the others will be sent to the Secretary-General of the International Seabed Authority and to the Secretary-General of the United Nations.

(signed)
Tullio TREVES,
President

(signed)
Philippe GAUTIER,
Registrar
Inter-American Court of Human Rights

Kichwa Indigenous People of Sarayaku v. Ecuador
Judgment of 27 June 2012
JUDGMENT OF JUNE 27, 2012
(Merits and Reparations)

In the Case of Kichwa Indigenous People of Sarayaku, the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) composed of the following judges:

Diego García-Sayán, President;
Manuel E. Ventura Robles, Vice-President;
Leonardo A. Franco, Judge;
Margarette May Macaulay, Judge;
Eduardo Vio Grossi, Judge

also present,
Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodriguez, Deputy Secretary,
pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court1 (hereinafter “the Rules of Procedure”), delivers this Judgment, which is structured in the following manner:

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INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. On April 26, 2010, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) filed before the Court, pursuant to the provisions of Articles 51 and 61 of the American Convention, a petition for a case concerning the violation of the rights of the Kichwa People of Sarayaku and its members, in relation to Articles 1(1) of the American Convention, to the detriment of the Indigenous Community of Sarayaku and its members; the right to life, fair trial [judicial guarantees] and judicial protection, established in Articles 4, 8, and 25, in relation to Article 1(1) of the American Convention; the right to freedom of movement and residence recognized in Article 22, in relation to Article 1(1) of the American Convention, to the detriment of the Sarayaku Community and its members; the right to human treatment (personal integrity), stated in Article 5 of the American Convention and Article 1(1) of the American Convention, to the detriment of 20 members of the Kichwa People of Sarayaku; and the duty to adopt domestic legal measures as established in Article 2 of the American Convention, and to the detriment of the Sarayaku Community and its members.

2. According to the Commission, this case concerns, among other issues, the granting of a permit by the State to a private oil company to carry out oil exploration and exploitation activities in the ancestral territory of the Kichwa Indigenous People of Sarayaku (hereinafter “the Sarayaku People” or “the Sarayaku”) during the decade of the 1990s, without previously consulting them and without obtaining their consent. Thus, the company began the exploration phase, and even introduced high-powered explosives into several points of the Sarayaku territory, thereby creating an alleged situation of risk for the population, given that for a time they were prevented from practicing their traditions, their lack of legal protection and enforcement of judicial guarantees.

3. On June 15, 2004, the Commission submitted a petition to the Court requesting provisional measures in favor of the Sarayaku People in this case (hereinafter “the petition”). On November 5, 2004, the Court ordered provisional measures on the case, adopting the provisional measures described in the Inter-American Commission’s report on the provisional measures on July 9, 2010.

4. On September 10, 2010, Mr. Mario Nejo Cavalls and CEJIL, representatives of the Sarayaku Community in this case (hereinafter “the representatives”), submitted to the Court their brief containing pleadings, motions and evidence (hereinafter “pleadings and motions brief”), pursuant to Article 40 of the Rules of Procedure. The pleadings and motions brief supported the allegations of the Commission and asked the Court to declare the State’s international responsibility, as well as to order the State to adopt specific measures of reparation and a report on the provisional measures then in force.

5. On September 10, 2010, the Inter-American Commission submitted a petition to the Court requesting provisional measures on behalf of the Sarayaku Community and its members, in accordance with Article 63(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of 20 members of the Kichwa People of Sarayaku; of Article 5 in relation to Article 1(1) of the American Convention, to the detriment of the Sarayaku Community and its members; and under the terms of Article 50 of the American Convention. The Commission appointed Luz Mrs. Elizabeth Abi-Mershed, Deputy Executive Secretary, and the attorneys Mrs. Isabel Madariaga and Mrs. Karla I Quintana Osuna as legal advisors.

6. On September 10, 2010, the Commission submitted a petition to the Court requesting provisional measures in favor of the Sarayaku Community and its members, in accordance with Article 63(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kichwa People of Sarayaku; of Article 5 in relation to Article 1(1) of the American Convention, to the detriment of the Sarayaku Community and its members; in the Report on the Merits, the Commission concluded that the State was responsible for the violation of the rights recognized in the following provisions: Article 21, in relation to Articles 13, 23 and 1(1) of the American Convention, to the detriment of the Sarayaku Community; of Article 5 in relation to Article 1(1) of the American Convention, to the detriment of the Sarayaku Community; and Article 50 of the American Convention, to the detriment of the Sarayaku Community.

7. The petition was notified to the State and to the representatives on July 9, 2010.

8. On December 19, 2003 by the Association of the Kichwa People of Sarayaku (hereinafter “AKPS”), the Center for Economic and Social Rights (hereinafter “CEJIL”). On October 13, 2004, the Commission approved Admissibility Report No. 62/04, in which it declared the case admissible. On December 18, 2009 the Commission approved the Report on Merits No. 138/09, in which it found that the State was responsible for the violation of the rights recognized in the following provisions: Article 21, in relation to Articles 13, 23 and 1(1) of the American Convention, to the detriment of the Sarayaku Community; of Article 5 in relation to Article 1(1) thereof, to the detriment of 20 members of the Kichwa People of Sarayaku; and the duty to adopt domestic legal measures as established in Article 2 of the American Convention, and to the detriment of the Sarayaku Community.

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49. The petition was notified to the State and to the representatives on July 9, 2010.

50. The petition was notified to the State and to the representatives on July 9, 2010.
Visit to the territory of the Sarayaku People

C.

14. On August 30 and 31, 2011, the representatives submitted their observations on the Order of the President of June 17, 2011, concerning the legal assistance fund. The Secretariat informed the parties that the President, by the same Order of June 17, 2011, had decided to set aside the objections raised by the representatives in respect of the State’s brief and had reserved the matter of the legal assistance fund for a hearing to be held at the same time as the public hearing on the preliminary objections.

15. In its Order of August 30, 2011, the President of the Court ordered the Secretariat, within a reasonable time, to consult with the representatives and the State regarding the legal assistance fund and to send to the parties a new Order in the matter.

16. On September 9, 2011, the Secretariat submitted its report to the President, containing the views of the representatives and the State on the matter of the legal assistance fund.

17. On September 12, 2011, the President of the Court ordered the Secretariat, within an extended time period, to consult with the representatives and the State on the matter of the legal assistance fund, and to send the parties a new Order in the matter.

18. On October 12, 2011, the Secretariat submitted to the President the views of the representatives and the State on the matter of the legal assistance fund.

19. On October 13, 2011, the President of the Court issued an Order on the legal assistance fund.

20. On October 13, 2011, the President of the Court, in response to the request of the representatives, ordered the Secretariat to consult with the representatives and the State on the matter of the legal assistance fund and to send the parties a new Order in the matter.

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The delegations were received by numerous members of the Sarayaku Community. After crossing the Bobonaza River in canoes, they were escorted to the People’s Assembly House (Tayjasaruta), where they were greeted by the President, Mr. José Gualinga, the kurakas, the yachaks, and other representatives of the Sarayaku Community. The delegations also went on a walking tour of the community and its surrounding areas, visiting various cultural activities and rituals. The delegations also heard from the President and other officials about the ongoing work of the Community government.

On September 28, 2011, the Constitutional President of Ecuador, Mr. Rafael Correa Delgado, addressed the President of the Court to “ratify and formalize the invitation issued by the State’s agents at the hearing held in San Jose, Costa Rica, for the Inter-American Court to carry out an official visit to his country.” Subsequently, following the instructions of the President, the representatives of the delegations gave the representatives of the alleged victims and the Inter-American Court the opportunity to submit their observations on this matter.

The purpose of this visit would be to conduct “proceedings aimed at obtaining additional information about the situation of the alleged victims and places where some of the alleged events took place.” Furthermore, the delegation was to conduct a visit to the territory of the Sarayaku People to verify the situation of the alleged victims and their living conditions.

The Court heard statements from Narsiza Gualinga, Representative of Shiwakocha; Holger Cisneros, Representative of Shiwakocha; Franco Viteri, Representative of Pista; Digna Gualinga, Representative of Pista; Lenin Gualinga, Representative of Pista, Cesar Santi, Representative of Sarayakillu, Isidro Gualinga, Representative of Kali Kali; and Siria Viteri and Ronny Ávilez in representation of the young people of Sarayaku.

The Court received statements from the Kichwa Indigenous People of Sarayaku, the State, and other organizations involved in the case. The Court also heard from the representatives of the alleged victims, the State, and the Inter-American Commission. The Court was satisfied that the delegation had conducted a thorough and comprehensive visit to the Sarayaku territory, and that all relevant information had been obtained.

The Court acknowledged that this visit was an important step in the process of obtaining evidence and determining the facts of the case. The Court also acknowledged the efforts of the State and the representatives of the alleged victims in facilitating the visit and providing access to the territory.

The Court declared that it would consider the evidence obtained during the visit and make a determination on the case in accordance with the provisions of the Inter-American Convention on Human Rights.
the oil issue, we could have the best doctors treating the mothers in the communities, we could have the best health teams and best teachers coming from Quito to the area, if there is going to be money generated through oil exploitation.

Oil development should benefit the communities. However, the fact is that historically the State has acted behind the backs of indigenous people. That is the historical reality of this country; because the State has acted behind the backs of indigenous people, oil exploitation has been carried out to the detriment of communities. However, we don't want this system, this government does not want it, and therefore we will not allow any oil exploitation to continue behind the backs of communities. Instead, we will seek dialogue if we decide to resume oil exploitation or think about a new oil project here. There will be no oil development unless it is an open, frank dialogue; not a dialogue by the oil company, as has always been changed. We have changed the legislation so that the dialogue is initiated by the government and not by the extractive industry.

So, in short, Mr. President, I would like to thank you for allowing me to speak. I refer to the State acknowledges its responsibility and is willing to make any arrangement for compensation. Finally, I would like to add a thought. The petitioners accuse us of being “villains” in this scenario ... I recall that Mr. Cisneros said that we were the “villains” ... I don’t see it in that way, I believe there has been suffering that must be compensated for. And finally, with respect to ancestral knowledge, I see here before me the indigenous leadership. We should work together to bring charges against the companies that steal the ancestral rights from indigenous communities. At some point we should begin a frank discussion in order to establish, and not allow others to take these rights and knowledge that belong to these communities, and make themselves rich from it. At some point we must discuss these issues. Thank you, Mr. President.

24. Following this statement, the President of the Court gave the floor to members of the Sarayaku Community, to their representatives in this case and to the Inter-American Commission, who submitted their observations in this regard. Immediately after the meeting, members of the Sarayaku Community announced that the community had decided to await the judgment of the Court.

25. On May 15, 2012, after the visit to the territory and the acknowledgement of responsibility, the State affirmed that "the public declaration [of the Secretary for Legal Affairs of the Presidency] is, in itself, and in advance, a formula for the reparation of human rights, in the context of the provisions of Article 63(1) of the American Convention," and asked the Court to "officially convey this position, which will eventually allow the parties to move forward toward specific and technical agreements regarding reparations or merits, as the case may be." The Commission and the representatives did not submit any observations in this regard.

26. Under Articles 62 and 64 of the Court’s Rules24, and in exercise of its powers of international jurisdictional protection of human rights, in a matter of international public order that transcends the will of the parties, it is the Court’s responsibility to ensure that acts of acquiescence are acceptable for the purposes sought by the Inter-American system. This task is not limited to verifying, recording, or taking note of the acknowledgement made by the State, or confirming the formal conditions of such acts; rather, it must examine them in accordance with the nature and seriousness of the alleged violations, the requirements and interests of justice, the particular circumstances of the specific case and the attitude and position of the parties25, so that it can elucidate the truth about what took place, to the extent possible, and in the exercise of its jurisdiction.26

27. In the present case, the Court notes that the State’s acknowledgement of responsibility has been made in broad and generic terms. Thus, it is up to the Court to give full effect to this action by the State and value it positively, given its far-reaching significance in the context of the Inter-American system for the protection of human rights. Such acknowledgement represents to the Court an admission of the facts contained in the factual framework of the Commission’s application27, and of the relevant information provided by the representatives that clarifies or explains the facts. Furthermore, in the present case, it highlights the State’s commitment to promote the necessary reparations through dialogue with the Sarayaku People. All these actions on the part of Ecuador make a positive contribution to this process, to the exercise of the principles underlying the Convention28, and, in part, satisfy the need for reparation of the victims of human rights violations.29

28. Finally, although there is no longer a dispute, the Court shall proceed to a specific determination of the events that occurred, inasmuch as this contributes to reparation for the victims, to preventing a recurrence of similar situations and, in general, to the satisfaction of the purposes of inter-American jurisdiction over human rights.30 Furthermore, the Court will open the relevant chapters to analyze and specify, where relevant, the scope of the alleged violations and, since a dispute still exists over the extent of the reparations, it will, accordingly, rule on the matter.

24. These provisions of the Court’s Rules of Procedure establish the following:

Article 62. Acquiescence: If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.

Article 64. Continuation of a Case. Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding Articles.


27. The State has also referred to open criminal cases against members of the Sarayaku Community in relation to alleged acts of violence and the alleged theft of 150 kg of petrolite explosive, for which one of the members of the community was convicted in a criminal court. The State also referred to a "significant progress, between November 22, 2002 and January 25, 2003, 29 workers from the CGC company were kidnapped." In addition, it claimed that members of the Sarayaku were obtaining financial benefits from the petrolite exploitations in their territory. On this point, the Court emphasizes once again, what it stated in the first judgment delivered in a contentious case: that it is not a criminal court or a court of first instance that analyzes or determines the crime, administrative or disciplinary liability of individuals (Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988. Series C No. 4, para. 134 and Case of López Mendez v. Venezuela. Merits, Reparations and Costs. Judgment of September 1, 2011, Series C No. 233, para. 98). Thus, even if information has been provided regarding the criminal conviction of a member of the Sarayaku, such an event would be outside of the scope of the present case. Accordingly, the Court will not take into consideration allegations regarding the guilt or innocence of members of the Sarayaku People with regard to the irregular actions of which they have been accused, since it is not within the scope of this case.

28. In their brief of pleadings and motions, the representatives referred to a number of events not included in the petition submitted by the Commission. In its jurisdiction the Court has reiterated that alleged victims and their representatives may invoke the violation of other rights different to those already included in the petition, provided these are limited to events already described therein, which constitute the factual context of the proceedings before the Court. This does not preclude the possibility of setting forth those facts that may explain, clarify or reject those mentioned in the petition (Case of "Five Penjoniens" v. Peru. Merits, Reparations and Costs. Judgment of February 28, 2003. Series C No. 98, paras. 153 and 154 and Case of Fonneron and daughter v. Argentina. Merits, Reparations and Costs. Judgment of April 27, 2012 Series C No. 242, para. 17), or the supervening facts which may be submitted to the Court at any stage of the proceedings before the Judgment is issued. Ultimately, it is up to the Court to decide on the validity of such arguments in each case, in order to protect the procedural equality of the parties. (Cf. Case of the "Mapiripán Massacre" v. Colombia. Merits, Reparations and Costs. Judgment of September 15, 2005, Series C No. 134, para. 58, and Case of Torres Millacura et al. v. Argentina. Merits, Reparations and Costs. Judgment of August 26, 2011, Series C No. 229, para. 52). Therefore, the Court will consider arguments by the representatives that are not part of the factual framework or that do not explain or clarify other facts, nor will it refer to legal allegations made by the representatives that are outside this factual framework.


PRELIMINARY OBJECTION

(Failure to exhaust domestic remedies)

29. The State argued that the Sarayaku Community lodged an appeal for constitutional protection (writ of amparo) on November 27, 2002 against the CGC company and its subcontractor “Daymi Services S.A.”, which had remained unresolved due to the lack of action on the part of the appellants themselves, namely, the Sarayaku Community, who had not provided the facilities or the cooperation necessary to ensure the prompt and efficient processing of the appeal. The State added that the parties were summoned to a public hearing on December 7, 2002, at which principal respondent in the process, the CGC company appeared, but no representative of the Sarayaku did so. Therefore, according to the Law of Constitutional Supervision in force at that time, the appeal was deemed to have been withdrawn. Furthermore, the State pointed out that the alleged victims had sufficient remedies at their disposal to resolve this situation, such as filing a complaint before the Human Rights Commission of the National Council of the Judiciary or a hearing to challenge the judge who heard the case (“Juicio de recusación”). In this regard, the Commission indicated, inter alia, that during the processing of the case before it, the State indeed filed the aforementioned objection, but that, contrary to what it has claimed before the Court, on that occasion the State indicated that the application for amparo was not adequate and effective to resolve this situation, since the amparo was not conceived to contest a contract for an oil concession, which should be contested through an appeal under administrative law. For this reason, in its Report 62/04 the Commission concluded that the writ of amparo was appropriate according to the Ecuadorian legislation applicable to the case and that the objection contemplated in Article 46.2.c) of the Convention was applicable, due to the lack of effectiveness of the remedy. Consequently, the Commission requested that, based on the principle of estoppel, the objection be declared inadmissible. For their part, the representatives agreed with the Commission, presented other arguments and called on the Court to dismiss this objection.

30. Having regard to the provisions of Article 42.6, and under the terms of Articles 61, 62 and 64 of its Rules of Procedure, the Court considers that, having acknowledged its responsibility in the present case, the State has accepted the full jurisdiction of the Court to hear this case, and therefore the filing of a preliminary objection for the failure to exhaust domestic remedies is, in principle, incompatible with the aforesaid acknowledgement. Furthermore, the content of that objection is intimately related to the merits of the present case, particularly with regard to the alleged violation of Articles 8 and 25 of the Convention. Consequently, the objection filed serves no purpose and it is not necessary to analyze it.

VI EVIDENCE

31. Based on the provisions of Articles 46, 47, 48, 50, 51, 57 and 58 of its Rules of Procedure, and on its case law regarding evidence and assessment thereof, the Court will examine and assess the documentary evidence submitted by the Commission, the representatives and the State at the different procedural stages, the statements of the alleged victims and witnesses and the expert opinions rendered by affidavit before a notary public and at the public hearing before the Court. In doing so, the Court shall adhere to the principles of sound judgment, within the applicable legal framework.

A. Documentary, testimonial, and expert evidence

32. The Court received various documents offered as evidence by the Inter-American Commission, the representatives, and the State, together with their main briefs. Also, the Court received affidavits rendered before a notary public by four alleged victims, namely: Sabine Bouchat, Bertha Gualinga, Franco Viteri and José Gualinga, all members of the Sarayaku Community, and six expert witnesses: Rodolfo Stavenhagen, Alberto Acosta Espinosa, Victor Julio López Acevedo, Bill Powers, Shashi Kanth and Suzana Sawyer.

33. The Court notes that, in their brief of June 23, 2011, the representatives stated that they had “decided to present the written statements” of four of the alleged victims and “desist from presenting” the statements of eight other alleged victims, all of which were required by the Order of the President issued on June 17, 2011. Once the President has ordered the presentation of an affidavit, the submission of that evidence is no longer up to the parties, and therefore not submitting it requires the respective justification. Therefore, failure to furnish evidence can only affect the party that unjustifiably failed to do so.

34. With respect to the evidence furnished at the public hearing, the Court heard testimony from the following alleged victims: Mr. Sabino Gualinga, spiritual leader (Yachak), Patricia Gualinga, leader of the women and families, Marlon Santi, former President of the Confederation of Indigenous Peoples of Ecuador (CONAIE), and former President of Sarayaku, and Ena Santi, all members of the Sarayaku Community. Moreover, it heard from witnesses Oscar TROYA and David Gualinga (offered by the State), and two expert witnesses (offered by the Commission and the representatives): James Anaya, current United Nations Special Rapporteur on the Rights of Indigenous Peoples, and the anthropologist and lawyer, Rodigo Villagran Carron.

B. Admission of the documentary evidence

35. In this case, as in others, the Court accepts the evidentiary value of those documents submitted by the parties at the proper procedural stage, as well as those relating to supervening facts presented by the representatives and Inter-American Commission that were not contested or opposed, and the authenticity of which was not questioned, only insofar as they are pertinent and useful to determine the facts and their possible legal consequences.

36. As to the press reports offered by the parties and the Commission with their respective briefs, this Court has held that these may be considered as documentary evidence when they contain well-known public facts or statements by State officials, or when they corroborate certain well-known public facts or statements.
The Court decides to admit those articles that are complete, or at least aspects related to the case, and whose source and publication date can be verified, and shall assess them taking into account the observations made by the parties.

37. With respect to certain documents referred to by the parties by means of their electronic links, the Court has established that if a party provides at least the direct electronic link to the expert evidence, the Court will consider said study admissible, on the understanding that it was not yet available and had also been mentioned in the brief containing pleadings and motions.

38. For the purposes of conducting a census and that this information was not yet available and had been mentioned in the brief containing pleadings and motions, the Court will only admit those documents that relate to supervening events.

39. With regard to the procedural stage for the submission of documentary evidence, under the terms of Article 57(2) of the Rules of Procedure, this must generally be presented along with the body of evidence. These will be assessed in the relevant chapter, together with other elements of the body of evidence, taking into account the observations made by the parties in support of such documents.

40. In this regard, the Court notes that the State submitted a document entitled "Official Anthropological Report," and presented it as a witness and requested in the first operative paragraph of the Court's Order of June 17, 2011. The representatives argued that all these documents would be inadmissible and that several of them were time-barred, something that the State did not justify based on any of those exceptional circumstances.

41. As to the attachments submitted by the representatives together with their observations to the preliminary objection, the Court notes that the State submitted a document entitled "Official Anthropological Report," and presented it as a witness and requested in the first operative paragraph of the Court’s Order of June 17, 2011. The Court will only admit those documents that relate to supervening events.

42. Furthermore, the representatives submitted, with their final written arguments, proof of litigation expenses related to the present case. The Court will consider those documents and the corresponding costs for which the representatives claim were incurred during the proceedings.

43. Likewise, the Court notes that the document submitted by the State is not in accordance with the pertinent provisions of Articles 41(1)(b), 46, and 50 of the Rules of Procedure. Consequently, it is inadmissible.

44. With regard to the testimony offered at the hearing by Mr. Oscar Troya, a witness proposed by the State, the Court notes that when answering a question posed by the representatives during his testimony in open court, Mr. Troya himself accepted that he had been present in the courtroom on the date in question. The Court considers that such conduct is contrary to the provisions of Article 51(6) of the Rules of Procedure. Therefore, the Court will not admit the testimony of Mr. Oscar Troya.

45. The Court deems it appropriate to admit those articles that are complete, or at least aspects related to the case, and whose source and publication date can be verified, and shall assess them taking into account the observations made by the parties.

46. With regard to the testimony offered at the hearing by Mr. Rodrigo Braganza, offered by the State as witness, and requested in the first operative paragraph of the Court’s Order of June 17, 2011, the Court notes that his testimony was "on the subject matter approved by the Court." As is evident in the Order of the Court, Mr. Braganza participated as part of the delegation accredited by the State and in the presentation of the State’s closing arguments at the public hearing. However, it was not a submission of documentary evidence at the appropriate procedural time. In this regard, the Court considers that it is not appropriate to admit those documents presented by the State in its final written arguments that were not submitted at the proper procedural stage.
D. Assessment of the case file on provisional measures

47. In the “Evidence” section of the “Merits” chapter of its application, the Inter-American Commission took into account the proceedings for precautionary measures before it and the pending provisional measures ordered by the Court. Then, it considered that the State, “as a party to both proceedings, has had the opportunity to contest and object to the evidence offered by the petitioners and, as such, there exists due procedural fairness between the parties.” Therefore, the Commission incorporated “the evidence adduced by the parties during the proceedings for precautionary and provisional measures” into the body of evidence. For their part, the representatives have made numerous references in their pleadings and motions to the provisional measures or to documents provided in that context. The State, on the other hand, has alleged in its answer that the reports it has produced regarding provisional measures “must be considered as evidence in favor of the State by the Inter-American Court.”

48. The Court recalls that the purpose of the provisional measures proceedings, which are of an incidental, precautionary and protective nature, is different to the object of a contentious case, both in the procedural aspects as well as in the assessment of the evidence and the scope of the decisions. However, unlike other cases, the alleged victims in the case at hand have also been beneficiaries of such protective measures. That is, the specific or potential group of beneficiaries is identical to the group of persons comprising the alleged victims. Furthermore, the purpose of the provisional measures coincides with many substantive aspects of the case. Therefore, the briefs and documents submitted during the provisional measures proceedings will be considered as part of the body of evidence in this case, provided that these have been specifically and properly referenced or identified, in a timely manner, by the parties in relation to their allegations.

E. Assessment of the visit to the Sarayaku territory

49. With respect to the in situ proceedings (supra paras. 18 to 21) aimed at obtaining further information about the situation of the alleged victims and the places where some of the facts alleged in the present case took place, the information and audiovisual material received will be evaluated in consideration of the particular circumstances in which they were produced. Thus, in accordance with the case law of this Court, the statements of witnesses who were heard cannot be evaluated in isolation, but rather in the context of the evidence as a whole, as they are useful as corroborative as they can provide additional information about the alleged violations and their consequences.

50. As regards the information received at Jatun Molino, the Court has taken it as contextual information, but will not make any determination with respect to that community (supra para. 20).

VII

FACTS

A. The Kichwa Sarayaku Indigenous Peoples

51. The Kichwa nation of the Ecuadorian Amazon encompasses two Peoples who share the same linguistic and cultural tradition: the Napo-Kichwa People and the Kichwa of Pastaza People. The Kichwa of the province of Pastaza define themselves as Runas (persons or human beings), affirming their attachment and belonging to the same intra-ethnic identity, vis-à-vis other non-Kichwa Indigenous Peoples. According to the Consejo de Desarrollo de Nacionalidades y Pueblos del Ecuador [Council for the Development of Nations and Peoples of Ecuador] (hereinafter “CODENPE”), the Kichwa of the Amazon have organized themselves into several federations. The Kichwa Peoples of Sarayaku and other Kichwa-speaking groups of Pastaza province belong to the Canelos-Kichwa cultural group, who form part of an emerging culture arising from a mixture of the original inhabitants of the northern Bobonaza area.

52. The Kichwa Nation of Sarayaku lives in the Amazon region of Ecuador, in an area of tropical forest, in the province of Pastaza, at different points along the banks of the Bobonaza River. Their territory is located 400 m.a.s.l., at a distance of 65 kilometers from the city of Puyo. It is one of the Kichwa settlements in the Amazon with the largest concentrations of people and land area and, according to the census of the Peoples, consists of around 1200 inhabitants. The local environment of the Sarayaku peoples is one of the most biologically diverse in the world. The Sarayaku Nation consists of five towns: Sarayaku Center, Cali Cali, Sarayakuillo, Shiwacocha, and Chontayacu. These towns are not independent communities, but belong to the Sarayaku People and in each town there are groups of extended families or ayulis, which in turn are divided into huasi households consisting of a couple and their offspring. This was partially observed by the Court delegation during its visit.

53. The territory of the Sarayaku People is located in an inaccessible area. Travel between Puyo—the nearest town—and Sarayaku, depending on weather conditions, takes about 2 or 3 days by boat along the Bobonaza River and eight days over land. To enter Sarayaku territory, whether by river or land, it is necessary to travel through the Canelos Parish. Although Sarayaku also has a landing strip for small planes, the use of this mode of transport is expensive.

54. The Sarayaku People subsist on family-based collective farming, hunting, fishing and gathering within their territory, in accordance with their traditions and ancestral customs. Around 90% of their nutritional needs come from products obtained from their own land and the remaining 10% come from outside the community.

55. With respect to their political organization, in 1979 Sarayaku was granted a Statute registered with the Ministry of Social Welfare, which includes authorities such as President, Vice-President, Secretary and Members. As of 2004, Sarayaku was formally recognized as the Kichwa


49 Cf. Case of Loayza Tamayo et al. v. Peru. Merits, paras. 43 and Case of Ataír Ríffo and Daughters v. Chile para. 25.

50 Most of the facts in this section have not been challenged and are drawn mainly from an anthropological-legal Report by FLACSO of May, 2005, on the social and cultural impacts of the presence of the CGC company in Sarayaku. FLACSO "Sarayaku: el Pueblo del Cénit", 1st Edition, CDES-FLACSO, Quito, 2005 (Evidence file, volume 8, p. 4224 and following pages). Other evidence is cited as necessary.


53 The Council for the Development of the Nations and Peoples of Ecuador (CODENPE) was created by Executive Decree No. 386, published in Official Record No. 86 of December 11, 1998.

Native People of Sarayaku. Currently, decisions on important issues or on matters of special significance for the people are made by the traditional Community Assembly, called Tayjasaruta, which also is the highest decision-making body. It is organized under a Governing Council composed of traditional leaders from each community (kurakas or varavkus), community authorities, former leaders, elders, traditional scholars (yachaks) and groups of technicians and advisors of the community. This Council has the authority to make decisions on certain kinds of internal and external conflicts, but its main task is to serve as an interlocutor with actors external to the Sarayaku, based on decisions taken at an Assembly.

56. The organization of the Kichwa People of Sarayaku forms part of the Kichwa Association of Pastaza. It also forms part of the Confederación de las Nacionalidades Indígenas de la Amazonia Ecuatoriana [Confederation of Indigenous Nations of the Ecuadorian Amazon] (CONFENIAE for its Spanish acronym) and of the Confederación de Nacionalidades Indígenas de Ecuador [Confederation of Indigenous Nations of Ecuador] (CONAIE).

57. According to the Sarayaku People's worldview, the territory is associated with a set of meanings: the jungle is alive and the natural elements have spirits (Supay), which are connected to each other and whose presence sanctions places. Only the Yachaks can enter certain sacred places and interact with their inhabitants.

B. Oil exploration in Ecuador

58. According to the State, from 1960 Ecuador intensified oil exploration activities, focusing its interest in the country's Amazon region. In this regard, the State mentioned that in 1969 the first reserves of crude oil were discovered in the northeastern region, and three years later, exports began and the region “became very important in a geopolitical and economic sense, being transformed from a ‘myth’ into a strategic national area.” According to statements by the parties, during the 1970s decade, Ecuador experienced rapid economic growth, a surge in exports and a strong process of modernization in its main cities.

59. As indicated by the State, at that particular historical moment, steps were taken with a view to securing complete control over the country’s oil resources from a nationalist perspective and under a philosophy of “national security,” based on an economic-political concept that defined the oil sector as a strategic area. At that time, “environmental, ethnic, and cultural variables were not sufficient reason for political debate.” According to the representatives, oil exploitation resulted in large-scale environmental costs which included, among other things, large spills of crude oil, contamination of water sources due to waste from oil production and open-air burning of significant amounts of natural gas. Moreover, this environmental pollution generated health risks for the populations in the oil producing areas of eastern Ecuador.

60. Ecuador is currently the fifth largest oil producer and the fourth exporter among Latin American countries. According to figures from the Ministry of Energy and Mines of Ecuador, in 2005 sales of crude oil generated about a quarter of the country’s gross domestic product (GDP) and oil revenues covered about 40% of the national budget.

C. Adjudication of territories to the Kichwa Peoples of Sarayaku and the Communities of the Bobonaza River in May 1992

61. On May 12, 1992, the State, through the Instituto de Reforma Agraria y Colonización [Institute for Agrarian Reform and Colonization] (IERAC for its Spanish acronym), adjudicated an undivided area of land in the province of Pastaza, identified in the title as Block 9, and covering a surface area of 222,094 Hectares or 264,625 Hectares, in favor of the communities of the Bobonaza River, which includes the Kichwa People of Sarayaku. Within Block 9, the Sarayaku territory consists of 135,000 Hectares. In fact, on June 10, 2004, the Executive Secretariat of CEDENPE (a State institution attached to the Presidency of the Republic with jurisdiction over indigenous matters) registered the Statute of the Native Kichwa Peoples of Sarayaku (Agreement No. 24), wherein Article 47 (b) establishes “the territory of the Kichwa People of Sarayaku and its natural resources found on the surface of Block 9, cohabited by the Kichwa peoples of Boberas, of which approximately and traditionally 135,000 Hectares correspond to the Sarayaku, as well as the assets referred to in Articles 45 and 46 of this Statute, noting that these territorial dimensions may be increased in the future.”


63. The political organization of the Kichwa People of Sarayaku has been recognized by the Executive Secretary of the Council for Development of Nations and Peoples of Ecuador (CODENPE for its Spanish acronym), through Agreement 24 of June 10, 2004. See FLACSO Anthropological-Legal Report (Evidence file, page 4273).

64. Assemblies are convened for the election of authorities, the announcement of the results of negotiations, decision-making processes that concern the entire community and the settlement of certain kinds of internal disputes. It is important to note that internal conflicts are dealt with at various preliminary stages before reaching the Assembly. Only disputes of a serious nature reach this body. These conflicts are of two kinds: the death of a member of the association and the failure to comply with the orders of the Assembly. See FLACSO Anthropological-Legal Report (Evidence file, page 4273).


66. Cf. Testimony of Sabino Gualinga and expert opinion of Rodrigo Villalba before the Court during the public hearing held on July 6 and 7, 2011.

67. Cf. Testimony of Sabino Gualinga and Rodrigo Villalba before the Court during the public hearing held on July 6 and 7, 2011.

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D. Participation contract with the CCG company for exploration of hydrocarbons and exploitation of crude oil in Block 23 of the Amazon Region

On June 26, 1995 the Comité Estatal de Licitación [Special Tender Committee] (CEL) for the exploration and exploitation of hydrocarbons, constituted in Quito, decided to award the exploration and exploitation of Block 23 to the CCG Company. Following this decision, CCG Company established offices in Chonta, using the sectors of Pacayacu, Shimi, Jatun Molino and Kunkuk as support points.

According to the Ministry of Energy and Mines, the environmental impact assessment required in the participation contract was completed in May 1997 and was approved by CEL, which also convened the eighth round of international public bidding for exploration and exploitation of hydrocarbons on Ecuadorian territory, which included “Block 23” of the Amazon region of the province of Pastaza.

On May 15, 1998, the CCG Company signed a contract with the Ministry of Energy and Mines of Ecuador, for the exploration and exploitation of hydrocarbons in Block 23, approx. 40 km from the town of Puyo to the east, and the base of operations of the CCG Company was in the village of Kunkuk.

Furthermore, on June 5, 1998 Ecuador adopted the Political Constitution of 1998, which established that the activities carried out in the adjudicated areas were subject to regulations regarding the care and management of the natural resources. The adjudicated area was the portion of the forest zone of the Amazon region, as defined by the Ministry of Energy and Mines, and was the area where the CCG Company was to carry out exploration and exploitation activities.

The CCG Company, in partnership with the Petroecuador Company, submitted an environmental impact assessment proposal to the Ministry of Energy and Mines, which included a description of the natural resources, especially the forests and wildlife, as well as the utilization of national legislation for the management of the forest resources. Furthermore, it was stipulated that the operational phase would last 20 years, with the possibility of an extension of up to 10 years.

According to the contract, the CCG Company was responsible for conducting the environmental impact assessment and preparing an environmental management plan for the exploration and exploitation phase. The plan was to be submitted to the Ministry of Energy and Mines, along with an environmental assessment report, for its approval. The plan was to be executed by the CCG Company, in cooperation with the local authorities and indigenous communities, in accordance with national legislation.

According to the contract, the CCG Company was required to conduct an environmental impact assessment (EIA) of the area, and to prepare an environmental management plan for the exploration and exploitation phase. The plan was to be submitted to the Ministry of Energy and Mines, along with an environmental assessment report, for its approval. The plan was to be executed by the CCG Company, in cooperation with the local authorities and indigenous communities, in accordance with national legislation.

Furthermore, on May 15, 1998, Ecuador ratified Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, of the International Labour Organization (ILO), which established that the activities carried out in the adjudicated areas were subject to regulations regarding the care and management of the natural resources. The adjudicated area was the portion of the forest zone of the Amazon region, as defined by the Ministry of Energy and Mines, and was the area where the CCG Company was to carry out exploration and exploitation activities.

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organizations against the workers and the destruction of the camp.” The suspension was ordered in an effort to continue developing community relations programs, in order to resolve the problems that had arisen. The suspension was extended several times until September 2002.

**E. Facts prior to the seismic prospecting and incursions into the Sarayaku People’s territory**

73. It was argued, without being contested by the State, that on numerous occasions the CGC company tried to gain access to the Sarayaku People’s territory and obtain the community’s consent for oil exploration, through actions such as: a) direct contacts with members of the community, circumventing the organizational levels within the indigenous community; b) offering to send a medical team to provide care in various communities of the Sarayaku People; however, in order to receive care, the people were required to sign a list that was subsequently used as a letter of support addressed to the CGC to continue its work; c) payment of salaries to individuals within communities to recruit others in order to endorse the seismic prospecting; d) offering gifts and personal benefits; e) forming support groups for the oil industry, individually or collectively.

74. The representatives also alleged that in May 2000, the attorney for the CGC visited Sarayaku and offered U.S. $60,000.00 for development projects and 500 jobs for the men of the Community. The State did not dispute this. On June 26, 2000, the Sarayaku held a General Assembly at which, in the presence of the CGC representative, they rejected the company’s offer. For their part, the neighboring communities of Pakayaku, Shaimi, Jatún Molino and Canelos signed agreements with the CGC.

75. In relation to the foregoing, the representatives argued, that given Sarayaku’s refusal to accept the CGC’s oil prospecting activities, in 2001 the company hired Daymi Service S.A., a team of sociologists and anthropologists to build community relations. According to members of Sarayaku, its strategy was to divide the communities, manipulate the leaders and instigate clandestine campaigns to discredit the leaders and organizations. The representatives argued that, as part of that strategy, the company created the so-called "Community of Independents of Sarayaku" in order to reach an agreement and justify its entry into the territory. The State did not dispute these facts.

76. As to Ecuadorian domestic legislation, the Law for the Promotion of Investment and Citizen Participation was enacted on August 18, 2000. This law states, inter alia, that:

"[p]rior to the execution of plans and programs for exploration or development of hydrocarbons found on lands allocated by the Ecuadorian State to Indigenous Communities or Black or Afro-Ecuadorian people, and which could affect the environment, PETROECUADOR and its subsidiaries, contractors, and associates must consult with the communities of each group. To that end, they will promote meetings and public hearings in order to present and explain their plans and the purpose of their activities, the terms under which these will be carried out, the timeframe and potential direct or indirect environmental impacts that could be caused to the community or its inhabitants. All acts, agreements or settlements reached as a result of consultations regarding the plans and programs for exploration and development shall be recorded in writing by means of minutes or a public instrument."

77. Furthermore, on February 13, 2001, the Substitute Environmental Regulations for Hydrocarbon Operations in Ecuador (Executive Decree 1215) were promulgated. Article 9 of said Regulations establishes that:

[...]

78. Furthermore, on July 30, 2001, the Ministry of Defense of Ecuador signed a Cooperation Agreement on Military Security with the oil companies operating in the country, in which the State undertook to "ensure the safety of oil facilities, and of the persons who work in them." 87

79. On March 26, 2002, the CGC company submitted to the Ministry documents referring to the updated Environmental Management Plan and Monitoring Plan for the 2D seismic prospecting activities in Block 23. On April 17, 2002, the Ministry requested information to ensure that the project to be implemented corresponded to the same area and characteristics as the seismic project approved on August 26, 1997, creating an Operational Plan so that, as the seismic exploration plan advanced, progress would also be made on aspects such as education, health, productive projects, infrastructure and community support.

80. See also affidavit of José María Gualinga Montalvo of June 27, 2011 (evidence file, volume 19, page 10018).

81. Cf. Ministerial Agreement No. 197, Published in Official Record No. 176 (evidence file, volume 14, page 8653 and 8654).

82. Cf. Resolution No. 028-CAD-2001-01-19 ordered the suspension of April 2000 to be extended until April 9, 2001 (Evidence file, volume 14, page 8656) and Resolution No. 431-CAD-2001-08-03 of August 2001 accepted a request for a further extension until September 26, 2002 (Evidence file, volume 14, page 8658).


84. Cf. Brief of pleadings and motions, volume 1, pages 281 and 282; See also affidavit rendered before a notary public by José María Gualinga Montalvo on June 27, 2001 (Evidence file, volume 19, pages 4815-4816).

85. Cf. Decision taken by the Association Sarayaku-PIP at a meeting held with the CGC company on June 25, 2000 (Evidence file, volume 8, pages 4812-4813); Letter of April 11, 2002 addressed to the Minister of Energy and Mines by the Sarayaku Association (Evidence file, volume 8, pages 4815-4816).

86. Cf. Decision taken by the Sarayaku-QIPP Association at the Meeting held with the CGC Company on June 25, 2000 (Evidence file, volume 10, pages 6109-6110) The Sarayaku Association and the Organization of Indigenous Peoples of Pastaza, QIPP for its Spanish acronym, have taken the following decisions: “Sarayaku ratifies its decision not to accept any oil company, be it CGC and/or other companies, mining or lumber organizations; based on this decision, there will be no further dialogue or negotiation with CGC; it does not decide to accept the USD $60,000,000 from the agreement of the provincial council and CGC, because this money would create inter-community conflicts with serious consequences; Sarayaku will not accept further meetings instigated by CGC with other communities of the Block; in accordance with these decisions, we request the definitive cancellation of the contract between the Ecuadorian State and CGC in Block 23. These decisions are supported by the collective rights recognized by the Ecuadorian Constitution; by ILO Convention No. 169 and by other laws and international bodies that protect the rights of indigenous peoples.”


88. Cf. Readings and motions brief, volume 1, pages 283. See also affidavit of José María Gualinga Montalvo of June 27, 2011 (Evidence file, volume 19, page 10021) and testimony rendered by Marlon Santi before the Court during the public hearing held on July 6, 2011.


90. Cf. Executive Decree 1215, Official Record 265 of February 13, 2001


80. On April 13, 2002, the Sarayaku Association sent a communication to the Ministry of Energy and Mines, expressing its opposition to the entry of oil companies to its ancestral territory.\textsuperscript{90}

81. In an official letter dated July 2, 2002, and considering that the project approved in 1997 had not been implemented due to force majeure “related to the actions of the indigenous communities,” and that the area concerned was the same one as that established that year, the Ministry approved the updated Environmental Management Plan and Monitoring Plan for 2D seismic prospecting in Block 23.\textsuperscript{91}

82. On August 26, 2002, the CGC submitted to the Ministry of Energy and Mines the following five investment agreements made with indigenous communities or associations and signed on August 6, 2002, before the Second Notary of the Canton of Pastaza: FENAQUIPA Organization, $154,000.00; AIEPPRA Organization, $154,900.00; FENASH-P Federation, $150,000.00; Association of Indigenous Centers of PACAYAKU, $222,600.00; and Achuar Community of SHAIMI, $50,600.00. These agreements involved contributions for productive projects, infrastructure, job training, health and education,\textsuperscript{92} and were based on an operational plan, implemented in the measure that the seismic activities were carried out in their territories.\textsuperscript{93}

83. According to the State, on September 2002, the CGC asked the Ministry of Energy and Mines to lift the force majeure status, which would allow for the reactivation of exploration or exploitation activities.\textsuperscript{94}

84. On November 13, 2002, the CGC company submitted its first progress report on the 2D seismic project, emphasizing that to date 25% progress had been achieved in reaching community agreements and that, as part of the dissemination of the Specific Environmental Management Plan, it had held a meeting with journalists in the city of Puyo and authorities of the Province.\textsuperscript{95}

85. On November 22, 2002, the Vice-President and Members of the Rural Parish Association of Sarayaku filed a complaint with the Ombudsman. They argued that the contract for 2D seismic prospecting in Block 23 constituted a violation of Articles 84(5) and 88 of the Political Constitution of Ecuador, in relation to Article 28(2) of the Environmental Management Law, and they requested: 1. that the CGC company respect the territory under the jurisdiction of the Sarayaku Parish 2. the immediate withdrawal of the Armed Forces that were providing protection to CGC workers, and 3. the immediate withdrawal of the Armed Forces that were protecting the community. Subsequently, Mr. Silvio David Malaver, a member of the Sarayaku Community, joined the complaint.\textsuperscript{96}

86. On November 27, 2002, the Ombudsman’s Office of Ecuador issued a “defensorial statement,” authorizing the members of the Sarayaku People were under the protection of its authority. Moreover, it stated that “[n]o person, authority or official shall impede the free movement, circulation and intercommunication of members of the Sarayaku across all lands [and] rivers that they require and need to exercise their legitimate right. Whoever obstructs, opposes, impedes or limits the right to free movement and circulation [of] the members of this community shall be subject to the penalties and sanctions established by the laws of Ecuador.”\textsuperscript{97}

87. On November 28, 2002, the President of the OPIP, representing the 11 associations of the Kichwa People of Pastaza, presented a constitutional writ of amparo before the First Civil Court of Pastaza against the CGC company and its subcontractor, Daymi Services. In the amparo, it was alleged that since 1999, CGC had carried out several efforts intended to negotiate, separately and in isolation, with the communities and individuals generating a series of conflicts and internal impasses within [their] organizations, which led to the deterioration of [their] hitherto strong organization.”\textsuperscript{98}

88. On November 29, 2002, the First Civil Court of Pastaza agreed to hear the amparo and, as a precautionary measure, ordered the suspension of “any current or impending action that affects or threatens the rights that are the subject of the complaint,” as well as the holding a public hearing on December 7, 2002.\textsuperscript{99}

89. According to the State, in a decision issued on December 2, 2002, the initial resolution was extended, “correcting the error made regarding the date, designating Friday, December 6, to hold the hearing.”\textsuperscript{100}

90. The hearing that was convened did not take place. The State alleged that no representative of the Sarayaku had appeared at the hearing, whereas the respondent party, the CGC company, did appear. The representatives, in their brief answering the preliminary objection, pointed out that the hearing never took place and that proof of this is the fact that no “minutes of the meeting” exist.\textsuperscript{101}

91. On December 12, 2002, the Superior Court of Justice of the District of Pastaza sent an official letter to the First Civil Judge of Pastaza, in which it “noted irregularities in the procedure [and expressed] concern over the total lack of speed [... of the] action, taking into account the social repercussions that its purpose implies.”\textsuperscript{102}

92. The seismic prospecting program proposed in Block 23 included an area of 633,425 km, distributed in 17 lines, mainly oriented north-south and east-west.\textsuperscript{103} Initially it was estimated that the seismic campaign would last 6 to 8 months depending on weather conditions. In the prospecting area, paths were cleared for laying down the seismic lines, as well as for the placement of camps, drop zones, and heliports.\textsuperscript{104}


On December 2, 2002, the Regulations for Consultation on Hydrocarbon Activities were approved. According to the regulations, the Kichwa People of the Sarayaku Territory shall have the right to be consulted on all matters related to hydrocarbon activities. The regulations provide for a uniform procedure for the hydrocarbon sector, including the application of the constitutional right of indigenous peoples to be consulted. Marcelo Gualinga Gualinga was sentenced to one year in prison for the crime of possession of explosives and was released after serving his sentence.

Following the reactivation of the seismic exploration phase in November 2002 and given the environmental activities of the CGC in the Sarayaku territory, the association of the Kichwa People of the Sarayaku Territory called for the formation of so-called Peace and Life Camps on the edges of the territory, each comprising 60 to 100 people, including men, women, and young people. These camps were designed to protect the boundaries of the community and prevent the entry of the CGC.

On January 7, 2003, the residents of Chontayaku and the Council of Kurakas held an emergency meeting in response to the reactivation of the seismic exploration phase. The community was concerned about the safety of its territory and its inhabitants.

On February 6, 2003, the Association for the Hydrocarbon Industry of Ecuador reported that force majeure conditions had been declared. The CGC was unable to continue with its operations due to the risk of conflict with the Sarayaku community. On February 10, 2003, the CGC expressed its willingness to continue with the seismic registration campaign and to participate in this surveillance, even if the Sarayaku community insisted on a peaceful solution to the problem without the intervention of the security forces.

On February 20, 2003, the Guayas District Court issued a judgment ordering the CGC to temporarily suspend seismic prospecting in Block 23 and to immediately release all workers detained in the communities of Shaimi and Sarayaku. This was a gesture of good will and was intended to open a dialogue. The Government undertook to urge the CGC company to temporarily suspend seismic prospecting in Block 23, so that the new government may address this issue. As a sign of good will, the Ministry of the Interior will appoint a high-level commission with representatives of the CGC, the Sarayaku community, and the Ministry of the Environment, in order to address the conflict. The commission will have the authority to address the conflict and will work towards a peaceful solution.

The National Environmental Protection Office reported that 5,463 kilograms of "pentolite" explosives, which were used by the CGC in the seismic exploration phase, remained in the Sarayaku territory. The explosives were buried and remained in the community until the judgment was issued. The community members successfully resisted the entry of the CGC and the explosives remained in the Sarayaku territory.

On March 13, 2003, the Commander of the 17th Brigade of Pastaza reported that the explosives were safely removed from the Sarayaku territory. The commander of the 17th Brigade of Pastaza assured that the community members had acted bravely and successfully resisted the entry of the CGC.

The CGC company was suspended from operations in Block 23, and the community members were allowed to return to their homes. The community members were left in peace and protected, and the explosives were safely removed from the Sarayaku territory.
challenged, that according to official letter No. 019-CGC-GG-03 of February 26, 2003 the CGC continued the suspension of activities. The State also mentioned that according to official letter No. 023-CGC-GG-05 of June 15, 2005 the suspension was maintained.\(^\text{115}\)

103. On April 10, 2003, the Ombudsman of the Province of Pastaza issued a ruling regarding the complaint filed on November 2002 (supra paras. 85 and 86), in which, based on the allegations made by the parties, the act of recognition of the scene of the events and international law, it decided to admit the complaint and ruled that the Minister of Energy and Mines and Chairman of the Board of PETROECUADOR and the attorney and legal representative of the CGC, were in full violation, inter alia, of Articles 84(5) and 88 of the Political Constitution of Ecuador, ILO Convention No. 169, and Principle 10 of the Rio Declaration on Environment and Development. Likewise, it declared the Minister of Energy and Mines and Chairman of PETROECUADOR and the attorney and legal representative of the CGC responsible for these violations.\(^\text{116}\)

104. Regarding the damages to the Sarayaku territory, it was argued, without this being challenged by the State, that in July 2003, the CGC destroyed at least one site of particular importance in the spiritual life of members of the Sarayaku People, on the land of Yachak Cesar Vargas.\(^\text{117}\) The events were recorded by the First Notary of Puyo in the following terms:

\[
\text{[... At the point known as PINGULLU, a tree whose name is LISPUNGU, measuring approximately twenty meters in height and one meter in width was destroyed. [... In the evening [...], we interviewed the elderly Shaman Cesar Vargas [...] who stated [...]. That employees from the oil company had entered his sacred forest in PINGULLU and destroyed all the trees that existed there, particularly, the great tree of LISPUNGU, which has left him without the power to obtain medicine to cure the ailments of his children and relatives [...].] }
\]

105. Similarly, the State has not disputed the fact that the company opened seismic trails,\(^\text{118}\) set up seven heliports,\(^\text{119}\) destroyed caves, water sources and underground rivers needed to provide drinking water for the community;\(^\text{120}\) it also cut down trees and plants of great environmental and cultural value, used for subsistence purposes by the Sarayaku People.\(^\text{121}\) Nor has the State disputed the fact that the CGC destroyed,\(^\text{122}\) in height and one meter in width was destroyed.\(^\text{123}\) In the evening\(...,

\[
\text{[... At the point known as PINGULLU, a tree whose name is LISPUNGU, measuring approximately twenty meters in height and one meter in width was destroyed. [... In the evening [...], we interviewed the elderly Shaman Cesar Vargas [...] who stated [...]. That employees from the oil company had entered his sacred forest in PINGULLU and destroyed all the trees that existed there, particularly, the great tree of LISPUNGU, which has left him without the power to obtain medicine to cure the ailments of his children and relatives [...].]}
\]

\text{H. Alleged threats and attacks against members of the Sarayaku Community}

107. Between February 2003 and December 2004 a number of incidents of alleged threats and harassment were reported against leaders, community members and a Sarayaku lawyer.\(^\text{125}\)

108. On December 4, 2003, about 120 members of the Sarayaku People were attacked with machetes, sticks, stones and firearms by members of the People of Canelos, in the presence of the police, for which they were going to a "peace march for peace and protection of the forests" that was to take place on December 5 and 6 in Puyo, due to the danger of "militarization in Block 23."\(^\text{126}\)

\text{The festival activities serve to renew the links with the territory and social bonds. People return to the recreational areas (purunas) and hunting areas, reinforcing the connection of these areas to the territory. Also, according to members of the Community, the Sarayaku festival involves the participation of all the Kurakas, as well as authorities and leaders, and the yachaks who visit the houses of the festival to order and transmit peace and respect, so that conflicts do not occur (FLACSO, “Sarayacu: el Pueblo del Cénit” (Evidence file, volume 11, page 6588)).}\n
\text{The oil company's work led to the suspension, during some periods, of the Sarayaku People's ancestral cultural rites and ceremonies, such as Utantsa, the most important festival held each year in February, and the seismic line passed near sacred sites used for initiation ceremonies for young people reaching adulthood.}\n
106. For its part, after visiting the Sarayaku Community on May 8, 2003, the Human Rights Commission of Ecuador's National Congress issued a report which concluded that "[t]he State, through the Ministries of Environment and Energy and Mines, violated paragraph 5) of Article 84 of the Political Constitution of the Republic, by failing to consult the community on plans and programs for the exploration and exploitation of hydrocarbons on their lands, and which would affect them environmentally and culturally." This Congressional Commission also concluded that by negotiating separately with the communities, the CGC did not recognize the leadership of the OPIP, which created conflicts between the groups. It also confirmed the damage to the territory's flora and fauna. As regards the population, the report concluded that "[t]here was a violation of human rights, given that serious psychological harm was caused to the children of the community who witnessed the confrontation with the army, the police and the CGC's security staff, and that the leaders of the OPIP were arrested and accused of terrorism, and were then subjected to physical abuse, which affected their personal integrity, something prohibited by the Political Constitution of the Republic."\(^\text{114}\)
109. In this regard, on December 1, 2003, the Kichwa Association of Sarayaku had sent a communication to members of Canelos inviting them to join the march. In response to this communication, the next day the Indigenous Kichwa Association of Canelos “Patolichuricuna” issued a press release stating that it had decided not to participate in the march and warning that “as is known at the provincial level [...] movement is totally suspended for those who have strongly opposed the oil matter.”

On December 4, 2003, Police Lieutenant Wilman Aceldo met with the President of the Parish Board of Canelos, who warned the lieutenant that “if the decision by Canelos not to allow passage through Canelos territory is not respected, [there will be] greater confrontations.”

110. The State sent a security contingent to the area consisting of 10 officers. Police Lieutenant Aceldo Argoti, who was there, stated:

 [...] all the settlers [of Canelos] were gathering in order to prevent the Sarayaku people from traveling to the city of Puyo, to march for peace and for life [...] I went to the Cuyas area to await the arrival of the people from Sarayaku. [At] about 1:00 p.m., five people arrived, but from that moment the inhabitants of Canelos indicated their clear refusal to allow any movement through and, approximately 500 meters from where we were we cut down a tree in the pathway to stop us from leaving [...] and immediately our security personnel provided protection, to avoid mishaps again [...] on the other side of the bridge near the school they had found around 110 Sarayaku, and so we redoubled our forces on the bridge with a police barricade but our efforts were not enough as the police barricade broke down, at which point they began to chase the Sarayaku people, armed with sticks [...] we tried to avoid conflict, exhausting our efforts, and they chased them for 10 minutes, and when they caught up with them, a fight broke out in which some people were injured.

111. In this incident, incident, members of the Kichwa People of Sarayaku were injured, among them, Hilda Santi Gualinga, Silvio David Malaver Santi, Laura Reina Gualinga, Edgar Gualinga Machoa, José Luis Gualinga Vargas, Victor Rondón Santi, Marco Gualinga, Héctor Santi Manya, Marco Santi Vargas, Alonso Isidro Manya, Marco Gualinga, Héctor Gualinga Santi, Jorge Santi Guerra, Aurala Cuyi Gualinga, Maria Angelica Santi Gualinga, Clotilde Gualinga, Emerson Alejandro Shiguango Manya, Romel F. Cisneros Dahua, Jimmy Leopoldo Santi Gualinga, Franco Tulio Viteri Gualinga, and Cesar Santi.

112. In light of these events, on December 5, 2003, the Ombudsman’s Office of the Province of Pastaza filed a complaint ex officio and issued a resolution in which it concluded that the leaders and members of the Indigenous People of Canelos were responsible for: a) flagrant violation of the right to move freely through national territory, a right guaranteed and recognized in Article 23-14 of the Political Constitution of the Republic; b) criminal infraction, as established and sanctioned in Article 129 of the Criminal Code; and c) violation of Article 12 paragraph 1 of the International Covenant on Civil and Political Rights.

and Report of the Parish Council of Canelos on the confrontation between the People of Canelos and the People of Sarayaku, undated (Evidence file, volume 9, pages 5141 to 5144). See also list of persons who allegedly attacked members of the Kichwa People of Sarayaku on September 4, 2003 (Evidence file, volume 9, pages 5146 and 5147) and eleven statements by 36 of the people accused of these incidents (Evidence file, volume 9, pages 5001 and subseq.).

127 Cf. Report of Parish Board of Canelos on the confrontation between People of Canelos and the People of Sarayaku, page 5111.


131 Cf. Preliminary ruling of investigation, officially opened by the Ombudsman’s Office of Pastaza Province on December 5, 2003, Appendix 45 to the petition.


133 Cf. Preliminary Inquiry of December 9, 2003 (Evidence file, volume 16, pages 9253 and 9254); Certification of appointment of expert witnesses of December 9, 2003 (Evidence file, volume 16, pages 9256-9259); statements of suspects, taken on May 4, 5, 14 and 20, 2004 (Evidence file, volume 16, pages 9313-9370); witness statement June 10, 2004 (Evidence file, volume 16, pages 9371-9372), and report on inquiry at the scene of the events involving Sarayaku and Canelos, of April 23, 2004 (Evidence file, volume 16, pages 9359 to 9360).

134 Cf. Inter-institutional Cooperation Agreement between the Ministry of Mines and Oil and the National Police to proceed with removal of pentolite (Evidence file, volume 14, pages 8679-8680).


136 This regulation also annulled Executive Decree No. 3401, Official Record No. 728 of December 19, 2002.


139 Cf. Evidence file, volume 9, page 5232.

140 Cf. Response of the State (Merits file, volume 2, pages 496-497).
121. On December 17, 2009, a “modification agreement” was approved, with the aim of increasing the budget allocated to the plan for “Reparation and Remediation of Environmental Damage,” to $8,640.00 USD. The State was to remove 14 kg. of the pentolite buried near the surface.

122. As confirmed in an official letter dated September 16, 2010, containing the Deed of approval by the Undersecretary for Environmental Quality of the “Comprehensive Environmental Assessment of Block 23,” the representative of the CGC was required to: a) Submit a schedule and specific deadlines for the implementation of activities contemplated in the Action Plan, including those referring to the management of pentolite, the current status of this explosive; b) environmental impact of the search and evaluation of the buried material, etc.

123. On November 19, 2010, in a document drawn up before a notary public, PETROECUADOR signed a Deed of Termination, by mutual agreement with the CGC, of the participation agreement for exploration and exploitation of crude oil in Block 23. The representatives noted that despite having expressly requested it, the Sarayaku People were not informed of the terms of the negotiation between the State and the CGC, or of the conditions under which the Act was signed. According to the terms of the Act of Termination of the contract of Block 23, in clause 8(4), the parties (PETROECUADOR and CGC) agree and ratify that there is no environmental liability in the concession area that is attributable to the contractor.

124. In this case, it must be determined whether the State adequately respected and guaranteed the rights of the Sarayaku People that were allegedly violated, in granting a contract for oil exploration and exploitation on their territory to a private company; in implementing said contract and causing a series of related events. Even though the State acknowledged that it did not carry out prior consultations in this case, it questioned its obligation to do so during the litigation and argued that certain actions carried out by the company satisfied the requirement to consult the indigenous communities of the area granted in concession. Unlike other cases heard by this Court, in this case there is no doubt regarding the right of the Sarayaku People to their territory, one fully acknowledged by the State in domestic proceedings (supra paras. 55, 61 and 62) and an undisputed fact before this Court. The Court shall proceed to analyze a) the arguments of the parties; and b) the obligation to guarantee the right to prior consultation, in relation to the rights to communal property and cultural identity of the Sarayaku People.

A. Arguments of the parties

A.1 Right to Property, in relation to the Obligation to respect the Right to Thought and Expression and Political Rights.

125. The Commission argued that the State violated the rights enshrined in Article 21 of the American Convention, in relation to Articles 11(1), 13, and 23 thereof, to the detriment of the Sarayaku Community and its members. In particular, it noted that Ecuadorian law contains a provision that the State is responsible for the “use and enjoyment” of the property.


A.2 Right to Thought and Expression.

149. Case of the Indigenous People of Sarayaku regarding Ecuador. Provisional measures. Order of the Inter-American Court of Human Rights and the relevant printed and electronic documents. With reference to said official letter, on August 4, 2010, the Sarayaku People requested that the State grant them a certified copy of the Memorandum of Understanding. The State complied with the request on September 20, 2010. The Sarayaku People have never been granted a certified copy of the Memorandum of Understanding.

150. Article 121 of the American Convention establishes: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society, but no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law [.....].”

151. Article 1(1) of the American Convention establishes: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

152. Article 23 of the American Convention states: “Every citizen has the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”
emphasized that this in no way implied any disregard or disrespect for the land rights of indigenous peoples, and therefore the State adjudicated the territory to the Sarayaku People. This is not an unlimited property title, because according to the provisions of the adjudication contract the State’s power to build roads or other infrastructure is not restricted and its institutions and Security Forces have free access to the territory to fulfill their constitutional obligations. Furthermore, it argued that underground natural resources belong to the State, which may exploit these without interference provided that it does so in accordance with environmental protection standards.

129. The State also pointed out that, even if there were no obligation to engage in prior consultation, the State considered that the participation of indigenous peoples in matters that affect them and the right to be consulted are essential for their social and cultural development. However, it argued that there is no regulation authorizing indigenous communities to exercise a “right of veto” over a decision made by the State concerning the exploitation of natural resources, particularly those underground.

130. The State added that despite the lack of any obligation in this regard, in August 2002 the CGC company, the alleged victims and other communities signed an agreement to “develop the territory in an environmentally sustainable manner,” which had also been duly and properly “discussed” with the affected communities, although “in practice it was never implemented.” Furthermore, when the Constitution of 1998 entered into force, the Environmental Management Plan was updated.

131. The State argued that the constant and repeated lack of cooperation and reactive attitude of members of the Sarayaku Community had prevented the full implementation of compensatory measures agreed by the CGC. For his reason, the declaration of force majeure remained in effect and the contract was terminated without a single barrel of oil having been extracted.

132. With regard to the alleged violation of freedom of expression of the Sarayaku People, the State considered that, based on the facts of this case, there has been no act or omission to their detriment that is attributable to it.

133. The State noted that access to political participation by indigenous peoples, in general, had been guaranteed, more fully as of the nineties, and that the Sarayaku leaders hold innumerable positions of political power in public institutions and have participated in many elections. Furthermore, the State reiterated that, with regard to political participation in consultations on matters concerning natural resources, the Sarayaku People have been protected by the international legal framework that recognized the right to culture as a central focus of public policies related to natural resource extraction. Consequently, the institutions and mechanisms enabling indigenous people to exercise political participation prior to undertaking natural resource extraction projects had not been incorporated in such a way as to constitute a justiciable right. Finally, the State recalled that the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169 and a wide range of collective and comprehensive constitutional rights were implemented as of 1998.

A. 2 Right to Freedom of Movement and Residence

126. In relation to Article 13 of the Convention, the Commission argued that, as part of the consultation process, the State should have provided clear, sufficient and timely information on the nature and impact of the activities to be carried out and on the prior consultation process. It added that in a case such as this, access to information is vital for the proper exercise of democratic oversight of the State’s administration with respect to the exploration and exploitation of natural resources in the territory of indigenous communities, a matter of obvious public interest. At the same time, in relation to Article 23 of the Convention, the Commission pointed out that, by failing to inform or consult the Sarayaku People about a project that would directly impact their territory, the State was in breach of its obligations, under the principles of international law as well as under domestic law, to adopt all necessary measures to guarantee the participation of indigenous peoples, through their own institutions and in accordance with their values, traditions, customs and forms of organization, in the decisions made regarding matters and policies that affect or may affect the social and cultural life of indigenous peoples.

127. The representatives argued that the State was internationally responsible for violating Articles 21, 13 and 23 of the Convention, in relation to Article 1(1), to the detriment of members of the Sarayaku People, for allowing and supporting the incursion of third parties into the Sarayaku territory and for not protecting their use and enjoyment of the natural resources found therein, which are the basis of their livelihood. They alleged the same violations as the Commission, having regard to the following facts and circumstances: i) the State not only signed the contract with the company without consulting the Community and obtaining its consent, but it also allowed and supported (through the “militarization of the territory”) the illegal incursion of the CGC company into the territory, despite the Community’s repeated position, ii) the unauthorized use and destruction of the territory by the oil company during its incursion between November 2002 and February 2003, when nearly 200 kilometers of primary forest were clear-cut. This action affected the area’s resources, which is particularly serious given the Community’s dependence on these resources for its livelihood, and iii) the destruction of the sacred areas. The representatives added that while the entire territory was sacred, the company destroyed specific sites of special cultural and spiritual value. Thus, the granting and subsequent implementation of the oil concession took place without the State having guaranteed the Community’s effective participation in consultations and its free, prior and informed consent, according to its traditions and customs, in such a way that it would reasonably benefit from a preliminary study of the social and environmental impact by an independent entity under the supervision of the State. The representatives also claimed that the violation of Article 21 is aggravated by the State’s failure to comply with the precautionary measures of the Commission and the provisional measures ordered by the Court, particularly the failure to remove the petrolite from the territory.

128. The State argued that, having signed the contract for oil exploration with the CGC in 1996, it was under no obligation to initiate a consultation process, or obtain the free, prior and informed consent of the Sarayaku People, since it had not yet ratified ILO Convention 169 and because the Constitution at that time made no provision to that effect. Thus, based on Article 28 of the Vienna Convention on the Law of Treaties, this was a legally non-existent obligation for Ecuador. The State
The Commission did not allege a violation of Article 26 of the Convention and did not refer to the arguments of the representatives.

The State argued that there was no violation of Articles 22 and 26 of the Convention, and that, in the case of the Sarayaku People, the free movement of members was not affected. The representatives argued that the State violated the right to culture of the members of the Sarayaku People by granting the concession in the territory of the Sarayaku People without consulting them, and that the Sarayaku People are responsible for their freedom of movement.

The representatives argued that the Sarayaku People’s suspension of their daily activities and the adults’ dedication to the defense of the territory had a profound impact on the teaching of cultural traditions and rituals to the children and young people, as well as on the transmission and perpetuation of the elders’ spiritual knowledge.

The representatives and the Commission argued that the State is responsible for the alleged violations, cited previously, in relation to Article 1(1) of the Convention.

The State, for its part, considered that it had not violated Article 2 of the Convention and stressed that the Constitution is in the process of being harmonized with the laws, regulations and constitutional provisions. The representatives defined culture from “a fixed ethnic notion” and participated in the Commission’s comments regarding the violation of Article 2 of the Convention.

The representatives essentially agreed with the Commission’s comments regarding the obligation to respect rights.

The Commission recalled that travel by boat across the Bobonaza River is the most usual form of transport for members of the Community, who cannot use the air strip given that for many years it was not suitable for the Community to take off or land. Similarly, the Commission argued that the State is responsible for the free movement of its members, reducing the areas in which they could look for food and ensure their subsistence.

The State argued that the free movement of its members, reducing the areas in which they could look for food, affected the right of movement through the only access route to their territory without affecting the right of prior consultation with indigenous peoples, in line with applicable international law. The representatives stressed that the provisions of the Convention imply that the right of access to information or to the right to prior consultation with indigenous peoples, in the application of international human rights instruments, must be accessible, adequate and timely, under the terms described in this petition.

The representatives mentioned that the Sarayaku People’s suspension of their daily activities and the adults’ dedication to the defense of the territory had a profound impact on the teaching of cultural traditions and rituals to the children and young people, as well as on the transmission and perpetuation of the elders’ spiritual knowledge.

The representatives argued that Ecuador violated the right to culture of the members of the Sarayaku People by granting the concession in the territory of the Sarayaku People without consulting them, and that the Sarayaku People are responsible for their freedom of movement.

The representatives essentially agreed with the Commission’s comments regarding the violation of Article 2 of the Convention.

The Commission argued that the provision of domestic law to the State, did not adapt the provision of domestic law to the Convention. Specifically, the Commission noted that Decree No. 1040 of April 2008 makes no reference to the right of access to information or to the right to prior consultation with indigenous peoples, in the application of international human rights instruments.

The Commission recalled that travel by boat across the Bobonaza River is the most usual form of transport for members of the Community, who cannot use the air strip given that for many years it was not suitable for the Community to take off or land. Similarly, the Commission argued that the State is responsible for the free movement of its members, reducing the areas in which they could look for food, affecting the right of movement through the only access route to their territory without affecting the right of prior consultation with indigenous peoples, in line with applicable international law.

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The representatives essentially agreed with the Commission’s comments regarding the obligation to respect rights.
F. The obligation to guarantee the right to consultation in relation to the rights to communal property and cultural identity of the Sarayaku People

B.1 The right to communal indigenous property

145. Article 21 of the American Convention protects the close relationship between indigenous peoples and their lands, and with the natural resources of their ancestral territories and intangible elements stemming from these. Among indigenous peoples there exists a communitarian tradition related to a form of collective land tenure, inasmuch as land is not owned by individuals but by the group and the community. This notion of land ownership and possession does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific forms of use and enjoyment of property, based on the culture, uses, customs and beliefs of each community, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.

146. Given this intrinsic connection that indigenous and tribal peoples have with their territory, the protection of property rights and the use and enjoyment thereof is necessary to ensure their survival. In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected with the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between territory and natural resources that indigenous and tribal peoples have traditionally maintained, one that is necessary for their physical and cultural survival and the development and continuation of their worldview, must be protected under Article 21 of the Convention so that they can continue living their traditional lifestyle, and so that their cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.

147. Moreover, lack of access to the territories and their natural resources may prevent indigenous communities from using and enjoying the natural resources necessary to ensure their survival, through their traditional activities, or having access to their traditional medicinal systems and other socio-cultural functions, thereby exposing them to poor or inhumane living conditions, to increased vulnerability to diseases and epidemics, and subjecting them to extreme situations of vulnerability that can lead to various human rights violations, as well as causing them suffering and harming the preservation of their way of life, customs and language.

B.2 The special relationship between the Sarayaku People and their territory

148. To determine the existence of a relationship between indigenous peoples and communities and their traditional lands, the Court has established that: i) this relationship can be expressed in different ways depending on the indigenous group concerned and its specific circumstances, and ii) the relationship with the land must be possible. Some ways in which this relationship is expressed may include traditional uses or presence, through spiritual or ceremonial ties; sporadic settlements or cultivation; traditional forms of subsistence such as seasonal or nomadic hunting, fishing or harvesting; use of natural resources associated with their customs or other elements inherent to their culture. The second element implies that Community members are not prevented, for reasons outside their control, from carrying out activities that reveal the enduring nature of their relationship with their traditional lands.

149. In this case, the Court finds that there is no doubt regarding the Sarayaku People’s communal ownership of their territory, which is exercised in a time-honored and ancestral manner. This was expressly recognized by the State through the adjudication made on May 12, 1992 (para. 61). Notwithstanding the foregoing, in addition to the points noted in the section on the facts of the case (supra paras. 51 to 57), the Court considers it pertinent to emphasize the deep cultural, non-pecuniary and spiritual ties that the community has with its territory, so as to more fully understand the damages caused in this case.

150. Mr. Sabino Gualinga, Yachak of Sarayaku, stated during the public hearing that “Sarayaku is a living land, a living jungle; there are trees, medicinal plants and other types of beings there.” Previously, he had stated:

Beneath the ground, ucuacha, there are people living as they do here. There are beautiful towns down there, and there are trees, lakes and mountains. Sometimes you hear doors shutting in the mountains; this is the existence of the men that live there. We live in the caipacha. In the jahapacha lives the powerful and ancient sage. There everything is flat, it is beautiful... I don’t know how many pachas there are above, where there are clouds there is a pacha, where the moon and stars are there is another, beyond this there is another pacha where I have been, it is a planet of flowers where I saw a beautiful hummingbird which was drinking honey from the flowers. I arrived at this point, but I couldn’t go beyond. All the ancient sages have studied in order to arrive at the jahapacha. We know that god is there, but we have not reached it.

151. In a previous statement, Mr. Gualinga had explained that “the extermination of life is intolerable; with the destruction of the jungle, the soul is erased, we stop being people of the land.”

152. The current Sarayaku President, José Gualinga, stated that in this “living jungle” there are “noises and special phenomena” and it is “the inspiration where, when we are in these places, we feel a breath, an emotion and then when we return to the people, to our family, we are strengthened.” These spaces “give us the power, potential and energy that is vital to our survival and life. And everything is interconnected with the lagoons, the mountains, the trees, the beings and also us as an exterior living being.” He further stated: “[W]e were born, we have grown, our...
ancestors have lived on these lands, and also our parents, in other words, we are natives of this land and we live from this ecosystem, from this environment."

153. For the Sarayaku, an intimate relationship exists between the Kawsak Sacha or "living jungle" and its members. According to Mrs. Patricia Gualinga:

It is an intimate relationship, a relationship of harmonious coexistence. The Kawsak Sacha for us is the living forest, with everything that it implies; the living forest with all its beings, with all of its worldview, with all of its culture with which we are intertwined. [...] These beings are extremely important. They provide us with vital energy, they maintain the balance and abundance, they maintain the entire cosmos and are connected with each other. These beings are essential not just for the Sarayaku, but for the equilibrium of the Amazon, they are all connected and for this reason the Sarayaku Community so ardently defends its living space. 170

154. During the public hearing, the expert witness Rodrigo Villagra Carrón stated that "the territory, knowledge, possibilities, production potential, but also human reproduction are intimately linked." 171 Similarly, he considered that "the cultural identity of each cultural group is dependent on the special relationship it has with Nature, expressed in a wide range of practices regarding management, protection, use, or primary extraction of natural resources, goods and services from the ecosystems." For his part, the expert witness Víctor López Acevedo explained that "for the Sarayaku it is not acceptable to depend on the State or other groups that demand goods, because they understand that the land is their greatest asset, in the sense that it contains all the material elements that determine appropriate social interaction, and where the beings which represent their spiritual beliefs are found. These beliefs are based on a different value system from that of the society around them, and constitutes their raison d'être and their reason for living." 172

155. The proven and undisputed facts in this case show that the Kichwa People of Sarayaku have a deep and special relationship with their ancestral territory, which is not limited to ensuring their livelihood, but rather encompasses their own worldview and cultural and spiritual identity.

156. The Inter-American Court has pointed out that when States impose limitations or restrictions on the exercise of the rights of indigenous peoples to the ownership of their lands, territories and natural resources, certain guidelines must be followed. Thus, "when indigenous communal property and individual private property enter into real or apparent contradiction, the American Convention and the Court's jurisprudence provide guidelines to define permissible restrictions," 173 which must be previously established by law, be necessary, proportional and aimed at achieving a legitimate objective in a democratic society without denying a people their livelihood. 174 The Court has stated that, in cases concerning natural resources in the territory of an indigenous community, in addition to the above standards, the State is required to verify that these restrictions do not imply the denial of the survival of the indigenous people themselves. 175

157. For this reason, in the case of Saramaka v. Suriname, the Court held that in order to ensure that the exploration or extraction of natural resources in ancestral territories does not imply a negation of the survival of indigenous people themselves, the State must comply with the following safeguards: i) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development plans or large-scale investment; ii) conduct an environmental impact assessment; and iii) where applicable, reasonably share the benefits arising from the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of such compensation should be, according to its customs and traditions. 176

158. In this case, no specific arguments have been presented in relation to those standards to determine the admissibility or validity of the communal ownership restrictions to the Sarayaku territory, or in regard to one of the protection measures regarding the right to share benefits. Accordingly, the Court will not examine these issues and will proceed to refer to the right to consultation.

B.4 The State's obligation to guarantee the right to consultation of the Sarayaku People

159. The Court notes, then, that the close relationship between indigenous communities and their land is generally an essential component of their cultural identity based on their own worldview, which, as distinct social and political actors in multicultural societies, should be specifically recognized and respected in a democratic society. The recognition of the right to consultation of indigenous and tribal communities and peoples is founded, inter alia, on respect for their rights to their own culture or cultural identity (infra paras. 212 to 217), which should be assured in a pluralistic, multicultural and democratic society. 177

160. It is for all the aforementioned reasons that one of the fundamental guarantees for ensuring the participation of indigenous peoples and communities in decisions regarding measures that affect their rights and, in particular, their right to communal property, is precisely the recognition of their right to consultation, which is recognized in ILO Convention No. 169, among other complementary international instruments. 178

161. In other cases, 179 the Court has pointed out that human rights treaties are living instruments, whose interpretation must evolve over time and reflect present day living conditions.

170. Testimony rendered before a notary public José María Gualinga Montalvo, pages 10028-10029. See also: Testimony rendered before a notary public by Franso Tulio Viteri Gualinga, on June 27, 2011 (Evidence file, volume 19, pages 9994-9995)

171. Testimony rendered by Patricia Gualinga before the Inter-American Court during the public hearing of July 6, 2011.

172. Expert opinion rendered by anthropologist Rodrigo Villagra before the Inter-American Court during the public hearing held on July 7, 2011.

173. Expert opinion rendered by anthropologist Prof. Víctor López Acevedo before the Inter-American Court during the public hearing held on June 29, 2011 (Evidence file, volume 19, pages 10145-10146).


175. Regarding this point, by way of example, in Judgment C-169/01, the Constitutional Court of Colombia declared: "The Constitution has recognized that "pluralism establishes conditions so that the axiologic content of constitutional democracy has root and democratic foundation. In synthesis, the free and popular choice of best values is formally justified by the possibility of choosing other values without restriction, and materially for the reality of a higher ethic." (Judgment C-089/94, ibid). The same judgment emphasized the democratization of the State and society prescribed by the Constitution, which can be linked to a progressive effort of historical construction, in which it is essential that the public domain and the political system are open to constant recognition of new social actors. Consequently, it is only possible to speak of a true, representative and participative democracy when the formal and material composition of the system maintains an adequate correspondence with the diverse forces of which society is composed, and allows all of them to participate in making decisions that concern them. This is particularly important in for the Social Rule of Law, which presupposes the existence of a deep interconnection between the traditionally separate spaces of the "State" and "Civil Society," and which seeks to overcome the traditional notion of democracy, seen simply as formal government of the majority, in order to better adapt to reality and include within the public debate, as active subjects, different social groups, minorities or those in the process of consolidation, thereby fostering their participation in decision-making processes at all levels.


This evolutionary interpretation is consistent with the general rules of interpretations established in Article 31 of the Vienna Convention. But the Court has also taken into account the conventions or other agreements in which these standards are confirmed or applied, in particular the American Convention. Furthermore, the Court has also considered the relevant norms of customary international law and their development, construing these norms in light of the purpose and scope of the Convention. Therefore, the Court has constructed an interpretation of Article 21 that is consistent with the purposes of the Convention and the advanced stages of international law. In this regard, the Court reiterates that, in cases involving indigenous peoples, it has examined the rights of indigenous peoples, the legal status of their communities and their communal possession and ownership of the territories they live in. Given that the instant case concerns the rights of members of an indigenous and tribal peoples in cases involving indigenous peoples, the Court has examined the rights of indigenous peoples, the legal status of their communities and their communal possession and ownership of the territories they live in. In order to ensure the effective enjoyment of these rights, the Court has examined the methods and procedures for the participation of indigenous peoples in decision-making processes, the role of human rights mechanisms at the inter-American level, and the existence of a right to prior consultation. Furthermore, the Court has also examined the role of international mechanisms at the inter-American level in this context, and the role of international mechanisms at the national level in this context. Finally, the Court has also examined the role of the ILO Convention No. 169 in this context.
have made reference to the 2002042007, Chile, Colombia, Ecuador, of September 13, 2003, Political Constitution of the Free and Sovereign State of Chihuahua, Article 64; Political Constitution of the State of Durango, February 22, 2004; Political Constitution of the Federal Republic of Brazil, Article 196; Political Constitution of the State of Quintana Roo of November 20, 1996. In particular, it noted that “the State’s respect for the social, economic and cultural rights of indigenous peoples, especially making effective the guarantees to protect indigenous peoples for their special characteristics, including social, economic, and cultural identity, quality of life and development” and that “[i]t is also appropriate to carry out consultation on national and regional development plans, programs and projects that directly affect these rights.” See also the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, 2011-1768 of February 11, 2011, Amparo Proceedings.

The Constitutional Court of Ecuador has discussed prior consultation in its jurisprudence, noting that “public consultation is another one of the major issues related to the management of the environment, and the participation of the indigenous peoples must be monitored and proceed in a way that respects the principles of justice and the right to prior consultation.”

The Constitutional Court of the Republic of Nicaragua states that “[t]he Communities of the Atlantic Coast [...], as a result of their historical and cultural identity, have the right to preserve and develop their cultural identity within national union; establish their own forms of social organization in the spirit of the community and the respect for their cultural identity as an integral part of the new national identity of the country.”

The law on the right to prior consultation with indigenous or native peoples, recognized in the ILO Convention No. 169, of September 6, 2011 which states, “all the people in the exercise and development of their way of life, their rights and their social, economic and cultural development, and their participation in the life of the community, including the right to consult in advance on legislative or administrative measures which directly affect their collective rights.” See also the Constitutional Chamber of the Supreme Court of Costa Rica, 2011-1768 of February 11, 2011, Amparo Proceedings.

The Constitutional Court of Costa Rica has noted that the “Political Constitution of Costa Rica is subject to the principles established in the ILO Convention No. 169, which recognize the rights of indigenous peoples and communities, and the guarantees of the right to consultation with indigenous peoples for the planning and implementation of national, regional and local development programs and projects that directly affect indigenous peoples and their communities, in accordance with the procedures established in this law. All activities to be carried out in consultation with indigenous peoples and communities must be subject to the procedures of information and prior consultation, set forth in this law.”

The following years are the number of the case law related to the constitutionality of measures affecting the indigenous peoples and communities, in accordance with the procedures established in the American Convention on Human Rights (Art. 17) and the ILO Convention No. 169.”

The National Indian Council of Paraguay has noted that “the right to prior consultation with indigenous peoples for the planning and implementation of national, regional and local development programs and projects that directly affect indigenous peoples and their communities, in accordance with the procedures established in the ILO Convention No. 169.”

The Constitutional Court of Ecuador has discussed prior consultation in its jurisprudence, noting that “the public consultation is another one of the major issues related to the management of the environment, and the participation of the indigenous peoples must be monitored and proceed in a way that respects the principles of justice and the right to prior consultation.”

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The National Indian Council of Paraguay has noted that “the right to prior consultation with indigenous peoples for the planning and implementation of national, regional and local development programs and projects that directly affect indigenous peoples and their communities, in accordance with the procedures established in the ILO Convention No. 169.”
Guatemala, Mexico, Peru, and Venezuela have noted the need to respect the norms of prior consultation and of this Convention. Other courts of countries that have not ratified ILO Convention No. 169 also refer to the need to carry out prior consultations with indigenous, native or tribal communities regarding the rights to which they are entitled. Thus, similar developments in case law are evident in the high courts of countries within the region, such as Canada or the United States of America, or of those outside the region such as New Zealand.

In other words, the obligation to consult, in addition to being a conventional standard, is also a general principle of international law.

In other words, nowadays the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are to be affected, and in particular the right to consultation, is a principle protected by the various international treaties, conventions and protocols to which these States are parties. Such principles must respect the specific consultation system of each people or community, so that the consultation may be understood as an appropriate and effective interaction with other State authorities, political and social actors and other third parties concerned.

The obligation to consult Indigenous and Tribal Communities and Peoples on any administrative or legal measure that may affect their rights, as recognized under domestic and international law, as well as the obligation to guarantee the rights of indigenous peoples to participate in decisions on matters that concern their interests, is directly related to the general obligation to guarantee the free and full exercise of the rights recognized in the Convention (Article 1(1)). This implies the duty to adequately organize the entire governmental apparatus and, in general, all the organizations through which public power is exercised, so that these are capable of legally guaranteeing the free and full exercise of those rights. The foregoing means that States have the obligation to structure their standards and institutions in such a way that indigenous, native or tribal communities can be consulted effectively, in accordance with international standards in this matter. Thus, States must incorporate those standards within the prior consultation processes, so as to generate sustained, effective and reliable channels for dialogue with indigenous communities in processes of consultation and participation through their representative institutions.

Given that the State must guarantee the rights to consultation and participation in all phases of planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival, these processes of dialogue and consensus-building should take place from the first stages of planning or preparation of the proposed measures, so that the indigenous peoples can truly participate in and influence the decision-making process, in accordance with the relevant international standards. To that effect, the State must ensure that the rights of indigenous peoples are not disregarded in any other activity or agreement reached with private or third parties, or in the context of public sector decisions that would affect their rights and interests. Therefore, where applicable, the State must also carry out the tasks of inspection and supervision of their application and, when appropriate, deploy effective means to safeguard those rights through the corresponding judicial organs.
The 2008 Constitution of Ecuador came into force on October 20, 2008. Article 57 of the Constitution establishes that indigenous peoples, exercising their rights to self-determination, will enjoy guarantees and protection of their rights, autonomy, self-governance, and participation in the management of the public policy related to their territories. This includes the right to consult about projects that may affect their lands and interests, and the right to maintain, develop, and strengthen their identity, ancestral traditions, and forms of social organization. 

In 2012, the Constitutional Court of Ecuador ruled that the State had obligations to consult indigenous communities on projects that would affect their lands and interests, and that the State failed to fulfill these obligations in previous cases. The Court ordered the State to take corrective measures and pay compensation to the affected communities.

The 2003 Law on Vacant Lands and Colonization in Ecuador established the right to possession and enjoyment of land, and the right to consultation and consent regarding projects that may affect these rights. The law also established the right to compensation for any loss or damage caused by the State.

The 2006 Law on Biodiversity and the Environment established the right to participate in the management of natural resources, and the right to consultation and consent on projects that may affect these resources.

The 2010 Law on the Protection of Indigenous Peoples established the right to participation in the formulation of public policies that affect their territories and interests, and the right to consultation and consent on projects that may affect these interests.

The consultation process is mandatory and timely, and if consent is not obtained, the procedures established in the Constitution and law will be applied.

The right to consultation is fully recognized in Ecuador and is provided for in the Constitution, laws, and international instruments.

Even though, prior to the ratification of ILO Convention 169 in 1998, the State had an obligation to guarantee the Sarayaku People their right to effectively enjoy their land, in accordance with their communitarian tradition, bearing in mind the specificities of their indigenous identity in their connection with the land, the State assumed the international commitment to guarantee the right to consultation, upon ratifying ILO Convention 169 in April 1998, and the collective rights of Indigenous and Afro-Ecuadorian peoples were established.

The consultation process is mandatory and must be conducted by competent authorities. If consent is not obtained, the procedures established in the Constitution and law will be applied.

The right to consultation is fully recognized in Ecuador and is provided for in the Constitution, laws, and international instruments.
Environmental Impact Plan, submitted by CGC and implemented by a subcontractor, which had been initially approved in August 1997. According to the State, this plan was approved on the basis of the Subtitle B of the National Human Rights Plan of 1998226 and the Law for the Promotion of Investment and Citizen Participation227 of 2000). It was not until after the company’s environmental impact Plan was approved, and the prospecting activities reactivated, that the Regulations for Consultation on Hydrocarbon Activities were approved in December 2002. Article one of this document states:228

[A] standard procedure for the oil industry is the application of the constitutional right of consultation of Indigenous Peoples, as is done in the National Human Rights Plan of 1998 and the Law for the Promotion of Investment and Citizen Participation227 of 2000). According to the State, the Republic is a sovereign and independent State with the duty to consult the most affected indigenous communities regarding the oil exploitation project. The objective of the consultation is to prevent or mitigate the effects of the environmental damage caused by oil exploitation and to ensure the rights of the indigenous peoples affected, in accordance with international and national law. The consultation is conducted through mechanisms established by the State, such as the National Human Rights Plan, the Declaration of the Right of Indigenous Peoples and the Declaration of the Right of Afro-Ecuadorians.

173. Nor has it been disputed that another national regulation was in force since 1998, which established the mechanisms and procedures of the National Human Rights Plan of 1998226 and the Law for the Promotion of Investment and Citizen Participation227 of 2000). It was not until after the company’s environmental impact Plan was approved, and the prospecting activities reactivated, that the Regulations for Consultation on Hydrocarbon Activities were approved in December 2002. Article one of this document states:228

226. Cf. National Human Rights Plan of Ecuador of June 18, 1998, Appendix 60. Article 8 (4) Establish as general objectives: Ensure that indigenous peoples are consulted before permitting projects for the exploration and exploitation of renewable and non-renewable resources located on their ancestral lands and territories and consider the possibility of indigenous peoples sharing equitably in the benefits arising from activities for the exploitation of those resources, as well as their right to be compensated for the damage caused.

227. Published in Official Record No. 144, Supplement, of August 18, 2000.


174. In this case, based on the exploitation plan for Block 23, the oil concession involved seismic work in an important area of the Sarayaku territory, which would substantially affect the land, given the inherent and probable impacts of an oil project in the jungle. The total area affected by the project in Sarayaku territory included primary forest, sacred sites, areas for hunting, fishing and food gathering, medicinal plants and trees and places used for cultural rites. Therefore, considering the impact that previous oil exploitation projects in Ecuador have had on the lives of indigenous peoples229 and other inhabitants of the region, it is understandable that the Sarayaku People should reasonably feel that a project of this magnitude would seriously affect their territory and way of life.

175. Indeed, it should be noted that the Sarayaku Community always opposed the company’s entry into its territory through various activities within and outside the community, by decision of their own authorities (supra paras. 74, 80, 85, 97 and 98). In this regard, during the public hearing Mrs. Patricia Gualinga stated that people in Sarayaku opposed the plan because “they had seen all the misery that oil exploitation had caused in other areas; they had seen everything that happened in Block 10 and all the division it was causing […] and aside from that, they knew that part of their livelihood depended on defending their living space and territory.”

176. Given that ILO Convention 169 applies to the subsequent impacts and decisions stemming from oil projects, even though these had been contracted prior to the force of the instrument, it is clear that at least since May 1999233 the State was under the obligation to guarantee the Sarayaku Impact Assessment and Environmental Management Plan, including the Community Relations Plan (Evidence file, volume 8, page 4130 and subs.)

229. In his expert report, William Powers describes the impacts inherent to an oil project in the jungle, which include the arrival of workers in the zone, the opening up of many trails involving the clearing of vegetation, impact on water supply, and the use of toxic by-products in the water which they use to drink and wash, in the air which they breathe, and the soil in which they plant their food crops. The Lima Declaration of 1994, in paragraphs 10 and 11, states: “The ILO Convention 169 is a most important instrument to protect the employment rights of indigenous peoples and workers in independent and autonomous economic activities, and it is based firmly on the rights of indigenous peoples to their own self-determination, land ownership, and respect for their traditions, customs, and way of life.”

230. In this regard, the expert witness Alberto Acosta referred to the effects that the oil boom has had on the Ecuadorian Amazon, indicating that “[t]he unspeakable is the fact that since the second half of the sixties, oil activities have significantly harmed the biodiversity and well-being of the Amazon populations. The communities and societies have suffered ineradicable violations of their most basic rights, in the name of the mythical well-being of the entire population” (Evidence file, volume 19, pages 10073-10074).


232. In this regard, the Inter-American Commission had established in 1997 that oil exploitation in eastern Ecuador would directly infringe upon the right to life of many of the inhabitants of the region, pointing out that these activities had exposed them to toxic by-products in the water which they use to drink and wash, in the air which they breathe, and in the soil in which they plant their food crops. The Lima Declaration of 1994, in paragraphs 10 and 11, states: “The ILO Convention 169 is a most important instrument to protect the employment rights of indigenous peoples and workers in independent and autonomous economic activities, and it is based firmly on the rights of indigenous peoples to their own self-determination, land ownership, and respect for their traditions, customs, and way of life.”

233. This testimony was rendered by Patricia Gualinga before the Court during the public hearing on July 6, 2011. Also testimony rendered before a notary public by Gloria Berta Gualinga Vargas, June 27, 2011 (Evidence file, volume 19, page 10037).

234. In the context of Ecuadorian oil operations, the ILO Expert Committee affirmed that although the convention cannot be applied in Ecuador because, as is the case with the ILO Convention 169, the activities are not applicable to countries that have already ratified the convention, the Committee noted that the ILO Convention 169 should be taken into account as a recommendation. The Committee stated that “the ILO Convention 169 should be taken into consideration as a recommendation, which occurred on May 15, 1999”. According to the Committee, “the duty to consult the persons concerned is not only applicable to contracts but arises in the general context of the implementation of the Convention”. Accordingly, the Committee established that from the entry into force of the Convention, the State would “fully apply the Agreement” and “in the context of the implementation of the Convention, the State would consider the recommendation that the State establish prior consultation in cases involving exploration and development of hydrocarbons which could affect indigenous and tribal communities, and to ensure the participation of interested persons in the various stages of the process, and similarly in the studies of environmental impact and the plans for environmental management” (Evidence file, volume 19, pages 10073-10074).

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People’s right to prior consultation, in relation to their right to communal property and cultural identity, in order to ensure that the implementation of the oil concession would not compromise their ancestral lands, livelihood or survival as an indigenous people.

B.5 Application of the right to consultation of the Sarayaku People in this case

177. The Court has established that in order to ensure effective participation by members of an indigenous community or people in development or investment plans within their territory, the State has the duty to consult the community in an active and informed manner, and in accordance with its customs and traditions, in the context of a continuous communication between the parties. Moreover, the principle of good faith, through culturally appropriate procedures and must be aimed at reaching an agreement. Similarly, the indigenous people or community must be consulted in accordance with its own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community’s approval. Also, the State must ensure that members of the community are aware of the potential benefits and risks so they can decide whether or not to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community.

178. It is appropriate, then, to determine the manner and scope in which the State had an obligation to guarantee the Sarayaku People’s right to consultation and whether the actions of the concessionaire company, the State described as forms of “socialization” or attempts at reaching an “understanding,” satisfy the minimum standards and essential requirements of a valid consultation process with indigenous communities and peoples in relation to their rights to communal property and cultural identity.

179. It is necessary to clarify that it is the State’s obligation— and not that of the Indigenous Peoples—to effectively demonstrate, in this specific case, that all aspects of the right to prior consultation were effectively guaranteed.

a) Consultation must take place in advance

180. With regard to the moment at which the consultation should be carried out, Article 15(2) of ILO Convention No. 169 states that “governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.” On this point, the Court has noted that consultation should take place, in accordance with the traditions of the indigenous people themselves, during the first stages of the development or investment plan and not only when it is necessary to obtain the community’s approval, if this were the case, since prior warning would allow sufficient time for internal discussions within the community and for it to provide an appropriate answer to the State.

181. In this regard, the ILO’s Expert Committee, upon examining a complaint that alleged non-compliance with ILO Convention No. 169 by Colombia, has established that the requirement of prior consultation implies that this should be undertaken during an action or implementing a project that is likely to affect the communities, including legislative measures, and that the affected communities must be involved as early as possible in the process.

182. Therefore, in this case, the consultation should take place in advance.
have international standards. Similarly, the legislation made reference to the requirement of good faith.

considered as a true instrument for participation, a condition for which should respond to the ultimate purpose of establishing a dialogue between both parties and having the benefit of the project in question. This is why, in this case, the State is responsible for the failure to consult Sarayaku, and therefore the planning and carrying out of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the communities of Canelos, Pacayacu and Shauk. Thus, from the position taken by the State before this Court, it is clear that State authorities sought to endorse the oil company’s actions as forms of participation with indigenous communities, and not to protect the rights of Sarayaku.

In this sense, it is an inherent part of every consultation with indigenous communities that “a climate of mutual trust be established,” and appropriately adapted to the social standards of the affected community, even though in practice it was never implemented. To date, the State has not taken any steps to inform Sarayaku of the environmental and health risks associated with the oil exploration project, nor has it provided any information on the potential impacts of the project on their territory. Furthermore, the State has not consulted Sarayaku on the terms and conditions of the contract, nor has it ensured that Sarayaku participates in decisions related to the exploration and exploitation of oil in their territory.

b) Good faith and attempts to reach agreement

According to the provisions of ILO Convention No. 169, consultations must be “carried out in good faith and in a manner appropriate to the proposed measures,” with the aim of reaching an agreement. In this regard, it is not disputed that the State did not carry out any form of consultation with Sarayaku, and that the consultation that took place was conducted by the very company that intended to enter into the contract. During the visit by the Court delegation to the Sarayaku territory, the State, in accepting its responsibility in this case, acknowledged that it had not carried out a proper prior consultation process. However, the State did not indicate what steps it had taken to observe, supervise, and ensure that the consultation process was carried out in good faith.

It should be emphasized that the obligation to consult is the responsibility of the State, and not of the company. The State must ensure that the consultation process is carried out in good faith, and that it is not a mere formality. The State must also ensure that the consultation process is not delegated to a third party, and that it is conducted in a manner appropriate to the proposed measures. Only in this way can the State fulfill its obligation to consult and respect the rights of indigenous communities.
monitor or participate in the process and ensure that the rights of the Sarayaku People were protected.

190. In addition to the foregoing, members of the Sarayaku community reported a military presence on their territory during the incursions by the CGC company and said that the purpose of this presence was to assure that the company could carry out its work, given their opposition. During the hearing, the State questioned whether the Army had entered with the intention of facilitating the oil exploration on the Sarayaku territory.

191. It has not been disputed that the Army's Seventeenth Jungle Brigade operated in the area of Blocks 23 and 260, specifically that four military bases were set up around Sarayaku, that is, in Jatun Molino, Shaami, Pacayaku and Pozo Landa Yaku. During the public hearing, the witness Ena Santi explained that the reason that the "peace and life camps" were created was because they had "found out that soldiers from Montalvo were coming here [and we] were very afraid that they would harm our husbands, or kill them, and that's why we were there." The witness Marlón Santi, who was in the "peace and life camps," stated at the public hearing that "the oil company had two types of security: so-called private security, provided by a private security company, Jansseg, and public security, which was a collaboration between the Ecuadorian Army and the National Police." These statements are supported by photos and videos taken by Sarayaku members, which are included in the case file, as well as by press reports and by a video produced by Sarayaku in 2003.

192. It is also significant that on July 30, 2001, the Ministry of Defense signed a military cooperation agreement with the oil companies operating in the country, whereby the State promised to "guarantee the security of the oil facilities, as well as of the persons working there." In this regard, the State presented, as an attachment to its response, a letter from the CGC company to PETROECUADOR, dated December 2002, in which the company requests that the State anticipate "the security necessary for the oil operations, by urgently calling for the intervention of the Military Police and the Armed Forces." In another similar letter, dated November 25, 2002, the same representative of CGC requested that the State, given the opposition of Sarayaku, take all necessary steps that it deems appropriate to facilitate, together with the armed forces, the implementation of the Seismic project.

193. Therefore, it is possible to consider that the State supported the oil exploration activities by the CGC company, given that it provided security with members of its armed forces at certain times, presence on their territory during the incursions by the CGC company, and said that the purpose of this presence was to ensure that the company could carry out exploration and exploitation of natural resources in their territory, without implementing a systematic and flexible process of participation and dialogue with them. Furthermore, it was alleged, and was not disputed by the State, that the CGC company had used fraudulent means to obtain signatures of support from members of the Sarayaku Community.

194. In fact, on April 10, 2003, the Ombudsman's Office of the Province of Pastaza declared that in this case it had been "fully" proven that the constitutional right established in Article 84(5) of the Political Constitution of Ecuador had been violated, along with the ILO Convention No. 169 and Principle 10 of the Rio Declaration on Environment and Development. Moreover, it blamed the Ministry of Energy and Mines and the president of the board of PETROECUADOR for these violations, as well as the legal representative of CGC.

195. For its part, the Human Rights Commission of Ecuador's National Congress issued a report on May 8, 2003, after visiting the People of Sarayaku, in which it concluded that "[t]he State, through the Ministries of the Environment and Energy and Mines, violated clause 5) of Article 84 of the Political Constitution of the Republic, by not consulting the community on plans and programs for the exploration and exploitation of non-renewable resources on their lands, which could affect them environmentally and culturally." This Congressional Commission also concluded that the CGC disregarded the leadership of the OPIP by negotiating separately with the communities, generating conflicts between them. Similarly, it confirmed the damage caused to flora and fauna within the territory. With regard to the population, it noted in its conclusions that "[t]here exists a violation of human rights, since severe psychological harm was caused to the children of the community, upon seeing the confrontations and threats to the community, which were not their fault, with the] arrest of leaders of the OPIP, accusing them of being terrorists and subjecting them to physical abuse, which affected their personal integrity, prohibited by the Political Constitution of the Republic.

196. After the suspension of the prospecting activities, high-ranking authorities of Pastaza Province and of the Government in office at that time, issued statements supporting the oil company's actions, which did not help to create a climate of trust with the State authorities.

197. On February 3 and 4, 2003, in the Sarayaku Community, the Minister for Energy and Mines announced that they had decided to "suspend the presence of soldiers and police in the Sarayaku area." Report of the Ecuadorian Minister of Energy and Mines regarding the activities carried out in Block 23 (Evidence file, volume 8, page 4786). Map "of military presence" prepared by the Socio-Environmental Information Center of Pastaza (Evidence file, volume 9, page 4970); Ombudsman's Office of Pastaza Province, Resolution of April 10, 2003, (Evidence file, volume 8, page 9).

200. "As will be seen below, the corporation cultivated relations with select communities that supported oil activity through patronage and promises. This selective corporate-indigenous engagement led to strident disagreement among indigenous communities as to who had authority to dictate what would happen within indigenous territory. Because broad consultation never occurred the intimate relations that Kichwa maintain with their sentient rain forest were placed under threat […] And fully informed consultation and consent among equals would necessarily diminish the chances of manipulation and encourage the chances of indigenous cohesion." Expert report rendered before a notary public by Professor Suzana Sawyer, of 24 June 2011 (Evidence file, volume 19, pages 10109 and 10119).
198. It is possible to consider, then, that State's failure to conduct a serious and responsible consultation process, at a time of high tension in relations between the communities and with State authorities, encouraged, by omission, a climate of conflict, division and confrontation between the indigenous communities of the area, in particular with the Sarayaku People. Although numerous meetings took place with different local and State authorities, public and private companies, the Police, the Army and other communities, there is an evident disconnect between these efforts and a clear determination to seek consensus, something that created situations of conflict.

199. In other words, the State not only partially delegated —inappropriately— its consultation obligation to private companies, but also left the obligation to guarantee the Sarayaku People's right to participation, but it also discouraged a climate of respect among the indigenous communities of the area by promoting the execution of an oil exploration contract.

200. The Court reiterates that the search for an "understanding" with the Sarayaku People, undertaken by the CGC company itself, cannot be considered a consultation carried out in good faith as much as it did not involve a genuine dialogue as part of the participation process aimed at reaching an agreement. c) Adequate and accessible consultation

201. This Court has established in other cases that consultations with indigenous peoples should be undertaken using culturally appropriate procedures, that is, those consistent with their own traditions. For its part, ILO Convention No. 169 provides that "governments shall [...] consult the peoples concerned, through appropriate procedures and in particular through their representative institutions," and take "measures [...] to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means of communication," taking into account the "specific characteristics of those areas where the official language is not spoken by a majority of the indigenous population." Similarly, the ILO Committee of Experts on the Application of Conventions and Recommendations noted that the expression "appropriate procedures" should be understood with reference to the purpose of the consultation, and that therefore there is no single model for an appropriate procedure, which should "take into account the national circumstances and those of the indigenous peoples, as well as the [contextual] nature of the measures under consultation. Thus, such procedures must include, according to systematic and pre-established criteria, the various forms of indigenous organization, provided these respond to the internal processes of these peoples. Appropriateness also implies that the consultation has a temporal dimension, which again depends on the specific circumstances of the proposed action, taking into account respect for indigenous forms of decision-making. In this regard, the case law and domestic legislation of various States refer to the need to carry out appropriate consultations.

202. Similarly, the ILO Committee of Experts on the Application of Conventions and Recommendations noted that the expression "appropriate procedures" should be understood with reference to the purpose of the consultation, and that therefore there is no single model for an appropriate procedure, which should "take into account the national circumstances and those of the indigenous peoples, as well as the [contextual] nature of the measures under consultation. Thus, such procedures must include, according to systematic and pre-established criteria, the various forms of indigenous organization, provided these respond to the internal processes of these peoples. Appropriateness also implies that the consultation has a temporal dimension, which again depends on the specific circumstances of the proposed action, taking into account respect for indigenous forms of decision-making. In this regard, the case law and domestic legislation of various States refer to the need to carry out appropriate consultations.

203. Cf. mutatis mutandi, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, paras. 130 and 24 from December 2003. (See Press reports, Evidence file, volume 11, pages 6547 and 6550). On October 3, 2003, the Minister of Energy and Mines announced to the press that "the work of CGC will be protected because this is the policy of the State." In this declaration, he also mentioned that "the government is prepared to provide all security guarantees to CGC, so that it can continue with its operations in Block 23 and fulfill the established contract. And if, in order to provide security, according to law, the presence of the police or the Armed Forces is necessary, the government will take the necessary steps in line with its commitment to honor the contract." ("Colonial Arboleda hands military operation to invade Sarayaku," Press Release, Evidence file, volume 11, page 6553). In October 2003, the Minister of Energy and Mines declared that the exploration and exploitation of oil in Sarayaku's territory would be carried out with or without the agreement of the Sarayaku people, and as such the indigenous territory would be militarized as from various dates (Provisional Measures file, request of the Inter-American Commission 000101). On December 31, 2003, the Minister of Energy and Mines announced that a new intervention would begin to guarantee the entry of the oil companies, and therefore a new military incursion was imminent. ("Ecologists protest at destruction of the Ecuadorian Amazon," News report (Mexico), United Nations Environment Program, January 4, 2004). The same report states that "an armed incursion is expected the day after tomorrow but, even so, the river Arboleda continues to be blocked for 20 days and accessibility by land has also been affected." (Provisional Measures file, request of the Inter-American Commission, page 11).

204. Cf. mutatis mutandi, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, paras. 130

205. Cf. ILO Convention No. 169, Article 6(1)(c). Similarly, Article 30(2) of the United Nations Declaration of the Rights of Indigenous Peoples stipulates that "States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities." Similarly, Article 169, Article 12. For its part, the United Nations Declaration of the Rights of Indigenous Peoples establishes in Article 36(2) that "States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right."
must respect the
carried out in conformity with international standards and best practices,
Moreover, the State acknowledges the fact that it was not the one who "sought an understanding," but rather the oil company itself. Therefore, from the position expressed by the State before this Court, it is clear that it sought to delegate de facto its obligation to carry out a prior consultation to the private company that was interested in exploiting the oil in the subsurface of the Sarayaku People's territory. (supra para. 199). Accordingly, the Court considers that the actions carried out by the company in order to obtain the consent of the Sarayaku People cannot be construed as an appropriate and accessible consultation.

d) Environmental Impact Assessment

In relation to the obligation to conduct an environmental impact assessment, Article 7(3) of ILO Convention No. 169 states that "[g]overnments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, cultural, and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities." Conducting such studies constitutes a safeguard to guarantee that the restrictions imposed on indigenous or tribal communities, with respect to their right to property when concessions are granted within their territory, do not imply a denial of their subsistence as a people. (supra para. 157). In this regard, the Court has established that the State must guarantee that no concession shall be granted within the territory of an indigenous community unless and until independent and technically competent bodies, under the supervision of the State, carry out a prior environmental and social impact study. Moreover, the Court determined that Environmental Impact Studies "serve to assess the possible damage or impact that a proposed development or investment project may have on the property and community in question. The purpose of these studies is not [only] to have some objective measure of the potential impact on indigenous land and the people, but also to ensure that members of the community [...]." Therefore, the Court concludes that the environmental impact assessment was not carried out in accordance with its case law or with international standards on the matter.

209. As noted previously, the consultation must be informed, in the sense that indigenous peoples must be aware of the potential risks of the proposed development or investment plan, including the environmental and health risks. In this regard, prior consultation requires the State to accept and provide information and implies constant communication between the parties. The case law of the national courts and domestic legislation have referred to this aspect of the consultation.

e) The consultation must be informed

Peru: Law on the right to prior consultation of indigenous or native peoples recognized in ILO Convention No. 169, Article 4.f: "Absence of coercion or conditions. The participation of indigenous or native peoples in the consultation process shall be undertaken without coercion or conditions"; Article 4.7: "Timely information. Indigenous or native peoples have the right to receive from State institutions all the information necessary to be able to express their point of view, and be duly informed, on the legislative or administrative measure subject to consultation. The State has the obligation to provide this information from the start of the consultation process and with due anticipation," Bolivia: Executive Decree No. 2903, February 16, 2007: "The process of consultation and participation shall be based on this principle of truthfulness, in accordance with current legal provisions, especially the provisions of ILO Convention No 169, which establish that consultation shall take place in good faith and, therefore, all the information that is part of and the result of the process of consultation and participation must be truthful." Ecuador: Law on Environmental Management, Official Record supplement 418, September 10, 2004, Article 29: "Any physical or juridical person has the right to be informed in a timely and appropriate manner regarding any activity by the State institutions which, according to the Regulations of this Law, may produce environmental impacts." Likewise, in Venezuela, the Organic Law on Indigenous Peoples and Communities of December 8, 2005 states in Article 14 that "[p]rojects shall be prior to the granting of the concession, given that one of the purposes for requiring such studies is to guarantee the right of indigenous peoples to be informed about all proposed projects in their territory." Therefore, the State's obligation to supervise the Environmental Impact Assessment is consistent with its duty to guarantee the effective participation of indigenous people in the process of granting concessions. Furthermore, the Court considers that one of the points that should be addressed by the environmental and social impact assessment is the cumulative impact of existing and proposed projects.


Cf. Case of the Saramaka People v. Suriname. "Interpretation of Judgment, para. 41."


The Constitutional Court of Colombia stated that prior consultation must be aimed at ensuring that "the community has full knowledge of projects for the exploration and exploitation of natural resources in the territories it occupies or that belong to it, and the mechanisms, procedures and activities required for their implementation," and is duly "informed and instructed regarding the manner in which the execution of said projects may affect or harm the elements that constitute the foundation of the community's social, cultural, economic and political cohesion and, therefore, the basis for its survival as a human group with unique characteristics" and that "it has the opportunity, through its members or representatives, to freely and knowingly assess, without external interference, the advantages and disadvantages of the project for the community and its members, to be heard in relation to its concerns and aspirations with regard to the defense of its interests and to express its views on the viability of the project." (Judgment SU-039/97). See also, Judgment C-030/08. See also, comments by the Constitutional Court of Ecuador in this regard, Case of Intag (459-2003-RA), Case of Nangaritza (0334-2003-RA) and Case of Yuma (0544-06-RA).

Cf. Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, para. 130.

Cf. Mutatis mutandi, Case of the Saramaka People v. Suriname, Interpretation of Judgment, para. 130.

209. In this case, the Court finds that there is no indication from the evidence submitted that the alleged "understanding" reached by the CGC company included the presentation of information contained in the environmental impact assessment, or that it allowed the Sarayaku People to actively participate in an appropriate discussion process. Nor was it demonstrated that the alleged "socialization" of the study was somehow related to a consultation process with the Sarayaku People, or that it served to inform them of the advantages and disadvantages of the project in relation to their culture and way of life, in the context of a communication process aimed at reaching an agreement. Therefore, the Court considers that the company's actions were not part of an informed consultation.

210. In this regard, there is evidence to conclude that the omissions in the consultation process on the part of the State, together with the numerous actions carried out by the company to fragment the communities, led to conflicts between the communities of Bobonaza and affected intercommunal relations. It is for this reason that, upon extending the provisional measures in June 2005, the Court considered it "particularly important that the measures adopted include actions to promote a climate of respect for the human rights of the beneficiaries [...] in order to ensure the effectiveness of the Convention in regard to relations between individuals." For that same reason, the Court ordered the State, when implementing those measures, to inform "the neighboring indigenous communities about the meaning and scope of the provisional measures, both for the State itself and for third private parties, in order to foster a climate of peaceful coexistence between them."

211. In conclusion, the Court finds that the State did not carry out an appropriate and effective process that guarantees the right to consultation of the Sarayaku People prior to beginning or authorizing the processes of prospecting or exploitation of natural resources within their territory. As noted by the Court, the oil company's actions do not comply with the minimum requirements of a prior consultation. The Sarayaku People were not consulted by the State prior to the company carrying out oil exploration activities, planting explosives or affecting sites of cultural value. All this was acknowledged by the State and, in any case, has been verified by the Court in the evidence submitted.

B.6 The rights to consultation and communal property in relation to the right to cultural identity

212. In relation to the foregoing, the Court has recognized that "[b]y disregarding the ancestral right of indigenous communities over their territories, this could affect other basic rights, such as the right to cultural identity and the very survival of indigenous communities and their members." Given that the effective enjoyment and exercise of the right to communal ownership of the land "guarantees that indigenous communities conserve their heritage.

213. Under the principle of non-discrimination established in Article 1(1) of the Convention, the recognition of the right to cultural identity is an ingredient and a means of broad interpretation to understand and guarantee the right to enjoy and exercise the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic legal systems.

214. In this regard, Principle 22 of the Rio Declaration on the Environment and Development has recognized that:

"Indigenous people and their communities, as well as other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."  

215. Two international instruments are particularly relevant to the recognition of the right to cultural identity of indigenous peoples: the ILO Convention No. 169 on indigenous and tribal rights, and the United Nations Declaration on the Rights of Indigenous Peoples. Various international instruments of UNESCO also address the right to culture and cultural identity.

216. For their part, the African Commission on Human and Peoples' Rights, in cases alleging the violation of Articles 17(2) and 17(3) of the African Charter, and to the PIDESC Committee, and to the

Cf. Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, para. 91.


to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake", the African Commission concluded that the State had violated Articles 17(2) and 17(3) of the Charter, considering "the very essence of the Endoros right to culture has been denied", rendering the right, "to all intents and purposes, illusory". (para. 250 and 1).  

286 The strong collective dimension of the cultural life of the indigenous communities is indispensable for their existence, well being and integral development, and encompasses the right to lands, territories and resources that they have traditionally possessed, occupied, or otherwise used or acquired. The cultural values and the rights of the indigenous communities are interwoven with their ancestral territories and their relationship with nature must be respected and protected in order to avoid the degradation of their particular way of life, including their means of subsistence, the loss of natural resources and, in the final instance, their cultural identity. (para 36). As such, States Parties must take measures to recognize and protect the rights of indigenous peoples to possess, exploit, control and utilize their lands, territories and communal resources, and in the case of other kinds of occupation or utilization of their lands or territories without their free and informed consent, adopt measures to ensure that they are returned.

287 In the Case of Chapman v. the United Kingdom (no. 27238/95 ECHR 2001-1), the Court acknowledged that Article 8 protects the right of a minority ("Gypsy") to maintain its identity (para. 93). In the Case of Gorzelik and others v. Poland (no. 44158/98, para. 92, February 17, 2004), the European Court noted that the need to protect cultural identity is also important for the proper functioning of a democracy. Reference to all the cases mentioned in this paragraph is found in "Cultural Rights in the Case-law of the European Court of Human Rights", Research division ECHR, January 2011, p. 9-12.

288 The right to self-determination of all indigenous communities is recognized in the 2007 United Nations Declaration on the Rights of Indigenous Peoples, now widely accepted with the adherence of 143 States (including Ecuador), which includes the rights of these Peoples to freely determine their political situation, to freely pursue economic, social and cultural development, to participate in the adoption of decisions which affect them, to fully participate, if they so wish, in the political, economic, social, and cultural life of the State (Articles 3, 4, 5, 18, 19, 20, 23, 31, and 34.). In the particular case of Ecuador, the recognition of this right is so clear that the current Ecuadorian Constitution of 2008 recognizes the right to self-determination in different ways, even declaring that all Indigenous communities, peoples and nations have the right to "maintain, develop and strengthen their identity, sense of belonging, ancestral traditions and forms of social organization, for which the Constitution will guarantee the respect and promotion of the customs and identities of indigenous peoples in all aspects of life", and in the case of "people's living in voluntary isolation", the State "shall adopt measures to guarantee their lives, ensure their social development and their wish to remain in isolation and ensure the observance of their rights."

289 1LO Convention No. 169. Considering paragraph 5.

290 The Yachak Sabino Gualinga stated: "In a place called Pingullo, were the lands of Mr. César Vargas, and he lived there with his trees, which were woven like threads which he could use to cure. When they cut down that Lispungo tree, it caused him much sadness (...). When they cut down the great Lispungo tree (...) he became very sad indeed, and his wife died, then he died, and a son also died, and after that the other son died and now only two daughters are left. (Testimony rendered by Sabino Gualinga before the Inter-American Court of Human Rights during the public hearing held on July 6, 2011).

291 César Santi stated that "Two months ago the company came through here with the seismic line and now there are no birds, the owner, the Amaangua (spirit being) left and because he left all the animals left (...). As the helicopters have been stopped from coming here, if we leave things quiet for a good time, perhaps the animals will return." FLACSO, Sarayaku: el Pueblo del Cenit, pages 6627 and subsq.

292 The festival activities serve to renew the links with the territory and social bonds. People return to the recreational areas (puntas) and hunting areas, reinforcing the connection of these areas to the territory. Also, according to members of the Community, the Sarayaku festival involves the participation of the traditional leaders and yachaks who visit the houses of the festival to order and transmit peace and respect, so that conflicts do not occur. FLACSO, Sarayaku: el Pueblo del Cenit, pages 6672-6676. See also statements of Simón Gualinga and Jorge Malaver, Self-evaluation, page 6588 and subsq.

to adopt the necessary measures to render effective the exercise of the rights and freedoms adopted by the Convention.

228. The Court notes that it did not refer to any other mechanism or “other measure” in particular that would suggest that the lack of regulation of the right to prior consultation contained in the domestic and international legislation applicable to Ecuador does not constitute an obstacle to its effectiveness in this case.

229. The Court finds that the State was aware of the situations affecting the free movements of members of the Sarayaku Community along the river. However, the evidence submitted by the petitioners is insufficient to support these facts under Article 22 of the Convention.

230. The State has previously recognized for constitutional harmonization" and that in the transition period established in the Constitution of 2008 itself, the legislative packets to be approved were previously marked. In April 2008, the State took steps to adopt domestic legal measures, particularly in relation to the right to prior consultation, under Article 2 of the American Convention, in relation to the violations declared in paragraphs 222-226.

231. The Court considers that in this case the facts have been sufficiently analyzed, and the violations conceptualized under the rights to communal property, consultation and cultural identity of the Sarayaku People, under the terms of Article 21 of the Convention, in relation to Articles 1(1) and 2, and therefore it shall not rule on the alleged violations of those provisions.

232. As to the points raised by the Inter-American Commission, the Court agrees with the findings of the Commission that, in such matters, access to information is vital for effective monitoring and control of the activities of the State authorities. Therefore, the Court concludes that the failure to adopt the mechanisms referred to in Articles 13, 25 and 26 of the Convention has not constituted an obstacle to the effective exercise of the rights to prior consultation, as established in the domestic law.

B.10 Conclusion

233. The Court concludes that the Ecuadorian State has violated the rights to communal property, consultation and cultural identity of the Sarayaku People, under the terms of Article 21 of the Convention, in relation to Articles 1(1) and 2, and therefore it shall not rule on the alleged violations of those provisions.

234. In so doing, the Court has found that the State has failed to adopt the necessary measures to render effective the exercise of the rights and freedoms adopted by the Convention, and has therefore violated the rights to communal property, consultation and cultural identity of the Sarayaku People.

235. In conclusion, the Court reiterates that it is the State’s responsibility to adopt the necessary measures to render effective the exercise of the rights and freedoms adopted by the Convention.

236. The Court notes that it did not refer to any other mechanism or “other measure” in particular that would suggest that the lack of regulation of the right to prior consultation contained in the domestic and international legislation applicable to Ecuador does not constitute an obstacle to its effectiveness in this case.

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people's recognizes their rights as collective subjects of International Law and not only as individuals. Given that indigenous or tribal communities and peoples, united by their particular ways of life and customs, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or issued in this Judgment should be understood from that collective perspective.

232. The State, by failing to consult the Sarayaku People on the execution of a project that would directly affect their territory, was in breach of its obligations, under the principles of international law and of its own domestic law, to adopt all necessary measures to guarantee the participation of the Sarayaku People, through their own institutions and mechanisms and in accordance with their values, traditions, customs and forms of organization, in the decisions made regarding matters and policies that affected or could affect their territory, their cultural and social life, their rights to communal property and to cultural identity. Consequently, the Court considers that the State is responsible for the violation of the right to communal property of the Sarayaku People, recognized in Article 21 of the Convention, in relation to the right to cultural identity, under the terms of Articles 1.(1) and (2) thereof.

VIII.2 RIGHTS TO LIFE, PERSONAL INTEGRITY AND PERSONAL LIBERTY

A. Arguments of the parties

A.1 Right to Life

233. The Commission argued that the State of Ecuador is responsible for having violated Article 4 of the Convention, in relation to Article 1(1) thereof, to the detriment of the Sarayaku Indigenous Community and its members, since its failure to comply with its obligation to guarantee them the right to property by allowing the burial of explosives in their territory, has created a situation of permanent danger that threatens the life and survival of its members and, furthermore, has jeopardized the Community's right to preserve and transmit its cultural heritage. The Commission added that the detonation of explosives had destroyed forests, water sources, caves, subterranean rivers and sacred sites, forcing the migration of animals, and that the placement of explosives in areas traditionally used for hunting had presented the people from gathering food, diminishing their ability to ensure their subsistence and disrupting their life cycle. The Commission also argued that when the Sarayaku Peoples' Association declared the state of emergency, the community members paralyzed their daily economic, administrative and academic activities for three months, during which time they survived on resources from the jungle, because their crops and food ran out. All this also affected the possibility of leading a life with dignity for members of the Sarayaku People. In this context, the State did not adopt the necessary positive measures within the scope of its powers, which would reasonably have been expected to prevent or avoid risk to the right to life of members of that Community.

234. The representatives considered that the State incurred in liability by placing members of the Sarayaku People at serious risk as a result of the oil company's "unconsulted" incursion into their territory. They also alleged that the State did not take the necessary and sufficient measures to ensure dignified living conditions for all members of the Sarayaku People, "afflicting their different way of life, their individual and collective life projects and their development model," which amounts to a violation of Article 4(1) of the Convention. They further argued that the State did not take any steps to fulfill its obligation to protect the community, considering the special condition of vulnerability of the indigenous peoples due to the incursion by the oil company. They claimed that during the period of food shortages and state of emergency, various illnesses affected the people, mainly children and the elderly, situations described as "fatal to the health of community members who were prevented from having access to health care centers," which affected their right to life. The representatives also claimed that the State had not provided information regarding the amount of pentolite that had been left on the surface. They added that relations between the Sarayaku and neighboring communities and within the community had been affected, which seriously disrupted the security, tranquility and lifestyle of members of the Community.

235. The State considered that the right to life has priority within the system of guarantees enshrined in the Convention and, therefore, there are only a few exceptional cases in which the State can be declared responsible for the violation of this right for having failed to respond with due diligence. In this case, it reiterated that it cannot be argued that the impact of the oil company's actions has caused serious damage to conditions required for a dignified life of the Sarayaku. With regard to the buried explosives, in the provisional measures the State informed the Court of the progress made in removing these explosives. As for the alleged illnesses and other alleged damages, the State emphasized that no impartial medical certificates or other scientific evidence were provided, but rather only affidavits from community members and "studies of questionable reliability." The State argued that it is illogical to claim violations of the right to life because the right to health, nutrition, access to clean water or access to means of subsistence were affected as a result of a private action that was interrupted and did not even reach the seismic prospecting phase; therefore it is not appropriate to discuss pollution or substantial disruption of the lifestyle of the indigenous peoples of the area. Finally, it claimed that it had not breached its positive or negative obligation to protect the right to life, inasmuch as it had ensured compliance with the regulations applicable at the time of the facts, regarding natural resource extraction activities.

A.2 Rights to personal integrity and personal liberty

70

303 Article 5 of the American Convention states: "1. Every person has the right to have his physical, mental and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman or degrading treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person [•]."

304 Article 7 of the American Convention states: "1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty, except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial [•]."
asserted that the situation had created distress, anxiety and fear among members of the Sarayaku, affecting their physical and psychological well-being. Therefore, they asked the Court to declare that the Ecuadorian State violated the right to humane treatment (personal integrity) of all members of the Sarayaku People.

As to the events of January 25, 2003, the State argued that without reasonable evidence to prove a particular pattern or evidence of the responsibility of State agents, the Court cannot declare its assistance. However, the Court found that the evidence presented pointed to the violation of the right to physical integrity to the detriment of the members of the Sarayaku who were assaulted. The representatives and the Commission argued that the State did not provide adequate protection to the 20 members of the Sarayaku People who were attacked, as the contingent of police officers present was "in every sense insufficient" to prevent acts of violence, particularly given that the Canelos police did not arrest the aggressors after the attack. It was alleged that the State did not even provide medical assistance to the injured people, thereby demonstrating that the State did not take the necessary measures to protect the integrity of the Sarayaku People.

In its case law, the Court has established that the obligations imposed by Article 4 of the Convention (the right to life) are especially demanding of preventive measures. The Convention obligates the States to ensure the effective protection of the right to life, to prevent and investigate acts and crimes that violate it, and to provide adequate and prompt relief to the victims. The Court has held that the positive obligations of States Parties also extend to the prevention of torture and cruel, inhuman or degrading treatment or punishment.

In the case of the assassination of members of the Sarayaku People, the Court found that the State was responsible for the violation of the right to life. The representatives alleged that Marcelo Gualinga, Reinaldo Gualinga and Fabian Grefa were detained by Ecuadorian soldiers, without a warrant and without having been informed of the charges against them. They claimed that they were not informed of the reasons for their arrest and that they were subjected to inhumane treatment. The representatives also alleged that the treatment to which they were subjected by the army was in violation of Article 7 of the Convention.

The Court found that the State was responsible for the violation of the right to life, considering that, having failed to ensure the right to communal property, it deprived the Sarayaku of the possibility of having access to their traditional means of subsistence, as well as the use and enjoyment of their natural resources. The Court also found that the State failed to adopt affirmative measures to ensure living conditions with dignity (Article 11, paragraph 1, letter d) and e). The Court ruled that the State was responsible for the violation of the Convention and that it had to pay reparations to the Sarayaku People.
B. Alleged threats to members of the Sarayaku People

246. Since the provisional measures were ordered in this case in June 2005 (para. 5), the Court has noted with particular concern the placement of over 1400 kg of high-powered explosives on the Sarayaku People’s territory, which the representatives alleged were intended for the purpose of harassment and intimidation. As noted by the representatives, the explosives were placed on the Sarayaku People’s territories in the context of a logging project, which has been ongoing since the mid-2000s. The Court recognizes the potential danger posed by the explosives and the need for further investigation to determine who was responsible for their placement.

247. The task of removing the explosives began in December 2007, after a First Cooperation Agreement was signed between the Kichwa Indigenous People of Sarayaku and the oil company. The agreement called for the removal of the explosives from the Sarayaku People’s territories, but the operations were not carried out in a timely manner. As the Court indicated in its last order on provisional measures (para. 265), the removal of the explosives has been a contentious issue, with both the State and the representatives of the Sarayaku People expressing concerns about the conditions under which the removal was to be carried out.

248. In its last order on provisional measures, the Court valued “that the State authorities and the representatives of the Sarayaku People together with the oil company fulfilled their obligations in good faith.” The Court noted that the removal of the explosives was not completed in a timely manner, and that the State had not provided adequate guarantees for the safety of those involved in the operation. The Court also highlighted the need for additional measures to prevent the occurrence of similar incidents in the future.

249. For the foregoing reasons, the Court has ordered the following measures in relation to the obligation to guarantee the right to communitarian property, under the Convention:

- The removal of the explosives from the Sarayaku People’s territories
- The provision of guarantees for the safety of those involved in the operation
- The establishment of a monitoring mechanism to ensure compliance with the measures
was the result of alleged criminal acts committed by these individuals, who were detained at the scene of the incidents. The Court notes, on that one hand, that during the time-span between the arrest of the four Sarayaku members at one of the helppoints opened in their territory (line E 16), and their handover to the National Police at Puyo, these individuals had been "investigated" by private security staff (supra para. 252). However, the representatives did not provide information on the applicable legal regime, nor did they specifically allege a violation of their right to personal liberty, for having been questioned by people who, apparently, were not competent authorities. On the other hand, those four people were subjected to a precautionary measure of imprisonment by decision of the First Court of Pastaza (supra para. 99), without the court record indicating whether the prosecution and judicial authorities duly justified the need for this measure based on procedural requirements in that situation, namely, the danger of failure to appear in court. Nevertheless, the representatives did not argue that the foregoing implied a specific violation of Article 7(3) of the Convention, nor did they report or provide evidence to enable the Court to analyze whether they were detained arbitrarily or for unlawful reasons.

Consequently, the Court does not have sufficient evidence to conclude that the State is responsible for the alleged violations of the rights recognized in Articles 5 and 7 of the Convention and in Article 6 of the Convention to Prevent and Punish Torture.

VIII.3 RIGHTS TO A FAIR TRIAL [JUDICIAL GUARANTEES]315 AND TO JUDICIAL PROTECTION316

A. Arguments of the parties

255. The Commission argued that the State had violated the right to judicial guarantees and judicial protection for several reasons: i) the writ of amparo was not processed in the usual manner and there were unexplained delays in the procedure, which was neither resolved nor was a hearing held; ii) the remedy was ineffective because the injunction ordered was not fulfilled; and iii) the State has not provided any information to conclude that it performed an effective investigation of the complaints related to the various incidents of violence and threats against members of the Sarayaku Community.

256. The representatives agreed with the Commission’s comments and added that the judge with jurisdiction over the writ of amparo had not summoned the hearing under the legal terms established by the Constitution and the Law of Constitutional Control. They argued that the State had violated the guarantee of due process by failing to comply with the precautionary measure ordered, and by not ensuring the means to implement the decisions and judgments issued by the competent authorities in order to effectively protect the rights, making the right to judicial protection ineffective. Like the Commission, they alleged that the State is responsible for the total lack of investigation into the complaints filed on various occasions by members of Sarayaku.

257. The State argued that the writ of amparo filed by the OPIP had been withdrawn given the procedural inactivity of the interested party, on the understanding that the plaintiff "did not show interest in pursuing the amparo" and therefore, it had been "inconclusive." In particular, it noted that in this case, "the lack of celerity was not due to irregularities in the process" but rather to the fact that the interested party did not provide the "necessary collaboration to proceed with summoning one of the defendants" prior to the date of the hearing. The State added that OPIP could not benefit from its own willful misconduct regarding the failure to summon Daymi Services "as it was their mistake for failing to verify the correct address of the defendant, in order to effectively protect the rights allegedly violated.” Moreover, the State argued that OPIP did not appear at the hearing, nor did it justify its absence, which, pursuant to the Law of Constitutional Control, amounts to a withdrawal of the writ.

258. With respect to the foregoing, the representatives noted that the First Civil Judge of Pastaza changed the date of the hearing to December 2, and notified OPIP of the change that same day. They added that the address for Daymi Services listed in the OP/IP brief was wrong, but that the error was corrected by a letter from OPIP dated December 16, 2002, and that it was not on the record “that the court conducted further proceedings from that date to once again summon a hearing.” Thus, the representatives noted that if not all the parties were summoned, “the Judge could not possibly have held the hearing, as was the case, and therefore, the plaintiffs could not be accused of failing to appear and even less considered to have withdrawn the amparo.”

259. With regard to the investigations, the State noted that “it cannot be considered guilty over the lack of investigation into the complaints filed by members of the Sarayaku Community because the investigative processes by the Prosecutor’s Office of Pastaza were undertaken only after the authorities had access to the communities and the collaboration of the plaintiffs to continue with the investigation of the cases presented.” Moreover, it mentioned that the "Sarayaku Community did not provide facilities for the Prosecutor to conduct an investigation given that it restricted access to its territory, exposing law enforcement authorities to a major confrontation if they attempted to enter by force." The State further indicated that the lack of progress in the inquiries "is due to a refusal to cooperate on the part of the possible victims," and that under the reforms made to the Criminal Procedure Code in 2009, "proceedings cannot be kept open for more than one year for misdemeanors and two years for felonies."

B. Considerations of the Court

260. The Court has held that the State has a duty to provide effective judicial remedies to persons who claim to be victims of human rights violations (Article 25), remedies that must be substantiated in accordance with the rules of due process (Article 8(1)), all within the general obligation of States to guarantee the full and free exercise of the rights recognized by the Convention to every person under its jurisdiction (Article 1(1)).317

261. On the other hand, the Court has pointed out that Article 25(1) of the Convention establishes, in general terms, the duty of the States to guarantee effective judicial remedies against acts that violate fundamental rights. In interpreting the text of Article 25 of the Convention, the Court has held, on other occasions that the duty of the State to provide a judicial remedy is not satisfied by the mere existence of courts or formal procedures or even the possibility of having recourse to the courts. Rather, the State has the duty to adopt affirmative measures to guarantee that the judicial remedies it provides are "truly effective in establishing whether or not a human

315 Cf. Prosecutor’s Investigation 069-2003, pages 9096 and 9097.

316 Article 8.1 of the American Convention states: “1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”

rights violation has occurred and providing redress." 318 The Court has further held that "the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which such remedy is lacking." 319

262. Similarly, the Court has reiterated that the right of all persons to simple and prompt recompense or any other effective remedy before a competent judge or tribunal for protection against acts that violate their fundamental rights "constitutes one of the basic pillars, not only of the American Convention, but also of the Rule of Law itself in a democratic society, within the meaning of the Convention." 320

263. This Court has also held that for a State to comply with the provisions of the aforesaid article, it is not sufficient to ensure that the remedies formally exist, but that they are effective. 321 In this sense, under the terms of Article 25 of the Convention, it is possible to identify two specific responsibilities of the State. First, it must embody in its legislation and ensure due application of effective remedies and guarantees of due process of law before the competent authorities, which protect all persons subject to their jurisdiction from acts that violate their fundamental rights or which lead to the determination of the latter's rights and obligations. Second, guarantee effective mechanisms to execute the decisions or judgments issued by said authorities, so that the declared or recognized rights are effectively protected. Because a judgment is binding in character, the latter provides certainty on the right or controversy at issue in the case and, therefore, has as one of its effects the requirement or need for compliance. The process should lead to the materialization of the protection of the right recognized in the judicial ruling, by the proper application of that ruling. 322 Therefore, the effectiveness of the sentences or judicial orders depends on their execution. 323 Anything to the contrary would imply the denial of the right concerned. 324

264. Furthermore, with respect to indigenous peoples, it is crucial that the States grant effective protection that allows for the distinct characteristics of indigenous peoples, their economic and social situation, as well as their special vulnerability, customary law, values, traditions and customs. 325

B.1 Regarding the obligation to investigate

265. The Court has previously held that the obligation to investigate, judge and, if applicable, punish those responsible for human rights violations falls within the affirmative measures that States must adopt in order to guarantee the rights recognized in the Convention 326, in accordance with Article 1(1) thereof. This duty must be assumed by the State as a legal obligation and not simply as a formality that is preordained to be ineffective, or as a mere response to private interests, which relies upon the procedural initiative of the victims or their next of kin, or on the production of evidence by private parties. 327

266. Likewise, the Court has stated that the obligation to investigate, and the corresponding right of the alleged victim or their next of kin, do not only derive from the conventional norms of international law, which are imperative for the States Parties, but also derive from domestic legislation which refers to the duty to investigate ex officio certain unlawful actions and the rules that allow victims or their families to file a complaint or lawsuit, present evidence, petitions or any other matter, in order to participate procedurally in the criminal investigation in the hope of establishing the truth of the facts. 328

267. In this matter, the Court notes that several complaints were filed in relation to the alleged assaults and threats against members of the Sarayaku Community (supra para. 107).

268. There is no indication of proceedings or results related to the complaint filed before the District Attorney of Pichincha in April 2004 by Mr. José Serrano.

269. In addition to the official investigation begun by the Ombudsman of Pastaza in connection with the events that took place on December 4, 2003 (supra para. 112), the Court notes that the District Attorney carried out some inquiries 329 in response to the complaint filed (supra para. 113). Despite this, no evidentiary documents were submitted to determine whether or not any action was taken or if a final or provisional decision was made by the authorities in relation to the allegations. With respect to the other complaints, the Court finds that the parties did not furnish any evidentiary documents or specific allegations to determine whether or not an investigation or some sort of verification process was carried out as a result of the complaints filed. Nor was any documentation provided regarding any definitive or temporary action by the authorities in relation to the allegations.

270. In short, the Court finds that no investigation was conducted in five of the six complaints filed and, as to the one investigation begun, it is clear there was procedural inactivity after certain steps were carried out. Although the State argues that this inactivity was due to lack of access to the Sarayaku territory, it did not furnish any evidentiary documentation regarding any final action or decision by the authorities in connection with the investigation of the complaints filed, which contains that or any other explanation for not continuing with the investigations. Thus, the Court finds that in this case, the investigations were not an effective measure to guarantee the rights to personal integrity of the alleged victims of these acts.

271. Based on the foregoing considerations, the Court finds that in this case, the flaws in the investigation of the alleged facts demonstrate that the State authorities did not act with due diligence or in accordance with their obligations to guarantee the right to humane treatment derived from Article 5(1) of the Convention, in relation to the State's obligation to guarantee the rights
contained in Article 1(1) thereof, to the detriment of the Sarayaku People. (supra paras. 107 and 111).

B.2 Regarding the writ of amparo

272. In the context of the simple, prompt and effective remedies established in the provision under analysis, this Court has maintained that the procedural remedy of amparo has the necessary characteristics for the effective protection of the fundamental rights; in other words, it is simple and brief. In this regard, in the proceedings before this Court concerning the facts of the present case, the State argued that the writ of amparo was effective to "resolve the judicial situation of the petitioners." 273

273. As to the writ of amparo filed by the OPIP on November 28, 2002 in the instant case, the Court notes that the remedy was reviewed by the Superior Court of Justice of the District of Pastaza on December 12, 2002, and that it found "irregularities in [the] processing" of the writ. In that order, the Superior Court of the District of Pastaza further indicated that the initial ruling in which the parties are summoned to a public hearing violated the provisions of the Law on Constitutional Control and expressed "concern over the total absence of promptness in dealing with the matter, considering the repercussions to the social order that its objective implies." In the same ruling, the First Civil Judge of Pastaza was "strongly urged" to comply with the strict provisions of the Law on Constitutional Control, with the promptness and efficiency that the case requires. Similarly, although the OPIP filed a brief on December 16, 2002 before the First Civil Judge of Pastaza clarifying the address at which the defendants should be notified, no information or documentation was furnished to enable this Court to determine whether there were further procedural actions or a final decision by the abovementioned court in relation to the amparo petition.

274. Considering the foregoing, the Court holds that the reviewing court found irregularities in the processing of the writ of amparo and ordered these to be remedied. However, this Court cannot ascertain whether the First Civil Court of Pastaza complied with the orders of the reviewing tribunal, thereby rendering the order effective. On the contrary, as the State itself indicated, the action was inconclusive. Therefore, the Court considers that, in the present case, the amparo procedure was ineffective inasmuch as the First Civil Judge of Pastaza did not comply with the orders of the Superior Court, the District of Pastaza and prevented the competent authority from deciding on the rights of the plaintiffs.

275. Similarly, the Court notes that on November 29, 2002, the First Civil Judge of Pastaza ordered, as a precautionary measure, to suspend any action that could affect or threaten the rights that were the subject matter of the amparo (supra para. 88). There is no indication in the body of evidence that said order was fulfiled by the authorities. Therefore, the Court considers that the ruling by the First Civil Judge of Pastaza on November 29, 2003, which provided a precautionary measure, was ineffective in preventing the situation described, as it was not capable of producing the result for which it was conceived. In that regard, it is appropriate to reiterate that to ensure that the remedies applied in the instant case would be truly effective, the State should have adopted the necessary measures to ensure compliance.

276. Finally, while it is reasonable to consider that the precautionary measure ordered by the First Civil Judge was temporary, until the competent Judge had entered a final decision regarding the writ of amparo, it is not possible to conclude that the requirements imposed by this measure had been extinguished due to the remedy having been inconclusive. Particularly, if the ineffectiveness of the amparo is due, as was demonstrated, to the negligence of the judicial authorities themselves. Thus, the duty to comply with the precautionary measures ordered by the State's judicial authorities lasted throughout the period during which the alleged risk to the rights of the plaintiffs remained.

277. Furthermore, although judicial authorities did not issue an order or definite decision on the merits of the writ of amparo, they ordered a precautionary measure for the purpose of safeguarding the effectiveness of a subsequent final decision. Therefore, the State had the obligation to ensure compliance with said ruling under the provisions of Article 25(2)(c).

278. Based on the foregoing considerations, the Court finds that the State did not guarantee an effective remedy to address the judicial situation infringed, nor did it ensure that the competent authority ruled on the rights of the persons who filed the writ, or that the measures were executed through effective judicial protections, in violation of Articles 8(1), 25(1), 25(2)(a), and 25(2)(c) of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Sarayaku People.

IX REPARATIONS (Application of Article 63(1) of the American Convention)

279. Based on the provisions of Article 63(1) of the Convention, the Court has indicated that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation, and that this provision "reflects a customary norm that constitutes one of the fundamental principles of contemporary International Law on State responsibility." The reparation of the damage caused by a breach of an international obligation requires, wherever possible, full restitution (restituto in integrum), which consists of reinstating the situation that existed prior to the violation. Where this is not possible, as happens in the majority of cases involving human rights violations, the Court will order measures to guarantee respect for the infringed rights and ensure that the damage caused by the violations is repaired. Accordingly, the Court has considered the need to order several measures of reparation in order to fully redress the...
damage caused, and therefore, in addition to pecuniary compensation, the measures of restitution, satisfaction and guarantees of non-repetition are especially relevant.\textsuperscript{339} 

281. This Court has established that the reparations must have a causal connection with the facts of the case, the violations declared, the harm proven, as well as with the measures requested to repair the damage. Consequently, the Court must adhere to this concurrence in order to rule properly and according to law.\textsuperscript{340} 

282. At the end of the litigation before the Court, the State reiterated its willingness, expressed during the visit to the Sarayaku territory, to reach an agreement with the Community regarding reparations in this case (\textit{supra} paras. 22 and 25). During the aforementioned proceeding, the Tayak Apu, or President of the Sarayaku, José Gualinga, indicated that it was the will of the Community that the Court order reparations. At the time of issuing the judgment, the Court has not been informed of any specific agreements on reparations, which, of course, does not preclude these from being reached at the domestic level at any time after the Judgment has been delivered. 

283. Consequently, and without detriment to any form of reparation subsequently agreed between the State and the Sarayaku Community, in consideration of the violations of the American Convention indicated in this Judgment, the Court shall proceed to order measures aimed at repairing the damage caused to the Sarayaku People. To this end, the Court will take into account the requests for reparations made by the Commission and the representatives, as well as the State’s arguments, in light of the criteria established in the Court’s case law regarding the nature and scope of the obligation to make reparations.\textsuperscript{341} 

A. Injured Party 

284. Under the terms of Article 63(1) of the American Convention, the Court considers the injured party to be the kichwa Indigenous People of Sarayaku, who suffered the violation of the rights established in the Merits chapter of this Judgment (\textit{supra} paras. 231, 232, 249, 271 and 278), and are therefore considered as the beneficiaries of the reparations ordered by the Court. 

B. Measures of restitution, satisfaction and guarantees of non-repetition 

285. The Court shall determine the measures aimed at repairing the non-pecuniary damages that are not of a pecuniary nature, as well as measures of public scope and impact.\textsuperscript{342} International jurisprudence and, in particular, the jurisprudence of the Court, has repeatedly held that the judgment per se is a form of reparation.\textsuperscript{343} However, considering the circumstances of the case sub judicio, and having regard to the damage caused to members of the Sarayaku Community and the pecuniary or non-pecuniary consequences stemming from the violations of the American Convention declared to their detriment, the Court deems it appropriate to establish the following measures of restitution, satisfaction and guarantees of non-repetition. 

286. The Commission requested that the Court order the State to: 

i. "adopt the necessary measures to guarantee and protect the right to property of the members of the Kichwa indigenous community of Sarayaku with respect to their ancestral territory, guaranteeing the special relationship between the Sarayaku community and its ancestral territory"; 

ii. "guarantee members of the Community the exercise of their traditional subsistence activities by removing the explosive materials planted on their territory;" 

iii. "guarantee the meaningful and effective participation of the representatives of the indigenous peoples in decision-making processes related to development and other issues that affect them and their cultural survival"; 

iv. "adopt, with the participation of the indigenous peoples, the legislative or other measures necessary to make effective the right to prior, free, informed consultation in good faith, in line with international human rights standards"; and 

v. "adopt the measures necessary to prevent a recurrence of similar events, in accordance with the duty to protect and ensure the fundamental rights enshrined in the American Convention." 

287. In addition to the measures indicated by the Commission, the representatives called on the Court to order the State to: 

i. "immediately conduct effective and prompt investigations and prosecutions of all the facts alleged by members of the Kichwa People of Sarayaku, leading to the clarification of the facts, the punishment of those responsible and adequate compensation for the victims." 

ii. sign a "document of brotherhood with the neighboring communities of the Kichwa People of Sarayaku"\textsuperscript{344}; 

iii. the "immediate cessation of any type of oil exploration or exploitation in the territory of the Kichwa People of Sarayaku carried out without respecting the rights of the Community"\textsuperscript{345}; 

iv. the "removal of all types of explosives, machinery, structures and non-biodegradable waste and the restoration of the areas deforested by the oil company when clearing trails and establishing camp sites in the Sarayaku Territory;" 

v. "for respect for the decision of the Sarayaku People to declare their entire territory as ‘Sacred Territory and Heritage Site of Biodiversity’ and of the ancestral culture of the Kichwa Nation;" 

vi. "adopt, within a reasonable period, training modules on the rights of indigenous peoples for all police and judicial operators and other State officials whose duties involve relations with members of indigenous communities;" 

vii. "full compliance with the provisional measures in force in favor of members of the Sarayaku Indigenous Community;" 


\textsuperscript{341} Cf. Case of Velásquez Rodríguez v. Honduras, Reparations and Costs, paras. 25 a 27 and Case of Forneron and daughter v. Argentina, para. 147. 


The State did not present any observations in this regard. The case file contains no information regarding the specific arguments, evidence, or case law presented by the State. Therefore, the Court is unable to determine the extent to which the State was aware of the danger involved.

292. The Court orders that, in accordance with the technical expert testimony presented in this process, and in order to ensure that the measures adopted are consistent with the safety and security requirements of the parties, the Ministry of Defense shall: i) determine the number of personnel required for the removal of the explosives and ensure that the resources are available; ii) determine the process of deactivation, neutralization, and monitoring of the explosives to ensure their complete removal; iii) establish a schedule for the removal of the explosives; and iv) ensure that the work plan is implemented in accordance with the technical expert testimony.

293. The Court further orders that, in accordance with the technical expert testimony presented in this process, and in order to ensure that the measures adopted are consistent with the safety and security requirements of the parties, the Ministry of Defense shall: i) determine the number of personnel required for the removal of the explosives and ensure that the resources are available; ii) determine the process of deactivation, neutralization, and monitoring of the explosives to ensure their complete removal; iii) establish a schedule for the removal of the explosives; and iv) ensure that the work plan is implemented in accordance with the technical expert testimony.

294. As to the second point, the Court finds that, based on the technical expert testimony presented in this process, and in order to ensure that the measures adopted are consistent with the safety and security requirements of the parties, the Ministry of Defense shall: i) determine the number of personnel required for the removal of the explosives and ensure that the resources are available; ii) determine the process of deactivation, neutralization, and monitoring of the explosives to ensure their complete removal; iii) establish a schedule for the removal of the explosives; and iv) ensure that the work plan is implemented in accordance with the technical expert testimony.

295. In accordance with the technical expert testimony presented in this process, and in order to ensure that the measures adopted are consistent with the safety and security requirements of the parties, the Ministry of Defense shall: i) determine the number of personnel required for the removal of the explosives and ensure that the resources are available; ii) determine the process of deactivation, neutralization, and monitoring of the explosives to ensure their complete removal; iii) establish a schedule for the removal of the explosives; and iv) ensure that the work plan is implemented in accordance with the technical expert testimony.

296. In particular, the Court notes that, in accordance with the technical expert testimony presented in this process, and in order to ensure that the measures adopted are consistent with the safety and security requirements of the parties, the Ministry of Defense shall: i) determine the number of personnel required for the removal of the explosives and ensure that the resources are available; ii) determine the process of deactivation, neutralization, and monitoring of the explosives to ensure their complete removal; iii) establish a schedule for the removal of the explosives; and iv) ensure that the work plan is implemented in accordance with the technical expert testimony.
hectares of Block 23. This would affect the territory of Kichwa communities in the upper basin of the Bobonaza river and the Achuar Association of Shaime, as well as a portion of the Sarayaku territory.

298. In this regard, it is appropriate to recall that the Secretariat for Legal Affairs of the Presidency of the Republic of Ecuador, in acknowledging the State’s responsibility in this case, stated that:

[...]{\textit{...}}[...]{\textit{...}} will not do any oil exploitation behind the back of the communities but rather through the dialogue that will take place at some point, if we decide to begin oil exploitation [...] here. There will be no oil development without open and frank dialogue; not a dialogue made by the oil company, as has always been changed. We have changed the legislation so that the dialogue is initiated by the government and not by the extractive industry [...]

299. While it is not appropriate to rule on new bidding rounds that the State may have initiated, in the present case, the Court has determined that the State is responsible for the violation of the right to communal property of the Sarayaku People, for having failed to adequately guarantee their right to consultation. Therefore, as a guarantee of non-repetition, the Court orders that, in the event that the State should seek to carry out activities or projects for the exploration or exploitation of natural resources, or any type of investment or development plans that imply potential repercussions for the Sarayaku territory or affect essential aspects of their worldview or life world or cultural identity, the Sarayaku Community shall be previously, adequately and effectively consulted, in full compliance with the international standards applicable to this subject matter.

300. The Court further recalls that processes of participation and prior consultation must be carried out in good faith throughout all the stages of preparation and planning of any project of this nature. Moreover, according to the international standards applicable in such cases, the State must effectively ensure that any plan or project that affects, or could potentially affect the ancestral territory, includes prior comprehensive studies on the environmental or social impact, carried out by technically qualified and independent entities, and with the active participation of the indigenous communities involved.

b) Regulation of the right to prior consultation in domestic law

301. With respect to the domestic legal system which recognizes the right to prior, free and informed consultation, the Court has already noted that, in the evolution of the international corpus juris, the Ecuadorian Constitution of 2008 is one of the most advanced in the world on this matter. However, the Court has also confirmed that the right to prior consultation has not been sufficiently and adequately regulated through appropriate regulations for its practical implementation. Thus, under Article 2 of the American Convention, the State must adopt, within a reasonable period, any legislative, administrative or other type of measures that may be necessary to effectively implement the right to prior consultation of indigenous peoples, communities and nations and modify those measures that inhibit its full and free exercise, for which purpose the State must ensure the participation of the communities themselves.

c) Training of state officials on the rights of indigenous peoples

302. In this case, the Court has determined that the violations of the rights to prior consultation, cultural identity and cultural integrity of the Sarayaku Community resulted from the actions and omissions of various officials and institutions that failed to guarantee those rights. The State shall implement, within a reasonable period and with the corresponding budgetary provisions, mandatory programs or courses that include modules on domestic and international human rights standards concerning indigenous peoples and communities, aimed at law enforcement officials and others whose functions involve relations with indigenous peoples, as part of the general and continuing training of civil servants in the respective institutions, at all hierarchical levels.

B.3 Measures of satisfaction

a) Public act of acknowledgment of State responsibility

303. The representatives requested that the Court order the State to "[c]onduct a public act of acknowledgment of responsibility, previously agreed to by the Sarayaku Community and its representatives, in relation to the violations established in the eventual judgment of the Court." They added that "this act should be carried out in the Community’s territory, in a public ceremony, with the presence of the President of the Republic and other senior State authorities, and to which members of the neighboring communities of the Bobonaza River basin are invited." Moreover, in the course of said act, "the State should recognize that the Sarayaku are a peaceful people who have fought for over 14 years to defend the integrity of their territory and preserve their culture and means of subsistence." They also requested that [...] the "State should dignify the image of the Sarayaku leaders who have suffered threats, harassment and insults because of their work in defense of the territory and its People and, for this reason, have been beneficiaries of the provisional measures." Finally, they requested that the Court order the State to "[c]onduct the public act of recognition in Spanish as well as in the Kichwa language, and [...] disseminate it through the national media."

304. The Commission did not formulate similar requests and the State made no reference to the request of the representatives.

305. Although in this case the State has already acknowledged its responsibility on the territory of the Sarayaku, the Court considers, as it has in other cases\textsuperscript{300}, that in order to repair the damage caused to the Sarayaku People, particularly through the violation of their rights to self-determination, cultural identity and prior consultation, that the State should carry out a public act acknowledging its international responsibility for the violations set forth in this Judgment. The place, terms and conditions of this act shall be determined through prior consultation and in agreement with the Community. The act shall take place during a public ceremony; in the presence of senior State officials and members of the Sarayaku Community; in the Kichwa and Spanish languages and shall be widely publicized in the media. The State has one year as from notification of the Judgment to comply with this measure.

b) Publication and broadcasting of the Judgment

306. The representatives requested that "the relevant parts of the judgment be published at least once in the Official Gazette and in another newspaper of national circulation, both in Spanish as well as Kichwa." The Commission and the State made no comment on this matter.

307. In this regard, the Court considers, as it has in other cases\textsuperscript{301}, that the State must publish, within six-months from the date of legal notice of the present Judgment:

- the official summary of this Judgment issued by the Court, once only, in the Official Gazette; and

- the official summary of this Judgment issued by the Court, once only, in a newspaper with wide national circulation; and

308. Furthermore, the Court considers it appropriate for the State to publicize, through a radio station with wide coverage in the southeastern Amazon, the official summary of the Judgment, in the Kichwa and Spanish languages and shall be widely publicized in the media.


\textsuperscript{301} Cf. Case of Cantoral Benavides v. Peru Reparations and Costs, para. 79 and Case of Forneron and daughter v. Argentina, para. 183.
Spanish, Kichwa and other indigenous languages of the sub-region, with the relevant interpretation. The radio broadcast shall take place every first Sunday of the month, on at least four occasions. The State has one year from notification of this Judgment to comply with this measure.

C. Compensation for pecuniary and non-pecuniary damages

C.1 Pecuniary damages

309. The Court has developed case law on the concept of pecuniary damages and the circumstances in which compensation must be paid. This Court has established that pecuniary damage contemplates "the loss or detriment to the income of the victims, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the sub judice case."332

a) Arguments of the parties

310. The Commission requested that the Court order the State to make reparation "at the individual and the community level, for the consequences of the violations" and that, in determining the pecuniary damages and other claims made by the representatives, it consider the worldview of the Sarayaku People and the effect on the Community itself and its members as a result of being prevented from using, enjoying and disposing of their territory and, among other consequences, being prevented from carrying out their traditional subsistence activities."

311. The representatives asked the Court to determine, in equity, compensation for pecuniary damages, to be paid directly the Sarayaku People, for the damage caused to their territory and natural resources333; the effects of the cessation of production activities by the Sarayaku during the six months that the "state of emergency" lasted334; the effects of the actions undertaken to defend their territory335; and the economic impact of the restrictions on their freedom of movement along the Bobonaza River.336

312. The State argued that the damage caused to the Sarayaku People's territory and its natural resources, as well as expenses incurred by its members to move around, had not been proven and that no reports or inspections had been submitted to support the request. It claimed that the alleged lack of tourists was due to "the position taken by the leaders against the work of the foreign company" and that the "conflicts created by them and their refusal to establish negotiation mechanisms were the major causes of these situations." Regarding the lack of yucca production and the need to purchase other basic staples, the State alleged that the Sarayaku had not presented documents or evidence to justify these assertions. As to the losses suffered by the community tourism agency, "Papango Tours," the State noted that in order to demonstrate bankruptcy, it is necessary to present a series of documents, such as annual balances, income and loss statements, and the documents submitted to the Internal Revenue Service. Finally, the State asserted that the Sarayaku People's freedom of movement along the Bobonaza River was not restricted and "that the activities which, according to the Sarayaku Community, were not possible due to the restriction on their right to free passage, must be properly demonstrated, that is, duly supported."

b) Considerations of the Court

313. Regarding the damage to the Sarayaku territory and its natural resources, the Court notes that a report by the Human Rights Commission of the National Congress of the Republic of Ecuador337 was submitted, which indicates that "the State, through the Environmental Ministry and the Ministry of Energy and Mines violated [...] the political Constitution of the Republic by not consulting with the community regarding the plans and programs for exploration and exploitation of non-renewable resources found on their land and which could have environmental and cultural effects." Said report specifically refers to the "significant negative impact on the flora and fauna in the region due to the destruction of forests and the construction of heliports." Moreover, in relation to this matter, a report of the Ministry of Energy and Mines was submitted, which gives details of the "land clearance" to be carried out in the seismic exploration process.338 At the same time, the Court confirms that the rest of the supporting documentation furnished by the representatives consists of documents produced by the Sarayaku themselves (press releases339 or testimonials from the Self-Assessment document340) and an excerpt from a social study on the impacts on the quality of life and food security and sovereignty in Sarayaku.341

352. According to the allegations, the defense of the territory implied many expenses for the Sarayaku leaders, who had to travel to different parts within and outside the country. They added that the community tourism business went bankrupt.

356. The representatives claimed that this restriction implied additional transport costs because Sarayaku members had no choice other than to travel by air for urgent matters, which increased the community's expenses as each plane trip costs an average of $250 (two hundred fifty dollars of the United States of America). They added that the restrictions on freedom of movement had also hampered the following activities: a) entry of tourists; b) sales of Sarayaku products to the cities; c) the entry of basic commodities from the city, which had to be transported by plane, multiplying the costs; d) entry of goods for stores in Sarayaku; and e) because it was impossible for Sarayaku representatives to travel by river, they had to travel by plane to leave Sarayaku, which increased transportation costs.


359. Specifically, the report describes land clearance activities along the trails for laying seismic lines, for the camps, for trails in the drop zones, and trails for the helicopter.


314. The principle of equity has been used in the jurisprudence of this Court to quantify non-pecuniary damages and pecuniary damages. However, the use of this criterion does not mean that the Court may act discretionarily in setting the amounts of compensation. It is up to the parties to clearly specify the proof of damage suffered, as well as the specific connection between the pecuniary claim with the facts of the case and the violations alleged.

315. The Court notes that the evidentiary elements submitted are not sufficient or specific enough to determine the income lost by members of the Sarayaku Community due to the suspension of their daily activities during some periods, and the growing and sale of farm products, and for the alleged costs incurred to supplement their diet because of the food shortages during some periods, or for the impact on community tourism. Furthermore, the Court notes that the amounts requested for pecuniary damages vary significantly between the brief of pleadings and motions and the final written arguments submitted by the representatives. Although this is understandable because of the difference in the number of families initially indicated, which emerged after the census was carried out in Sarayaku, the differences in the criteria used by the representatives to calculate the pecuniary damages are not clear. However, given the circumstances of this case, it is reasonable to conclude or presume that as a result of these events, the members of the Sarayaku Community incurred a number of expenses and lost earnings which, in turn, affected their ability to use and enjoy the resources on their territory, particularly due to their restricted access to areas used for hunting, fishing and general subsistence. Moreover, given the location and way of life of the Sarayaku People, the difficulty in proving those and losses and pecuniary damages is understandable.

316. Similarly, although no supporting documents were presented for the expenses incurred, it is reasonable to assume that the actions and efforts undertaken by members of the Community generated costs that should be considered as emerging damages, particularly with regard to the actions or procedures to arrange meetings with the various public authorities and other community members for which their leaders or members have needed to travel. Accordingly, the Court establishes, in equity, compensation for the pecuniary damages, bearing in mind that: i) members of the Sarayaku People incurred expenses in carrying out actions and negotiations at the domestic level to demand the protection of their rights; ii) their territory and natural resources were damaged, and iii) the Community’s economic situation was affected by the suspension of production activities during certain periods.

317. Consequently, the Court establishes the amount of US $90,000.00 (ninety thousand dollars) of the United States of America as compensation for pecuniary damages. This sum shall be paid to the Association of the Sarayaku People (Tayjasruta) within one year of notification of this Judgment, so that the Community may decide, in accordance with its own decision-making mechanisms and institutions, how to invest the money, among other things, for the implementation of educational, cultural, food security, health and eco-tourism development projects or other works or projects of collective interest that the Community considers as priorities.

C.2 Non-pecuniary damages

318. In its case law, the Court has developed the concept of non-pecuniary damage and has established that it may "include both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other afflictions of a non-pecuniary nature, which affect the living conditions of the victims or their families."

a) Arguments of the parties

367. In this regard, they noted that the arrival of the oil company and the damage it caused to the territory meant that "the spirits that inhabited these places fled to other places taking with them the elements of the jungle like animals and spiritual strength." In addition, they mentioned other damage to their worldview, namely: a) The destruction of the sacred site of the Witchu Kachi, including the Lusipumpu tree, which was a place of meeting of the spirits and a place for the sacred dances; b) the destruction of trees and plants of great value for traditional medicine; c) harm to sacred sites, and d) inability to celebrate the Uyantacu festival for two years.

368. In this regard, they added that "the traditional education, and that of children and young people was also affected due to the suspension of classes in schools for three months, during which time young children were left in the houses and young people joined the Peace and Life camps to protect their territory." They also mentioned that "many of the Sarayaku leaders had to abandon their studies at the University of Sarayaku, created by a cooperation project between Ecuadorian universities and a Spanish university, since they had to defend the territory and therefore could not obtain their college degree."

369. On this point the representatives indicated that a) as a result of food shortages during and after the "state of emergency" to defend the territory and the lack of time to devote to family life, and b) the divisions caused by the company led to the expulsion and punishment of members of Sarayaku, [and] situations of strife and distrust. In this regard, it indicated that the consequences “of these conflicts have had an impact on the territory as evidenced by the situation created by the attempted secession of the territory and creation of the Kutukachi community.”

370. The representatives argued that regarding this point a) "tension has been constant with neighboring communities, especially with the Canelos community, with which it is still working to improve relations" b) "the conflict raised tensions between the Sarayaku families because of disputes over allowed activities for the company to enter and the lack of time to devote to family life," and c) the divisions caused by the company led to the expulsion and punishment of members of Sarayaku, [and] situations of strife and distrust. In this regard, it indicated that the consequences “of these conflicts have had an impact on the territory as evidenced by the situation created by the attempted secession of the territory and creation of the Kutukachi community.”

Specifically, they argued that a) it affected the life project of many members of the community, who were forced to leave their previous occupations to devote themselves entirely to the defense of their territory, and b) development projects in the community such as the fish farming project, the community school, the conservation of the territory, the community tourism, and the university of Sarayaku were "delayed, hindered or thwarted."
D.2 Considerations of the Court

327. For its part, the State presented no comments regarding the representatives’ claims for costs and expenses.

328. As the Court has indicated, costs and expenses are part of the reparations provided that the actions carried out by the victims or their representatives serve to seek redress for the violation of human rights or the destruction of the right to life project of its inhabitants, as well as the potential and collateral damage caused by the lack of protection from the state apparatus.

329. According to the Court, the representations have clearly identified the payment of costs and expenses as a necessary prerequisite for the protection of human rights and the restoration of the rights to the life project of the Sarayaku Community, and its representatives, Mario Melo and CEJIL, for the following: expenses incurred by the Sarayaku People for their legal representation; expenses incurred by the attorney Mario Melo before the domestic authorities; and expenses incurred by CEJIL.

330. With respect to the expenses claimed by the attorney Mario Melo, the Court finds that some items have not been equitably deducted from the calculations established by the Court. Similarly, in other cases, the representatives do not identify the payments that are to be assessed. Consequently, the Court considers that no real changes exist to the life project of the Sarayaku People as compensation for non-pecuniary damages. This amount shall be paid to the Community, so that the people may be invested as the Community sees fit, in accordance with its own decision-making process.

331. With respect to the expenses claimed by CEJIL, the Court notes that some of the vouchers do not identify the payments that are to be assessed. Similarly, the representatives incurred costs in the processing of the case before the Inter-American Human Rights System, which must be clearly described.

332. In declaring the violations of the rights to communal property and consultation, the Court has determined that the State has invested more than half a million dollars in Sarayaku since 2004, including a project entitled “Development of the Life Plan of the Sarayaku Community.” It added that “all this investment is the result of the oil revenues, from which Sarayaku is one of the indigenous communities that has benefited the most,” and, therefore “considers that no real changes exist to the life project of its inhabitants” and that their claim “exceeds the scope of the potential and collateral damage caused by the lack of protection from the state apparatus.”

D. Costs and Expenses

333. The representatives requested reimbursement for costs and expenses incurred by the defense, undertaken by the members of the Pachamama Foundation team from 2007 to date. In particular, they listed “the costs incurred for their representation before the authorities of the domestic courts and in the proceedings before this Court, taking into the specific circumstances of the case.” The Court will make this assessment based on the principle of equity and the expenses identified by the parties, provided the amount is reasonable.

334. The representatives also requested reimbursement for the costs and expenses incurred by the attorney Mario Melo and CEJIL. They noted that some of the vouchers do not identify the payments that are to be assessed. Similarly, the representatives incurred costs in the processing of the case before the Inter-American Human Rights System, which must be clearly described.

335. The representatives also requested reimbursement for the costs and expenses incurred by the attorney Mario Melo and CEJIL. They noted that some of the vouchers do not identify the payments that are to be assessed. Similarly, the representatives incurred costs in the processing of the case before the Inter-American Human Rights System, which must be clearly described.

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the receipts submitted do not clearly show a connection with outlays linked to this case. However, the Court also notes that the representatives incurred various expenses related to, among other things, the collection of evidence, transportation and communications services in domestic and international proceedings in this case.

331. In this case, the expenses incurred by the Sarayaku People have already been taken into account in determining the compensation for pecuniary damages (supra paras. 316 and 317). Furthermore, the Court determines, in equity and in consideration of certain supporting documentation on expenses, that the State shall pay the total sum of USD $ 58,000.00 (fifty-eight thousand dollars of the United States of America) for costs and expenses. Of that amount, the State shall directly pay the sum of USD $ 18,000.00 to CEJIL. The rest of the amount set shall be paid to the Association of the Sarayaku People (Tajjasaruta), so that it may distribute it as appropriate among the other persons and, where applicable, organizations that have represented the Sarayaku People before the Inter-American System. During the monitoring of compliance with this Judgment, the Court may order the State to reimburse the victims or their representatives for subsequent reasonable and adequately proven expenses.

E. Reimbursement of expenses to the Victims’ Legal Assistance Fund

332. In 2008, the General Assembly of the Organization of American States (hereinafter “OAS”) created the Legal Assistance Fund of the Inter-American Human Rights System to “facilitate access to the Inter-American human rights system by persons who currently lack access to the resources needed to bring their case before the system.” In the present case, the victims were granted the necessary financial assistance from the Legal Assistance Fund for Mr. Sabino Gualinga, Mr. Marlón Santo and Mrs. Patricia Gulinga and Mrs. Ena Santi to appear at the public hearing (supra paras. 8 and 11).

333. The State had the opportunity to present its observations on the expenditures made in the present case, which amounted to the sum of US $6,344.63 (six thousand three hundred forty-four dollars and sixty-two cents of the United States of America). However, it did not submit any observations in this regard. Consequently, it is up to the Court, pursuant to Article 5 of the Rules of the Fund, to assess the appropriateness of ordering the respondent State to reimburse the Legal Assistance Fund for the expenditures incurred.

334. In consideration of the violations declared in this Judgment, the Court orders the State to reimburse the Fund in the amount of US $6,344.62 (six thousand three hundred forty-four dollars and sixty-two cents in United States dollars) for the aforementioned expenses related to the public hearing. This amount shall be repaid within 90 days of notification of the present Judgment.

F. Method of compliance with the payments ordered

335. The State shall pay the compensation established in respect of pecuniary and non-pecuniary damages, as well as reimbursement for legal costs and expenses (supra para. 331), directly to the Sarayaku Community, through its own authorities, and shall pay the corresponding amount for costs and expenses directly to the representatives, within one year from notification of this Judgment, under the terms of the following paragraphs.

336. The State shall discharge its obligations by making the payment in dollars of the United States of America.

337. If, for reasons attributable to the beneficiaries, it is not possible for them to receive the amounts ordered within the indicated period, the State shall deposit those amounts in an account held in the beneficiaries’ name or in a certificate of deposit from a financial institution in Ecuador under the most favorable financial terms allowed by law and customary banking practice. If, after 10 years, the compensation has not been claimed, these amounts shall be returned to the Ecuadorian State with the accrued interest.

338. The amounts allocated in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to the beneficiaries in their entirety in accordance with the provisions of this Judgment, without deductions derived from future taxes.

339. If the State should fall into arrears with its payments, it shall pay interest on the total amount owed at the current bank rate in Ecuador.

G. Provisional measures

340. Provisional measures were ordered from the time this case was under consideration by the Inter-American Commission (supra para. 5), for the purpose of protecting the lives and integrity of the members of the Sarayaku Community through a series of actions to be implemented by the State. The protection ordered was intended to prevent, inter alia, the thwarting of potential reparations that the Court might order in its favor. For the purpose of assessing the information contained in the provisional measures file (supra para. 48) and, unlike most other cases, the particular group of beneficiaries of such measures of protection are identical to the beneficiaries of the measures of reparations ordered in this Judgment on merits and reparations. In other words, the duty to protect the rights to life and personal integrity of the members of the Sarayaku People, initially set out in the orders for provisional measures, are, hereafter, covered by the reparations ordered in this Judgment, which must be complied with from the moment the State receives legal notice thereof. Thus, given the special nature of the present case, the State’s obligations within the provisional measures framework, are replaced by the measures ordered in this Judgment and, therefore, their implementation and enforcement shall be subject to the monitoring of compliance with the Judgment instead of the provisional measures. Consequently, the provisional measures no longer have any effect.

THE COURT

DECLARERS:

X

OPERATIVE PARAGRAPHS

341. Therefore,
By unanimity, that:

1. Given the broad acknowledgment of responsibility made by the State, which the Court has assessed positively, the preliminary objection filed is rendered purposeless and it is not appropriate to analyze it, under the terms of paragraph 30 of this Judgment.

2. The State is responsible for the violation of the rights to consultation, to indigenous communal property and to cultural identity, under the terms of Article 21 of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of the Kichwa Indigenous People of Sarayaku, as established in paragraphs 145 to 227, 231 and 232 of this Judgment.

3. The State is responsible for having gravely placed at risk the right to life and personal integrity, under the terms of Articles 4(1) and 5(1) of the American Convention, in relation to the obligation to guarantee the right to communal property, under the terms of Articles 1(1) and 21 thereof, to the detriment of the members of the Kichwa Indigenous People of Sarayaku, in accordance with paragraphs 244 to 249 and 265 to 271 of this Judgment.

4. The State is responsible for the violation of the right to a fair trial [judicial guarantees] and to judicial protection, recognized in Articles 8(1) and 25 of the American Convention, respectively, in relation to Article 1(1) thereof, to the detriment of the Kichwa Indigenous People of Sarayaku, pursuant to paragraphs 272 to 278 of this Judgment.

5. It is not appropriate to analyze the facts of this case in light of Articles 7, 13, 22, 23 and 26 of the American Convention, or of Article 6 of the Inter-American Convention to Prevent and Punish Torture, for the reasons stated in paragraphs 228 to 230 and 252 to 254 of this Judgment.

AND ORDERS:

By unanimity, that:

1. This Judgment constitutes per se a form of reparation.

2. The State shall neutralize, deactivate and, if applicable, remove all pentolite left on the surface and buried in the territory of the Sarayaku People, based on a consultation process with the Community, in accordance with the means and methods described in paragraphs 293 to 295 of this Judgment.

3. The State shall consult the Sarayaku People in a prior, adequate and effective manner, and in full compliance with international standards applicable to this matter, in the event that any activities or projects for the exploration or extraction of natural resources, or investment, development or other type of plans, were to be carried out that would imply potential damage to their territory, under the terms of paragraphs 299 and 300 of this Judgment.

4. The State shall adopt the legislative, administrative or any other type of measures necessary to give full effect, within a reasonable period, to the right to prior consultation of indigenous peoples, communities and nations and to modify those that prevent their free and full exercise, for which purpose it shall ensure the participation of the communities themselves, under the terms of paragraph 301 of this Judgment.

5. The State shall implement, within a reasonable period and with the respective budgetary provisions, mandatory training programs or courses consisting of modules on national and international standards on the human rights of indigenous peoples and communities, aimed at military, police and judicial officials, as well as others whose roles involve relations with indigenous peoples, under the terms of paragraph 302 of this Judgment.

6. The State shall carry out a public act of acknowledgment of international responsibility for the facts of this case, under the terms indicated in paragraph 305 of this Judgment.

7. The State shall issue the publications indicated in paragraphs 307 and 308 of this Judgment, within a period of six months as from notification of this Judgment.

8. The State shall pay the amounts established in paragraphs 317, 323 and 331 of this Judgment, as compensation for pecuniary and non-pecuniary damages, and as reimbursement for costs and expenses, under the terms established in the aforesaid paragraphs, and in paragraphs 335 to 339 of this Judgment, and shall reimburse the Victim’s Legal Aid Fund with the amount established in paragraph 334.

9. The State shall, within a period of one year as of notification of this Judgment, provide the Court with a report on the measures adopted to comply with the Judgment, without detriment to the provisions of Operative paragraph two, in relation to paragraphs 293 to 295, of this Judgment.

10. The provisional measures ordered in this case have been annulled, under the terms of paragraph 340 of this Judgment.

11. The Court shall monitor full compliance with this Judgment, by virtue of its authority and in compliance with its obligations under the American Convention, and shall close this case once the State has fully complied with the provisions established in this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on June 27, 2012.

Diego Garcia-Sayán
President

Manuel E. Ventura Robles
Leonardo A. Franco
Margarette May Macaulay
Rhdys Abreu Blondet
Alberto Pérez Pérez
Eduardo Vio Grossi
Pablo Saavedra Alessandri
Secretary
So ordered,

Diego García Sayán
President

Pablo Saavedra Alessandri
Secretary